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ADMISSIBILTY OF CONFESSIONS MADE SUBSEQUENT TO AN ILLEGAL ARREST: WONG SUN V. UNITED STATES REVISITED. *STATE V. MOORE*, 275 N. C. 141, 166 S. E.2d 53 (1969).

Police, without proper arrest warrants,[1] apprehended three men in connection with incidents of looting and burning in Wilson, North Carolina the night of April 6, 1968. Authorities insisted that at the time of the arrests each suspect was advised of his constitutional rights.[2] Within minutes of his apprehension one suspect, James Moore, uttered inculpatory remarks in the presence of arresting officers.[3] Suspects Carl Speight and Bobby Dawson implicated themselves with regard to the damage in separate statements to police, but only after spending a night in jail. At trial evidence proved that each defendant had been arrested illegally.[4] The court found that the defendants' statements following arrest were voluntary and admissible.[5] The three were convicted for malicious damage to property.[6]

[1] Police allegedly moved to arrest the three defendants on information from a person whom they refused to identify and about whom they made no representation as to reliability. Furthermore, no attempt was made to obtain valid warrants. State v. Moore, 275 N.C. 141, —, 166 S.E.2d 53, 55–56 (1969).

[2] In accordance with Miranda v. Arizona, 384 U.S. 436 (1965).

[3] State v. Moore, 275 N.C. 141,—, 166 S.E.2d 53, 55 (1969).

[4] The illegality of the arrests in question was based on N.C. GEN. STAT. sec. 15-41:

> A peace officer may without warrant arrest a person: (1) When the person to be arrested has committed a felony or misdemeanor in the presence of the officer, or when the officer has reasonable ground to believe that the person to be arrested has committed a felony or misdemeanor in his presence.

All evidence showed that each defendant was arrested without a warrant for misdemeanors not committed in the presence of the arresting officers. State v. Moore, 275 N.C. 141,—, 166 S.E.2d 53, 56 (1969).

[5] *Id.* at—, 166 S.E.2d at 56.

[6] Police versions as to the substance of each defendant's post arrest remarks conflicted with the characterization of their statements offered by the defendants themselves. Defendant Moore denied making any incriminatory statement concerning his alleged role in the damage. He insisted that he told police only that he had seen a crowd break windows near his home as he was leaving it that night. Dawson disputed police testimony as to the date of his verbal admissions and denied police testimony concerning the exact stores which he allegedly joined in damaging. Dawson further intimated that he pleaded guilty only after authorities suggested that that step would bring him a lighter sentence. In light of this controversy, it is interesting to note that none of the statements made by the defendants were reduced to writing. *Id.* at,—166 S.E.2d at 55.

The North Carolina Court of Appeals affirmed the conviction.[7] The defendants then appealed to the state supreme court claiming that their inculpatory statements were inadmissible since they were made subsequent to illegal arrests. The prosecution, they argued, ought to be denied the evidentiary rewards of illegal investigatory activity.[8]

The court rejected these arguments and held that every remark made by a person in custody after an illegal apprehension "is not ipso facto inadmissible."[9] Admissibility was to be determined by a voluntariness standard which required an assessment of the facts and circumstances surrounding the defendants' arrests and in-custody statements.[10] In essence voluntariness would depend upon the presence or absence of "violent or oppressive" police conduct prior to the confessions in question.[11]

An illegal arrest "unaccompanied by oppressive circumstances" was termed "no more coercive than a legal arrest."[12] The court held that in the absence of coercion the statements of a defendant are to be placed in evidence even though they follow violation of his Fourth Amendment right

[7] 3 N.C. App. 286, 164 S.E.2d 620 (1968).

[8] State v. Moore, 275 N.C. 141,—, 166 S.E.2d 53, 56 (1969).

[9] *Id.* at—, 166 S.E.2d at 62.

[10] *Id.* at—, 166 S.E.2d at 62 "Voluntariness remains as the test of admissibility." A precedent for the court's view of the test for admissibility was State v. Barnes, 264 N.C. 517, 520, 142 S.E.2d 344, 346 (1965), which held that

> [I]t is essential not only that full investigation be made and evidence be recorded, but facts must be found which disclose circumstances and conditions surrounding the making of incriminating admissions.

On remand, the trial court in *Barnes* held a hearing to undertake a full investigation of recorded evidence, together with an examination of facts that might have disclosed any coercion behind the incriminating statements. *See also* State v. Conyers, 267 N.C. 618, 148 S.E.2d 569 (1966).

[11] State v. Moore, 275 N.C. 141,—, 166 S.E.2d 53, 60 & 62 (1969). The court relied on the holding in United States v. Close, 349 F.2d 841, 851 (4th Cir. 1965), that a confession following an illegal arrest "which is shown to have been freely and voluntarily made without coercion either physical or psychological . . . is admissible."

[12] State v. Moore, 275 N.C. 141,—, 166 S.E.2d 53, 62 (1969).

to be free from arrest without probable cause.[13] A remand was ordered, however, since the trial judge[14] had failed to make the requisite findings on the voluntariness in fact of the defendants' confessions.[15]

Since 1914 exclusionary rules have barred the admission in federal courts of physical evidence secured through illegal search and seizure.[16] Federal courts have long recognized that evidence obtained as a result of such illegal police activity is inadmissible as "fruit of the poisonous tree."[17] That rule was made applicable to the states in *Mapp v. Ohio*, which held that "all evidence obtained by searches and seizures in violation of the Federal Constitution is inadmissible at trial in a state court."[18]

The federal exclusionary rules were later extended to evidence which was observed[19] or heard[20] as a result of an illegal search and seizure. The type of police conduct that occasioned application of exclusionary rules was not limited to search and seizure, however. Illegal arrest as well had always been included within the Fourth Amendment proscriptions.[21] These extensive exclusionary standards became applicable in toto to the states through *Ker v. California*.[22]

The admissibility of oral evidence in the form of confessions given by suspects illegally arrested arose in *Wong Sun v. United States*,[23] upon which the *State v. Moore* defendants relied in arguing the inadmissibility of their inculpatory remarks.

In *Wong Sun*, federal authorities entered the residence of James Wah Toy and arrested him without probable cause.[24] Toy immediately voiced self-incriminatory statements to the agents. The Supreme Court emphasized that the Fourth Amendment and attendant exclusionary rules commanded that his confession could not be used in evidence against him.[25] It held that "verbal evidence which derives so immediately from an unlawful entry and unauthorized arrest is no less the fruit of official illegality than the more tangible fruits of the unwarranted intrusion."[26]

[13] Id. at—, 166 S.E.2d at 62. Fourth Amendment proscriptions and federal standards against illegal search, seizure, and arrest were held to apply in toto to the states in Ker v. California, 374 U.S. 23, 30–34 (1963). The Fourth Amendment reads,

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated, and no Warrants shall issue but upon probable cause supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

[14] *See* Jackson v. Denno, 378 U.S. 368,391 (1964), holding that the voluntariness of a confession is not a jury question, but must be passed on by the trial judge or an independently convened jury.

That rule was first applied in North Carolina in State v. Rogers, 233 N.C. 390, 64 S.E.2d 572 (1951). *Rogers* held that a confession would be tested for voluntariness before the trial judge in the absence of the jury.

[15] State v. Moore, *supra* note 12 at—, 166 S.E.2d at 62. The trial judge entered the following statement in the record,

> [T]he court finds as a fact that any statement made by either of the three defendants was made freely and voluntarily... and that the evidence in regard to same is competent in this criminal action.

The North Carolina Supreme Court found error and remanded because the content of that entry was conclusory and not based upon legitimate findings of fact.

[16] *See* Weeks v. United States, 232 U.S. 383 (1914). The decision excluded from evidence items seized during an illegal search of the defendant's residence by federal investigatory authorities.

[17] *See* Nardone v. United States, 308 U.S. 338, 341 (1939), where Mr. Justice Frankfurter referred to evidence which was the product of an unlawful search (wire tapping) as "fruit of the poisonous tree." The phrase is often used to characterize evidence deemed inadmissible in the wake of unconstitutional police activity.

[18] 367 U.S. 643 (1961).

[19] McGinnis v. United States, 227 F.2d 598 (1st Cir. 1955).

[20] Silverman v. United States, 365 U.S. 505 (1960) reversing 275 F.2d 173 (D.C. Cir. 1960). At trial the prosecution was permitted to introduce into evidence incriminating conversations engaged in by the appellant at an alleged gambling establishment. The conversations were monitored by police through use of a microphone thrust through the walls of the house from the outside. On appeal, the Supreme Court characterized the eavesdropping as "an unauthorized physical penetration into premises" recognized as "a constitutionally protected area." The evidence (conversations) so obtained was found to be "fruit of the poisonous tree" and inadmissible. *Id.* at 509–512.

[21] *See supra* note 13. *See also* Henry v. United States, 361 U.S. 98 (1959). Federal officers investigating the theft of an interstate shipment of whiskey observed on two occasions cartons being loaded into a car in a residential district. They followed the car, arrested the petitioner who was driving, and seized cartons containing radios stolen from a different interstate shipment. At trial that evidence was admitted over the petitioner's objections. The court reversed, asserting that the officers had no probable cause for arrest when they stopped the car. The evidence arising out of the illegal arrest was ruled inadmissible.

[22] 374 U.S. 23, 30–34 (1963).

[23] 371 U.S. 471 (1963).

[24] *Id.* at 479. Police, in arresting Toy, acted on information from one Hom Way about whom no showing was made as to reliability. At the time of the arrest, no warrants were outstanding. *Id.* at 479–480.

[25] *Id.* at 484–487. *See infra* notes 32–34 and accompanying text for further elaboration of this holding.

[26] *Id.* at 485. *See also:* Kamisar, *Illegal Searches or Seizures and Contemporaneous Incriminating Statements: A Dialogue*, 1961 U. ILL. L. F. 78, 84–96 (1961).

On the other hand, the *Wong Sun* opinion, like *State v. Moore*, asserted that an unconstitutional arrest does not ipso facto invalidate a subsequent confession.[27] Wong Sun, a second defendant, had been illegally arrested, then arraigned and released. He voluntarily returned several days later to confess. The Court held that his confession was admissible since its relationship to the unconstitutional arrest was extremely "attenuated."[28]

The Court did not define the criteria for ascertaining when the relationship between an illegal arrest and a subsequent confession is so tenuous as to warrant the admission of a confession. However, two factors were inherent in the decision's differing treatment of the respective confessions of Toy and Wong Sun.

One factor appeared to be that of voluntariness. Defendant Toy probably would not have confessed if police had not entered his house without a proper warrant.[29] The Court treated that problem in discussing the impact of police entry into Toy's bedroom at night where his wife and child lay sleeping. The decision explained that "under the circumstances it [would be] unreasonable to infer that Toy's response [inculpatory statements] was sufficiently an act of free will to purge the primary taint of unlawful invasion."[30] The Court viewed illegal police conduct as a causative factor in Toy's immediate confession.

Wong Sun, however, was assumed to have acted on his own volition. The fact that he was released and returned days later to confess substantiated the finding of voluntariness.[31] The Court went no further in considering whether his illegal arrest represented a causative element in the act of confession.

The second factor underlying the *Wong Sun* decision was the Supreme Court's approach to deterrence of police illegality. The procurement of confessions possibly represented the motivation behind police utilization of illegal arrest tactics.[32] Law enforcement officials probably would be less willing to act illegally if the evidence so obtained proved inadmissible.[33] Once agreeing that the arrest and subsequent incarceration were unlawful, the *Wong Sun* court intimated that the exclusion of confessions arising out of that illegality could logically be required. Thus the Court excluded Toy's statements in order to "[deter] lawless conduct by federal officers [and to close] the doors of the federal courts to any use of evidence unconstitutionally obtained."[34]

However, the Court ruled that preventing admission of Wong Sun's confession would not deter police illegality since he was released from custody and returned voluntarily to confess days later. The confession represented no direct product of his prior illegal arrest and was not excluded.[35]

The Supreme Court in *Wong Sun* failed to indicate the relative weight to be given the two analytical factors inherent in the decision—voluntariness-causation and deterrence of police illegality. Yet the recent case of *Morales v. New York*[36] provided the Court with another opportunity to treat the question. The defendant was arrested as a murder suspect and confessed after less than an hour in custody. A lower court applied

[27] Wong Sun v. United States, 371 U.S. 471, 491 (1963). The Court stated that position in discussing only the case of the second defendant Wong Sun.

[28] *Id.* at 491.

> . . . we hold that the connection between the arrest and statement had become so attenuated as to dissipate the taint.

[29] A similar problem was also dealt with in Fahy v. Connecticut, 375 U.S. 85 (1963), decided by the Supreme Court shortly after *Wong Sun*. Police had obtained incriminating evidence during an illegal search of the defendant's premises. Based on that unconstitutionally seized evidence, police arrested Fahy. Subsequent to his arrest the defendant uttered damaging statements. The Court asserted in dictum that Fahy "should have had a chance to show that his admissions were induced by being confronted with the illegally seized evidence." *Id.* at 91.

[30] Wong Sun v. United States, 371 U.S. 471, 486 (1963).

[31] *Id.* at 491.

[32] *See* Kamisar, *Illegal Searches or Seizures and Contemporaneous Incriminating Statements*, 1961 U. ILL. L.F. 122–123 n.201 (1961).

[33] *See* People v. Bilderbach, 62 Cal. 2d 757, 766–67, 401 P.2d 921, 927 (1965), where the court concluded that admission of confessions obtained subsequent to illegal arrests would encourage the police to act illegally in the hope that a conviction would result.

> If the court were to admit such statements, the police would not be sufficiently deterred from engaging in illegal searches [or other illegal conduct] . . . The police would be encouraged . . . in the hope of obtaining confessions. . . ."

[34] Wong Sun v. United States, 371 U.S. 471, 486 (1963). *See also* Rea v. United States, 350 U.S. 214 (1955) and Elkins v. United States, 364 U.S. 206 (1960).

[35] With regard to defendant Wong Sun, the Court allowed the voluntariness finding to override any deterrence function. However, added weight to deterrence factors would seem no less appropriate in Wong Sun's case than with that of defendant Toy. The Court denied police the rewards of their illegal conduct toward Toy. Toy's confession was excluded as the product of his illegal arrest. Defendant Wong Sun confessed as well, but at a later date. Was his confession any less a reward to police arising out of an illegal arrest? That remains a key issue for consideration.

[36] — U.S.— (1969).

a voluntariness test in admitting the confession into evidence. The Supreme Court refused to disturb that voluntariness finding below but deferred consideration of possible application of deterrence principles. It termed the record below insufficient on the question of the legality of the defendant's arrest. As the Court phrased it,

> [t]he State may be able to show that there was probable cause for an arrest... or that the confessions were not the product of illegal detention.... [I]n the absence of a record which squarely and necessarily presents the issue and fully illuminates the factual context in which the question arises, we choose not to grapple with [it].[37]

Other cases since *Wong Sun* have fallen into two distinct lines of authority based on the weight accorded to voluntariness on the one hand and deterrence of police illegality on the other.[38] The decision in *State v. Moore* is best understood in terms of this post-*Wong Sun* dichotomy.

Emphasis on the deterrence factor alone led some courts to rule that all evidence, including confessions, obtained subsequent to illegal police conduct must be excluded. Thus in *People v. Sesslin*[39] the admission of evidence obtained after a defendant's arrest and during his illegal detention was held to have violated Fourth Amendment rights. Citing *Wong Sun*, the California Supreme Court asserted that "the state may not use evidence to convict a defendant obtained by exploiting an illegal arrest or detention."[40] It recognized that an admission of such evidence would weaken the deterrence function inherent in exclusionary rules.[41]

This position was restated by the United States Supreme Court itself in dictum in *Terry v. Ohio*.[42] The Court insisted that "the rule excluding evidence [obtained] in violation of the Fourth Amendment has been recognized as a principal mode of discouraging lawless police conduct... experience has taught that it is the only effective deterrent to police misconduct in the criminal context...."[43]

A second line of authority after *Wong Sun* has refused to follow this notion and has used the voluntariness-causation factor as the sole measure of admissibility. Under this analysis, courts have admitted a "voluntary" confession despite any prior illegality in conduct toward the accused.[44]

In *Prescoe v. State*[45], police arrested the defendant without a warrant or probable cause. While in custody, he gave police a written confession of his participation in a burglary. The court looked to *Wong Sun* asserting that that decision involved

[37] *Id.*

[38] The court in State v. Moore 275 N.C. 141,—, 166 S.E.2d 53, 58 (1969), acknowledged this division of authority. As the decision emphasized:

> We find no United States Supreme Court decision on this precise point since the decision in *Wong Sun;* however, the language used by the Supreme Court in *Wong Sun* has been interpreted by the state and lower federal courts so as to produce a definite split of authority.

[39] 68 Cal. 2d 418, 439 P.2d 321, 67 Cal. Rptr. 409 (1968). *See* other cases representative of this approach as follows: Gatlin v. United States, 326 F.2d 666 (D.C. Cir. 1963), in which one of the defendants was arrested without probable cause. He was brought to police headquarters where he confessed to robbery. The court looked to *Wong Sun* in holding that "the illegal arrest alone made the post arrest admission... poisonous fruit." *Id.* at 672; State v. Mercurio, 96 R.I. 464, 194 A.2d 574 (1963). The defendant was arrested for illegal gambling operations. Arrest was accomplished without a warrant or probable cause. The court cited to *Wong Sun* for the principle that none of the "evidence seized and incriminating statements elicited from one whose arrest had not been made with probable cause [was] admissible" at trial. *Id.* at 468, 194 A.2d at 576. *See also* United States v. Middleton, 344 F.2d 78 (2d Cir. 1965); United States v. Maresse, 344 F.2d 501 (3rd Cir. 1964); Allen v. Cupp, 298 F. Supp. 432 (D. Ore. 1969); United States v. Schipani, 289 F. Supp. 43 (E.D.N.Y. 1968); Lyons v. United States, 221 A.2d 711 (D.C. Ct. App. 1966).

[40] People v. Sesslin, 68 Cal. 2d 418, 426–27, 439 P.2d 321, 327, 67 Cal. Rptr. 409, 415 (1968).

[41] *Id.* at 427. The admission of the evidence (in the form of handwriting exemplars) would therefore " 'thwart the laudable policies [deterrence function] underlying the exclusionary rule.' " *See also* Bynum v. United States, 262 F.2d 465 (D.C. Cir. 1959); State v. Miller, 76 N.M. 62, 412 P.2d 240 (1966).; People v. Bilderbach, 62 Cal. 2d 757, 401 P.2d 921, 44 Cal. Rptr. 313 (1965).

[42] 392 U.S. 1 (1968).

[43] *Id.* at 12.

[44] In United States v. Close, 349 F.2d 841 (4th Cir.) *cert. denied* 382 U.S. 992 (1965) the defendant had confessed to a bank robbery while illegally detained on a vagrancy charge. The confession was found to be voluntary. It was admitted in evidence (with citation to Wong Sun v. United States) since "a statement which is shown to have been freely and voluntarily made without coercion... is admissible." *Id.* at 851. In People v. Freeland, 218 Cal. App. 2d 199, 32 Cal. Rptr. 132 (1963)(may no longer be good law after People v. Sesslin, *supra* note 40), police detained the defendant without probable cause. They questioned him intermittently for hours. At trial, no evidence of threats of duress was adduced. The court admitted the confession into evidence denying any relation between the defendant's remarks and the prior illegal arrest sufficient to taint that evidence. The ultimate test of the confession's admissibility remained volition in fact. The inquiry went to a determination of the degree to which the inculpatory remarks were "the product of his [the defendant's] own choice, and not that of the illegal restraint." *Id.* at 204, 3 Cal. Rptr. at 134.

[45] 231 Md. 486, 191 A.2d 226 (1963).

no departure from the voluntariness test long recognized in the jurisdiction. The confession there was found to be voluntary and admissible since "there [was] no indication that there cannot be a voluntary confession after an illegal arrest. . . ."[46]

Other courts have chosen to phrase the voluntariness test in terms of "causation" and have arrived at the same conclusion.[47] They have ruled that if illegal police conduct was "an operative factor in bringing out the confession" only then should it be termed inadmissible.[48]

State v. Moore followed the line of authority that has placed great weight on the voluntariness-causation factor rather than on the deterrence element. While the North Carolina opinion mentioned condemnation of "any illegal act by police," no provision was made for deterrence of such conduct.[49] In joining decisions that have opposed the extension of exclusionary rules to cover confessions following illegal police activity, the *State v. Moore* court acceded to such illegality. The decision allowed authorities the benefit of spontaneous statements arising out of unlawful but useful arrest practices contingent upon a finding of voluntariness.[50]

This voluntariness test assumes the ability of a suspect to decide apart from undue pressure whether to confess. Illegal police tactics and the need to apply exclusionary principles are to be measured in terms of the confessor's free will. However, the question remains whether the voluntariness test insures the reliability of a defendant's statements as evidence.[51]

State v. Moore held that on retrial the lower court must undertake a sophisticated inquiry into the suspects' mental states at the time of their confessions.[52] The court assumed that the trial judge could determine whether the inculpatory statements were the product of free and rational choice, deliberately and knowingly given.[53]

In the end, that voluntariness test would force the trial court to assess from the bench complex psychological unknowns. How could a judge gauge the extent to which the illegal arrest itself tended to incorporate a coercive atmosphere into the period of apprehension and interrogation? A degree of immeasurable coercion might underlay any prior illegal arrest. The reality of unlawful police tactics as they fell upon the three defendants

[46] *Id.* at 494, 191 A.2d 231.

[47] State v. Traub, 151 Conn. 246, 196 A.2d 755 (1963), *cert. denied* 377 U.S. 960 (1963). This case designated causation as an element to be assessed in addition to voluntariness in a test for the admissibility of a confession. Reference to causation as a separate factor in any voluntariness analysis appeared unique since any distinction between voluntariness and causation was difficult to draw. The voluntariness test would seem to assume a causation determination. Thus, the court pointed to a distinction without a difference:

> But even though, from the evidence produced, a confession made during an illegal detention is properly found to have been truly voluntary, nevertheless, if the illegal detention was an operative factor in causing or bringing about the confession, then the confession will be considered as the fruit of the illegal detention and will be inadmissible. *Id.* at 249, 196 A.2d at 757.

A confession caused by the coercive influence of an illegal detention should not be termed voluntary in the first place.

See also Fahy v. Connecticut, 375 U.S. 85 (1963). Defendant was accused of painting swastikas on a synagogue. Police searched his car without a warrant or probable cause. They discovered a paintbrush and can of paint. Confronted with that evidence, the defendant confessed. The trial court allowed Fahy no opportunity to claim that police possession of the illegally seized evidence led to his confession. The Supreme Court excluded the can and brush and then reasoned in dictum that the defendant should have been granted an opportunity to show that his admission was induced by being confronted with that evidence.

[48] State v. Traub, 151 Conn. 246, 249, 196 A.2d 755, 759 (1963).

[49] State v. Moore, 275 N.C. 141,—, 166 S.E.2d 53, 62 (1969).

[50] In Culombe v. Connecticut, 367 U.S. 568, 572 (1961), Mr. Justice Frankfurter referred to similar arrest and detention activities as a "common, although generally unlawful, practice."

[51] For evidentiary standards of reliability see 3 WIGMORE, EVIDENCE §823 (3rd ed. 1940).

[52] State v. Moore, 275 N.C. 141,— 166 S.E.2d 53, 62 (1969). Some authority for the North Carolina court's requirement of a voluntariness hearing is found with the decision in Bray v. United States, 306 F.2d 743, 748 (D.C. Cir. 1962) which held that:

> . . . the trial court should [hold] a hearing out of the presence of the jury on the question whether appellant's written confession introduced at trial was voluntary.

That hearing was held to be mandatory even if the defendant failed to request one himself. *See also* State v. Conyers, 267 N.C. 618, 148 S.E.2d 569 (1966).

[53] Other cases have made similar demands. See People v. Freeland, 218 Cal. App. 2d 199, 32 Cal. Rptr. 132 (1963) (may no longer be good law after People v. Sesslin, *supra* note 40). The case phrases the voluntariness test (to be applied by the trial court judge) in terms of the following inquiries: Was the accused person's will overborn? Was his decision the product of a rational intellect and free will?

A more recent case in the same jurisdiction, People v. Lewis, 68 Cal. Rptr. 790 (Ct. App. 1968), asserted that in testing the voluntariness of a confession (here made subsequent to a legal arrest but under questionable interrogation circumstances) the trial judge must explore all circumstances surrounding the interrogation as well as the conduct of the particular defendant in order to "reconstruct [the] defendant's mental condition immediately preceding his confession." *Id.* at 793.

might have struck such fear and confusion in their minds that no subsequent confession could be termed voluntary. Could it be assumed that the voluntariness test would serve as an adequate measure of such inner tensions? Significant doubt would remain as to voluntariness in fact given the myriad of possible mental reactions by the accused to the illegal police conduct wrought upon them.[54]

State v. Moore provided that the voluntariness hearing must concentrate on "the facts and circumstances surrounding the arrest and in-custody statements" of the accused.[55] That this test has often worked injustice was shown by a 1966 United States Supreme Court decision overruling a North Carolina federal court.[56] The case involved the confession of a man who was held incommunicado in a tiny cell for two weeks. The defendant had been fed only two sandwiches per day, was continually questioned, and finally confessed. The trial judge applied the voluntariness test to those circumstances and allowed the confession in evidence.

Recognition of the possibilities for similar injustice in application of the voluntariness test in federal courts led to a series of decisions grafting certain objective requirements upon any assessment of a confession's admissibility. The most famous of those decisions was *Miranda v. Arizona*.[57] The Supreme Court there ruled that the accused must be afforded clear warning of his right to silence and his right to the assistance of counsel before a confession would be considered voluntary.[58]

Fair and accurate application of any voluntariness test is a formidable undertaking. Assurance of the reliability of a confession as evidence can only come with police corroboration of the information obtained through a confession.[59] Should a confession be admitted in evidence, courts require the information derived therefrom to be corroborated in order to warrant a conviction.[60] The law appears to place little faith in the evidence of confessions alone.

With that in mind, courts should exclude confessions made subsequent to the use of unconstitutional arrest tactics by police. It is appropriate to suppress those confessions and channel police conduct toward the gathering of evidence in a constitutional fashion.

Exclusion of those confessions alone, however, would fail to prevent police from utilizing information derived from a defendant's inculpatory

[54] On remand of this case, the trial judge would be bound by North Carolina law providing that a confession is to be admitted only if the results of the voluntariness hearing are "conclusive" as to whether or not it was "freely and voluntarily" made. State v. Bishop, 272 N.C. 283, 291, 158 S.E.2d 511, 517 (1968).

Conclusive discovery of the voluntariness in fact of a confession, given the need to assess difficult mental and psychological considerations, could well prove impossible. All this diminishes the soundness of a voluntariness test as a method for protecting an accused's constitutional rights. *See, Developments in the Law—Confessions*, 79 HARV. L. REV. 935, 984 (1966).

[55] State v. Moore, 275 N.C. 141,—, 166 S.E. 2d 53, 62 (1969).

[56] Davis v. North Carolina, 384 U.S. 373 (1966) *rev'g* 221 F. Supp. 494(E.D.N.C.1963), *aff'd* 339 F.2d 770 (4th Cir. 1964).

[57] 384 U.S. 436 (1966).

[58] Congress has threatened the efficacy of those standards. Title II of the *Omnibus Crime Control and Safe Streets Act* has removed the mandatory nature of the *Miranda* warnings as a prerequisite to an admissible confession. *See* 18 U.S.C. § 3501 (1968). This represents, in effect, a return to the "totality of the circumstances" test for voluntariness within which there is so much room for injustice. The ultimate decision as to voluntariness in a federal court once again rests upon the judgment of the trial judge without the benefit of obligatory objective requirements. The federal courts would appear to have returned to the uncertainties of the State v. Moore type of voluntariness determination.

There is, however, evidence that the Miranda v. Arizona decision itself led to some instances of unjust application of the voluntariness test. For instance, the trial judge in California v. Wheeler, 243 Cal. App. 2d 340, 52 Cal. Rptr. 508 (1966), assumed that the mere recitation of *Miranda* warnings itself was sufficient to establish the voluntariness of a confession made subsequent to an unlawful arrest. So too, in People v. Johnson, 70 Cal. 2d 577, 450 P.2d 865, 75 Cal. Rptr. 401 (1969) it was pointed out that courts tend to treat deliverance of the *Miranda* warnings as sufficient to guarantee that subsequent confessions are voluntary. The danger here is that police will be encouraged to make illegal arrests in hopes of obtaining confessions after *Miranda* warnings have been given. This danger would not arise in a jurisdiction that applied the deterrence factor since no such confession would be admissible.

[59] *See* People v. Bernstein, 171 Cal. App. 2d 279, 340 P.2d 299 (1959). The court warned that evidence of a defendant's admission made subsequent to illegal police conduct should be viewed with caution, for a conviction cannot be predicated solely upon such evidence.

[60] *See* United States v. Michilopoulas, 228 F. Supp. 944 (D.D.C. 1964). The court there reasoned that in order to eliminate the possibility of false confessions, the law will not permit a conviction on the basis of an uncorroborated confession standing alone. It required corroboration either by separate proof of the corpus delicti or by independent evidence sustaining the trustworthiness of the confession.

People v. Chapman 261 Cal. App. 149, 67 Cal. Rptr. 601 (1968), forwarded the idea that a determination as to whether a confession is "fruit of the poisonous tree" required inquiry as to the information derived from the admission, and whether that information would have been discovered through independent sources. *See also* United States v. Rutheiser, 203 F. Supp. 891 (S.D.N.Y. 1962).

remarks to gather additional admissible evidence seemingly independent of the confession in question. Without more, there would be cases where a confession subsequent to an illegal arrest would be excluded, but evidence gathered with the aid of the defendant's statements would not. Effective deterrence requires denial to police of all evidence arising out of an illegal arrest, including such derivative information.

In any case of this type, exclusion would serve a desirable purpose. Trial judges would no longer deal with the uncertainties of a voluntariness test requiring analysis of the often indeterminate effects of illegal arrest upon an accused. Police and trial court judges would know where they stand with regard to any confession at issue.

Exclusion, however, ought not to become an unbending principle. It remains subject to the exigencies of a significant factor—time. For what happens when the victim of illegal police conduct confesses years after the fact? Is his confession to be ruled inadmissible since it followed an illegal arrest? How long after an arrest is the deterrence factor to receive primary consideration over that of voluntariness?

Little deterrence value would result from the exclusion of a confession offered years after an illegal arrest.[61] Police are not likely to intimidate an accused with an eye to eliciting an admissible confession a year or two later. So too courts would probably refuse to exclude such a confession with some sense of its apparent voluntariness. The notion of a temporal factor placing limits on the courts' obligation to deter illegal police conduct seems necessary.

With the possibility of a confession long after an illegal arrest, the uncertainties that plague the voluntariness test arise to haunt the deterrence purpose. The psychological impact of an illegal arrest as it affects a confession even years later becomes a new unknown. If a lengthy span of time intervenes between an unlawful apprehension and subsequent confession, even the deterrence purpose may well offer no rationale for exclusion of a defendant's remarks.

[61] *See generally, Voluntary Incriminating Statements Made Subsequent to an Illegal Arrest—A Proposed Modification of the Exclusionary Rule*, 71 DICK. L. REV. 573 (1967).