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# LEGAL PITFALLS TO AVOID IN CRIMINAL INTERROGATIONS\*

FRED E. INBAU

The cloud of uncertainty that has hovered over the law of confessions as a result of several United States Supreme Court decisions of the past few years has been dissipated to some extent by the Court's rulings and opinions in four very recent cases.<sup>1</sup> It now appears reasonably safe to venture a few concrete suggestions and recommendations to criminal interrogators as to what they can and cannot do in the interrogation of criminal suspects.

## I. THE PROBLEM IN FEDERAL CASES

Federal investigators undoubtedly will welcome the implication attending the Supreme Court's refusal to review a decision of the Court of Appeals of the District of Columbia in *Garner v. United States*.<sup>2</sup> In this case the defendants had been arrested at night, after the federal commissioner's office had closed, and confessions were made by each defendant within a few hours after their arrest. The next morning they were duly arraigned, and a subsequent trial resulted in their conviction for murder. Defense counsel contended at the trial and in the Court of Appeals that the confessions were inadmissible as evidence because they were obtained during a period of delay in arraignment. For their authority in support of this contention counsel for the defendants relied upon the United States Supreme Court decisions and opinions in the *McNabb* and *Upshaw* cases, which had developed the so-called "civilized standard" rule of interrogation for federal officers and branded as invalid any confession

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<sup>1</sup> For a detailed discussion of the uncertainty which prevailed, see the writer's article on "The Confession Dilemma in the United States Supreme Court" (1948) 43 Ill. L. Rev. 442, and his book "Lie Detection and Criminal Interrogation" (2d ed., 1948), 150-169. The four cases referred to are cited *infra* notes 2, 7, 8, and 9.

<sup>2</sup> 174 F. (2d) 499 (1949); cert. denied, 69 Sup. Ct. 1502 (June 20, 1949).

obtained by federal investigators during a period of "unnecessary" delay in taking the arrested person before a commissioner for arraignment as required by law.<sup>3</sup>

In a 2 to 1 decision of the *Garner* case the Court of Appeals for the District of Columbia held that the arresting officers were only required to avoid "unnecessary" delays, and that the absence of a federal commissioner made a delay in the arraignment until the next morning a necessary one, thereby placing this particular case situation beyond the orbit of the *McNabb-Upshaw* rule of exclusion. The dissenting judge, in his interpretation of the Supreme Court's views as expressed in the *McNabb* and *Upshaw* cases, adopted the position that even though the commissioner's office was closed, the police should have attempted to locate a committing magistrate. He reasoned that "unless at least one magistrate is always available, secret interrogation cannot be prevented," an objective he assumed to be implicit in the Supreme Court's previous opinions.

In view of the split decision of the Court of Appeals, and in the light of the Supreme Court's great concern over confession cases, there was good reason to believe that the Supreme Court might grant the defendants' petition to review the decision of the Court of Appeals. To the contrary, however, the Supreme Court denied the defendants' petition, thereby rendering final the Court of Appeals' affirmance of the trial court conviction.

A refusal to review, under the circumstances involved in the *Garner* case, is a reasonable indication that the Supreme Court, or at least a majority of the Court, approved the decision of the court below. The net effect of the *Garner* case seems to be this: If an arrest is made by federal officers at a time when a federal commissioner is unavailable for arraignment (*e.g.*, at night, on holidays, etc.), a confession obtained before a commissioner is available will not be considered invalid merely because it was made prior to the arraignment. This rule may well be conditioned in later cases, of course, upon the presence of good faith on the part of the arresting officers in not purposely postponing a contemplated arrest to take advantage of a commissioner's absence.

The basic rule of the *McNabb* and *Upshaw* cases still stands, of course. It is in no way altered by the refusal to review the

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<sup>3</sup> *McNabb v. U.S.*, 318 U.S. 332 (1943); *Upshaw v. U.S.*, 335 U.S. 410 (1949). For a discussion of the *McNabb-Upshaw* doctrine, see 43 Ill. L. Rev. 442.

*Garner* case. Federal officers are still duty bound, therefore, to take an arrested person before a commissioner for arraignment "without unnecessary delay." The *Garner* case ruling does mean, however, that an otherwise proper interrogation may follow an arrest which is effected (in good faith) at a time when a commissioner is unavailable for arraignment proceedings.

## II. THE PROBLEM IN STATE CASES

Prior to 1944 the United States Supreme Court, in its review of state court confession cases, applied the usual voluntary-trustworthy test of admissibility. In other words, the practice of the court in such cases was to determine from the trial court record whether the court and jury acted reasonably in holding that the defendant's confession had not been "forced" out of him, or, stated somewhat differently, "had not been obtained in a manner which rendered it untrustworthy." If the Supreme Court decided that the evidence clearly indicated force, and therefore untrustworthiness, the "due process" clause of the Fourteenth Amendment to the Federal Constitution would be invoked and the case reversed. On the other hand, if the record did not clearly disclose coercion or untrustworthiness, the Court would accept as final the state courts' findings that the confession was voluntary or trustworthy. In 1944, however, after the court had reversed several state court convictions which involved some rather shocking examples of police abuses of accused persons, particularly Southern negroes charged with crimes against white victims, the Supreme Court departed from the conventional voluntary-trustworthy test of confession admissibility and laid down a much more critical one in *Ashcraft v. Tennessee*.<sup>4</sup> In that case a divided Court (6-3) made what appears to be an abstract psychological appraisal of the thirty-six hour interrogation of the defendant and decided that an interrogation of that duration was "inherently coercive," for which reason the confession would be held inadmissible regardless of the effect of the police practices upon the particular defendant and regardless of the otherwise trustworthiness of the confession.

A careful reading of the opinion of the majority of the Court, considered along with several subsequent Supreme Court decisions, seemed to indicate that what the majority of

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<sup>4</sup> 322 U.S. 143 (1944).

the Justices wanted to accomplish was to impose a higher, "civilized" standard of investigative practices upon state law enforcement officers, a standard somewhat similar to that prescribed for federal officers in the *McNabb* and *Upshaw* cases. Unlike the federal cases, however, the Court could not do this directly, because of the absence of constitutional authority for any such inroads upon state government.<sup>5</sup> But the same attempt was practically available by extending the Court's interpretation of "due process" to prohibit "inherently coercive" interrogation practices.

For several years following the *Ashcraft* case it appeared that the growing restrictions on state interrogation practices would soon eliminate the opportunity for effective interrogation of criminal suspects. This possibility seemed quite imminent after the 5 to 4 decision in *Haley v. Ohio*,<sup>6</sup> a 1948 case in which a reversal was ordered for the conviction of a 15 year old negro defendant who had been questioned for five hours by several police officers "in relays of one or two each." The majority opinion stated that in any case where the undisputed evidence "suggested" that coercion was used the conviction would be reversed "even though without the confession there might have been sufficient evidence for submission to the jury." On June 27, 1949, however, the Supreme Court decided three state confession cases, in which there are some indications that the Court, or a majority of its members anyway, is prepared to relax the demands previously imposed by the Court upon state interrogators.

In the three recent cases of *Watts v. Indiana*,<sup>7</sup> *Turner v. Pennsylvania*,<sup>8</sup> and *Harris v. South Carolina*,<sup>9</sup> each of the defendants had been subjected to extensive interrogations over a period of several days and by relays of police officers. By a 6-3 decision in the *Watts* case, and a 5-4 decision in the *Turner* and *Harris* cases,

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<sup>5</sup> In its review of federal cases the Supreme Court can exercise its "supervisory" power over lower federal courts and federal officers; as regards state courts and state officers, however, the Court can only operate within the authority granted it by constitutional provisions. As regards state court confessions, therefore, the Supreme Court cannot reverse a conviction for the avowed purpose of disciplining state officers, whereas in federal cases, the Court does have that inherent power. *McNabb v. U.S.*, 318 U.S. 332 (1943).

<sup>6</sup> 332 U.S. 596 (1948).

<sup>7</sup> 69 S. Ct. 1347 (1949).

<sup>8</sup> 69 S. Ct. 1352 (1949).

<sup>9</sup> 69 S. Ct. 1354 (1949).

the Supreme Court reversed the convictions. In each case four members of the court—Justices Douglas, Frankfurter, Murphy, and Rutledge—found fault not only with the length of the interrogation and the relay method of questioning, but also with (a) the failure to take the defendants before a committing magistrate for a preliminary hearing, (b) the absence of “friendly or professional aid” at the time of their interrogation, and (c) the neglect to advise the defendants of their constitutional rights. One of the four, Justice Douglas, even went so far as to favor the outlawing of any confession, however freely given, if it is obtained during a period of custody between arrest and arraignment.<sup>10</sup> The encouraging indications previously mentioned as being evidenced in these cases are obviously not present in the attitudes expressed by the aforementioned justices. They are found, however, in the dissenting opinions of Chief Justice Vinson and Justices Burton, Jackson, and Reed, and in the fact that although Justice Black approved of a reversal of the convictions he was persuaded by the “inherent coerciveness” of the extensive, relay interrogation practices in these cases rather than by the three other considerations (*a*, *b*, and *c* above) mentioned by Justices Douglas, Frankfurter, Murphy, and Rutledge.

The dissenting opinions rather clearly indicated that four of the justices thought that the test of a confession’s admissibility should be its trustworthiness. “Checked with external evidence,” the confessions were considered “inherently believable,” and “not shaken as to truth by anything that occurred at the trial.” Justice Jackson, who authored the dissenting opinions in two of the cases, pointed right to the crux of the whole confession problem when he stated that all three crimes were unwitnessed, and that there was no way to solve them without taking suspects into custody for questioning. He added that there were only these alternatives: “to close the books on the crime and forget it,” or to take suspects into custody for questioning—“a grave choice for a society in which two-thirds of the murders already are closed out as insoluble.” He further commented that if the Constitution required the Supreme Court to hold that a state may not take into custody or question one suspected reasonably of an unwitnessed murder, “the people of this country must discipline themselves to seeing their police

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<sup>10</sup> See 69 S. Ct. 1357.

stand by helplessly while those suspected of murder prowl about unmolested."

With four of the nine justices thus firmly committed to the trustworthiness test of confession admissibility, is there not some practical adjustment that state interrogators may make in their interrogation practices in order to comply with the demands of some one or more of the remaining five justices? With three of the five justices, the interrogator's situation must be classed as a rather hopeless one, for he obviously cannot conduct an effective interrogation in the presence of the accused person's counsel, friends or relatives; nor is it ordinarily feasible to conduct a satisfactory interrogation after the arrested person has been promptly arraigned.<sup>11</sup> However, as regards one or two of the justices who have usually concurred in the reversal of convictions in these confession cases, the indications are that even though they have indicated or expressed their concern over the police deviations from so-called "civilized standards," the fundamental considerations were the factors of continuous lengthy interrogations by officers working in relays—factors which may, of course, render a confession untrustworthy.<sup>12</sup> It is the writer's opinion, therefore, that one or two additional justices may be won over to the law enforcement side of the confession controversy if state interrogators will:

1. Avoid *continuous* lengthy interrogations; and
2. Avoid the practice of *relay* questioning.

An abandonment of these two practices should contribute much toward a better future record for the prosecution in confession cases before the Supreme Court. The recent demise of Justice Murphy, who so staunchly applied the doctrine of "civilized standards" in his efforts to protect the interests of accused persons, and his replacement by Attorney General Tom Clark, is another factor pointing to the expectation of fewer reversals of future state court confession cases because of considerations going beyond the test of trustworthiness.

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<sup>11</sup> For a discussion of the conditions and circumstances required for an effective interrogation, see (1948) 43 Ill. L. Rev. 442, at pp. 447-451.

<sup>12</sup> Justice Black's reasons for reversing the *Watts*, *Turner* and *Harris* cases, *supra* notes 7, 8, and 9, were apparently based upon these larger considerations. Justice Frankfurter, although the author of the "civilized standards" rule for federal officers, apparently looks for more basic considerations in state cases. See his dissent in the *Ashcraft* case, *supra* note 4, and also his concurrence in the decision affirming the conviction in *Lyons v. Oklahoma*, 322 U.S. 596 (1944).

### III. THE NECESSITY FOR SPECIALLY SELECTED AND TRAINED POLICE INTERROGATORS

To modify current interrogation methods to the extent demanded for Supreme Court approval will require the establishment of police practices whereby the responsibility for interrogating suspects and witnesses is assigned to police personnel who are specially selected and trained for that purpose. In order to conduct effective interrogations within a reasonable and legally permissible period of time, the task of interrogation must be the responsibility of a trained specialist, and not the chore of any officer who happens to be assigned to the case, for the qualifications of an interrogator are vastly different from those which may mark an excellent general investigator.

An effective interrogator must have a good practical understanding of human nature generally. He must possess personality traits such as are evidenced by a general ability to "get along" with people and to be well liked by his friends and associates. He must also be a man of patience, with an intense interest in the work itself. A coupling of these basic qualifications with a relatively short period of instruction from an experience competent interrogator in the art of criminal interrogation will make available to any police department a service of immense practical value. A man or unit of men with these various qualifications will be able to solve many crimes by means of confessions which will successfully stand the test of admissibility not only in the state courts but in the United States Supreme Court as well.

