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Criminal Law: Involuntary Confessions

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other probable explanation for the occurrence before a court will apply the doctrine, it seems that the third element is merely a reiteration of this basic requirement, but specifically directed at the plaintiff's acts. Once the plaintiff satisfies the court that there is no other explanation for the occurrence, the third element has been satisfied and contributory negligence is not a bar to the application of *res ipsa loquitur.*

JOHN L. REITER

Criminal Law: Involuntary Confessions—The petitioner was found guilty of robbery in the Superior Court of Spokane County, Washington, after a trial during which the court admitted, over objection, the petitioner's written and signed confession. The petitioner's uncontradicted testimony was that the confession was made 16 hours after his arrest, during which time his requests to call his wife and attorney were denied. He stated that he was repeatedly told that he would not be allowed to call until he "co-operated" with the police and gave them a signed confession. Throughout this period the petitioner was not advised of his right to remain silent, warned that his statements might be used against him, or told of his rights respecting consultation with an attorney. The Washington Supreme Court affirmed his conviction holding that the issue of the voluntariness of petitioner's confession had been properly submitted to the jury.[1]

The United States Supreme Court reversed the conviction by a vote of five to four.[2] In the opinion written by Mr. Justice Goldberg, the Court held that the confession was coerced and thus violated the due process clause of the fourteenth amendment of the United States Constitution. The Court found that the confession was obtained in an atmosphere of substantial coercion and did not meet the requisite test for admissibility into evidence of being made "freely, voluntarily, and without compulsion or inducement of any sort."[3] The Court said:

> Confronted with the express threat of continued incommunicado detention and induced by the promise of communication with and access to family, Haynes understandably chose to make and sign the damning written statement; given the unfair and inherently coercive context in which made, that choice cannot be said to be the voluntary product of a *free and unconstrained will* as required by the Fourteenth Amendment.[4] (Emphasis added.)

Starting with *McNabb v. U.S.*,[5] the Court made clear its intention to review cases of coerced confessions using two distinct and separate standards of admissibility, depending on their jurisdictional origin.

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[1] Hayes v. State of Washington, 58 Wash. 2d 716, 364 P. 2d 935 (1961).
[2] Haynes v. State of Washington,—U.S.—, 83 Sup. Ct. 1336 (1963).
[3] Wilson v. U.S., 162 U.S. 613, 623 (1896).
[4] Haynes v. State of Washington, *supra* note 2, at 1343.
[5] 318 U.S. 332 (1943).

When faced with the admissibility of confessions arising in the federal court system, the Court need not resort to the due process clause to refuse coerced confessions' admission into evidence. The Court made reference to its broad jurisdiction over the federal courts and its power to establish standards of procedure and evidence within the federal court system. The Court stated:

> In the view we take of the case, however, it becomes unnecessary to reach the Constitutional issue pressed upon us. For, while the power of the Court to undo convictions in state courts is limited to the enforcement of 'those fundamental principles of liberty and justice'[6] which are secured by the fourteenth amendment, the scope of our reviewing power over convictions brought here from the federal courts is not confined to ascertainment of constitutional validity.[7]

Thus in the *McNabb* case, the Court held that the admission into evidence of a confession made when the prisoner was being held incommunicado was a violation of the *federal* rule of admissibility. In *Mallroy v. U.S.*,[8] the Court reiterated its policy and said that it was enforcing Rule 5(a) of the Federal Rules of Criminal Procedure which requires an officer making an arrest to bring the arrested person "without unnecessary delay" before the nearest available commissioner. The Court in explaining its position said:

> In order adequately *to enforce* the congressional requirement of prompt arraignment it was deemed necessary to render inadmissible incriminating statements elicited from defendants during a period of unlawful detention.[9]

In the *Mallroy* case the Court found no necessity to define what would be a violation of due process in this area, since it could exclude any confession which was obtained as a result of such unnecessary delay on the grounds that it was the final arbiter as to proper evidence in the federal courts.

The first reversal of a state conviction involving the admission into evidence of a coerced confession took place in the case of *Brown v. Mississippi*.[10] There the Court held that the use of physical torture to extort a confession was not consonant with due process because it violated "fundamental principles of liberty and justice." Since that time, the Court has reversed the convictions of prisoners who were subjected to the so-called "third degree" by holding that confessions obtained through these methods were a violation of due process. The decisions concerning the effect of the due process clause on the ad-

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[6] Herbert v. Louisiana, 272 U.S. 312, 316 (1926).
[7] McNabb v. U.S., *supra* note 5, at 340.
[8] 354 U.S. 449 (1957).
[9] *Id.* at 453.
[10] 297 U.S. 278 (1936).

missibility of confessions in state courts can basically be divided into three categories.

1) *Confessions extorted by physical torture*

Where there has been physical abuse to the body of the prisoner, the Court has invariably found the admission of the resulting confession into evidence a violation of due process. In *Stein v. N.Y.*, the Court stated:

> Physical violence or threat of it by the custodian of a prisoner during detention serves no lawful purpose; invalidates confessions that otherwise would be convincing and is universally condemned by law. When present, there is *no need to weigh or measure its effects on the will of the individual victim.*[11]

2) *Confessions extorted by extreme psychological coercion*

Where the Court has found extreme cases of psychological coercion, it has held as a matter of law that there was a violation of due process, without examining the effect of these tactics on the individual prisoners. Threats of mob violence,[12] deprivation of food and drink,[13] extended relay questioning by police officers,[14] and incommunicado detention for excessive periods of time,[15] have all been held, as a matter of law, to be "inherently coercive." In these cases, the Court has found the police methods so shocking to the concept of fundamental fairness and justice that there has been no need to examine the effect of the use of these tactics on the prisoner making the confession to see whether he was "in fact" coerced. Thus in this area the Court has concentrated on the techniques used by the police rather than on their subjective effect on the prisoner.

3) *Confessions obtained through general coercion*

The majority of cases have arisen from situations where the police have used various methods to coerce the prisoner to confess which are more subtle than the aforementioned tactics but still calculated to induce the prisoner to confess. In these cases, the Court felt that it was necessary to evaluate the facts and determine whether or not under the totality of circumstances the confession was involuntary "in fact." Some of the factors which the Court has considered in deciding whether the confession was voluntary have been the defendant's age,[16] his previous criminal record,[17] delay in arraignment,[18] lack of aid by counsel,[19]

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[11] 346 U.S. 156, 182 (1953).
[12] Chambers v. Florida, 309 U.S. 227 (1940).
[13] Paynes v. Arkansas, 356 U.S. 560 (1958).
[14] Ashcraft v. Tennessee, 322 U.S. 143 (1944).
[15] Gallegos v. Colorado, 370 U.S. 49 (1962).
[16] Note 12 *supra.*
[17] Lynumn v. Illinois, 372 U.S. 528 (1963).
[18] Stein v. N.Y., *supra* note 11.
[19] Crooker v. California, 337 U.S. 433 (1958).

and failure to advise the accused that his statements might be used against him.[20] The following test has been set down by the Court:

> The limits in any case depend upon a weighing of the circumstances of pressure against the power of resistance of the person confessing. What would be overpowering to the weak of will or mind might be utterly ineffective against an experienced criminal.[21]

The use of this subjective test, however, creates a problem of determining at what stage the confession will be deemed involuntary "in fact." This involves a determination by the Court as to when the prisoner is in such a psychological state of mind that his confession can no longer be considered voluntary. Prior to the *Haynes* case, a confession was held involuntary if the will of the prisoner was subdued and no longer operative in making the decision to confess. The coercion must have been the true cause of the confession. The requirement for involuntariness was that the prisoner "had so lost his freedom of action that the statements made were not his."[22] In other words, the coercive tactics of the police and the personality makeup of the prisoner must have been such that the will of the prisoner would have been overborn so that he could not have resisted, and a confession would have been a necessary consequence.

In the *Haynes* case, however, the facts are insufficient to support a holding that the confession was involuntary under a test which requires that the prisoner's will be so overborn that he could not resist the coercion. The two relevant facts in this case are: (1) the threat of incommunicado detention, (2) the refusal to allow the prisoner to see his counsel. The dissent makes it clear that never have such meager facts supported a reversal on the grounds of due process. Apparently, the Court has decided to broaden the requirements for the admissibility of confessions by insisting that the entire decision making process be free from coercive elements. This means that even when the effect of the coercive tactics are *not* such that the prisoner's will to resist is overborn, if the coercion leads the prisoner to make a rational and willful decision to confess which he would not have made if not for the coercion, the confession will be deemed involuntary. The dissent emphasizes this point by criticizing the majority for adopting a standard of admissibility which would hold a confession involuntary if the police had ". . . wrung from him [the prisoner] a confession he would not otherwise have made."[23] It thus seems that the crucial question in determining the voluntariness of a confession is whether or not the "attendant circumstances" which the accused is entitled to have considered

[20] Harris v. South Carolina, 338 U.S. 68 (1949).
[21] Stein v. New York, *supra* note 11, at 185.
[22] Lisenbia v. California, 314 U.S. 219, 241 (1941).
[23] Haynes v. State of Washington, *supra* note 2, at 1349.

in determining voluntariness are of such a nature that they have impeded his freedom to decide whether or not he wishes to confess. According to this standard, a confession will apparently be held voluntary only when the prisoner chooses to confess on the basis of his own motives. The test now used by the Court favors a more objective standard and lends itself to clearer guidelines in distinction to the prior standard.

Although, in this case, the Court has not yet fully applied the *McNabb* rule, which forbids the use of confessions that are made as a result of incommunicado detention, it may have accomplished a similar result by its change in policy.[24] Incommunicado detention would seem to be a relevant and pressing factor in determining whether the will of the defendant had been affected. It must, however, be noted that in the *Haynes* case, aside from the incommunicado detention, there was a threat of indefinite detention and a failure to notify the prisoner of his right to remain silent.

The Wisconsin Supreme Court has held that the ultimate test of the admissibility of a confession is not whether the confession was induced by threats or promises, but whether under the circumstances it was testimonially trustworthy.[25] There is no question that this standard is not the law today, and if it were applied in a case where there was substantial coercion involved, the conviction would be reversed after a petition of *habeas corpus* to the federal court. The United States Supreme Court specifically overruled the test of "testimonial trustworthiness" as the sole criterion for admissibility in the case of *Rogers v. Richmond.*[26] The most probable reason for the longevity of this rule in Wisconsin is that the cases which have arisen have not contained sufficient coercive elements to support a review by the United States Supreme Court.

In considering the effect on police interrogation methods of the *Haynes* decision and the general trend toward the *McNabb* rule, there seems little doubt that the Court is attempting to stop secret interrogation by police before arraignment. In the *Haynes* case the Court expressly stated:

> We cannot blind ourselves to what experience unmistakably teaches; that even apart from the express threat, the basic techniques present here—the secret and incommunicado detention and interrogation—are devices adapted and used to extort confessions from suspects.[27]

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[24] Two recent law review articles have expressed the belief that in the near future the Court will extend the *McNabb* rule to the states. Ritz, *Twenty-Five Years of State Criminal Confessions in the United States Supreme Court,* 19 WASH. & LEE L. REV. 202 (1962); Broeder, *Wong Sun v. United States—A Study in Faith and Hope,* 42 NEB. L. REV. 483 (1963).

[25] Kiefer v. State, 258 Wis. 47, 44 N.W. 2d 537 (1950).

[26] 365 U.S. 534 (1961).

[27] Haynes v. State of Washington, *supra* note 2, at 1343.

Some authorities have felt that the result of these decisions will be a serious impairment of police effectiveness to solve crimes which could have been solved with a few hours of police interrogation.[28] Those who argue in support of the Court's position feel that the sacrifice in police efficiency is a necessary evil which must be endured if individual freedom and liberty are to be protected against police tyranny.[29] It would seem desirable that a complete clarification of the law be forthcoming from the Court so that there would be a definite uniform standard which could be followed throughout the states.

AARON TWERSKI

Trade Regulations: The Applicability of Section 7 of the Clayton Act to Bank Mergers—In *United States v. Philadelphia National Bank*,[1] the Supreme Court held, in a case of first impression, that section 7 of the Clayton Act is applicable to bank mergers. The Philadelphia National Bank and the Girard Trust Corn Exchange Bank, the second and third largest commercial banks with main offices in the metropolitan area of Philadelphia, sought to merge into one consolidated bank. If such a merger had succeeded, the resulting bank would have been the largest in the immediate Philadelphia area. However, as soon as the banks had secured approval of such merger from the Comptroller of the Currency,[2] the government brought suit under section 1 of the Sherman Act[3] and section 7 of the Clayton Act.[4] The Court then enjoined the proposed merger agreement, holding that section 7 of the Clayton Act applied to bank mergers, and that the anti-competitive effects of the proposed merger violated its provisions.[5]

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[28] *Symposium—Law and Police Practice;* Inbau, *Restrictions in the Law of Interrogation and Confessions,* 52 NW. U. L. REV. 77 (1957). Professor Inbau also criticizes the Court for usurping a function which does not belong to them—that of passing over proper police practices. That in truth. this is what the Court is doing can be seen from the majority decision in the *Haynes* case where Mr. Justice Goldberg said that the Court was passing on proper and permissable police tactics.

[29] *Symposium—Law and Police Practice;* Liebowitz, *Safeguards in the Law of Interrogation and Confession,* 52 NW. U. L. REV. 86 (1957).

[1] —U.S.—, 83 Sup. Ct. 1715 (1963).

[2] The Comptroller's approval of such agreement is required under 73 STAT. 462 (1959), 12 U.S.C. §215 (Supp. 1963). Such approval in turn may not be given under the BANK MERGER ACT of 1960, 74 STAT. 129 (1960), 12 U.S.C. 1828(C) (Supp. 1960), until the Comptroller has received reports from the Attorney General, the Board of Governors of the Federal Reserve System, and the Federal Deposit Insurance Corporation, on the probable effects of the proposed transaction on competition.

[3] 26 STAT. 209 (1890), as amended, 15 U.S.C. §1 (Supp. 1960).

[4] 38 STAT. 731 (1914), as amended, 15 U.S.C. §18 (1958).

[5] The Sherman Act issue was never reached in this case, due to the fact that the majority based its decision on §7 of the Clayton Act. It should be noted, however, that in *dicta* the Court considered §1 of the Sherman Act to be applicable to bank mergers, and that Justice Goldberg, in his dissent, felt that there was a strong Sherman Act issue in the case. See Note, 75 HARV. L REV. 757, 759 (1962) for a discussion of this question.