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THE CONFESSION CONFUSION

Editor's Note: Miranda v. Arizona, 86 S.Ct. 1602 (1966) was decided during the process of publication of this article and therefore should be consulted for the most recent development of the law in this area.

ROBERT W. MILLER AND MARK KESSEL*

Recent decisions of the Supreme Court of the United States which overruled and changed well settled law . . . have created new and difficult legal and police problems, and have imposed new Constitutional restrictions on the solution of crime and the conviction of criminals. Especially when retroactively applied by the mandates of the Supreme Court, they seriously endanger the safety and welfare of all law-abiding citizens."

Certainly the decisions of the Supreme Court have created considerable confusion for judges, prosecuting officials and law enforcement officers in many areas of criminal law, not the least of which is the law with regard to confessions. While the short view is that a great deal of confusion has been created, Dean Erwin N. Griswold believes that the "long view" will indicate a welcome progress in the administration of criminal justice. Indeed, one jurist credits these decisions with bringing about "The Emergence of the Criminal Law."

Confessions are important to those engaged in law enforcement. They often expedite the search for evidence and remove lingering doubts. Prosecutors welcome a plea of guilty in that time and expense of a trial are saved. In many instances a confession may motivate a defendant to make, and a prosecutor to accept, a plea to a lesser offense. The minds of jurors are eased with the admission of a confession into a case in which they are judging the guilt or innocence of a fellow man.

Treatises on evidence indicate that since it is against a person's interest to confess, a valid confession is the highest kind of evidence. However, a confession, in and of itself, is not sufficient to warrant conviction without some additional proof that the crime charged has been committed.

COERCED CONFESSIONS

Whether one determines the voluntariness of a confession by simply inquiring "whether a defendant's will was overborne at the time he confessed," or by a "three-phased process," an examination of a

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4 See e.g. 3 WIGMORE, EVIDENCE §§866 (3d ed. 1940); see also McNabb v. United States, 318 U.S. 332, 348 (1943) (dissenting opinion.)
5 WIGMORE, EVIDENCE §§2070-72 (3d ed. 1940). Some states have enacted this requirement into law, e.g., N.Y. CODE CRIM. PROC., §395.

The inquiry whether, in a particular case, a confession was voluntarily or involuntarily made involves, at the least, a three-phased process. First,
state of mind is required. Therefore, the voluntariness of a confession when in issue before the Supreme Court is a question of fact to be independently determined by it:

Where the claim is that the prisoner's statement has been procured by such means [i.e., coercion], we are bound to make an independent examination of the record to determine the validity of the claim. The performance of this duty cannot be foreclosed by a finding of a court, or the verdict of a jury, or both.9

The decision as to whether or not particular conduct of law enforcement agencies constitutes coercion is judged by "the totality of circumstances"10 which is dependent upon two main factors: (1) The personal characteristics of the individual confessing, and (2) the pressures to which the individual was subjected to induce the confession.11 Although the Supreme Court, by taking cognizance of the race,12 age,13 prior experience with police,14 level of intelligence,15 and amount of education16 of the person confessing, has been concerned with the first factor, nevertheless, it is said that the Court has stressed there is the business of finding the crude historical facts, the external, "phenomenological" occurrences and events surrounding the confession. Second, because the concept of "voluntariness" is one which concerns a mental state, there is the imaginative recreation, largely inferential, of internal, "psychological" fact. Third, there is the application to this psychological fact of standards for judgment informed by the larger conceptions ordinarily characterized as rules of law but which, also, comprehend both induction from, and anticipation of, factual circumstances.

the nature of the methods employed by the law enforcement officials at the time the confession was extracted.\textsuperscript{37}

In 1936 the Supreme Court in \textit{Brown v. Mississippi}\textsuperscript{18} held that a conviction based solely on confessions obtained by physical torture was "void for want of the essential elements of due process."\textsuperscript{19} The same decision was reached four years later as to convictions founded upon confessions extracted by psychological coercion.\textsuperscript{20} The Court has held confessions to be involuntary in cases where the defendant was subjected to protracted periods of questioning,\textsuperscript{21} deprived of sleep,\textsuperscript{22} held incommunicado for a long period,\textsuperscript{23} or threatened that he would not be protected from mob violence unless he told the truth.\textsuperscript{24} In \textit{White v. Texas}, a confession was deemed involuntary when it was shown that the suspect was taken to a wooded area during the night and interrogated.\textsuperscript{25} Where a petitioner confessed after being arrested, taken to a hotel room, stripped and not allowed to put on his garments for several hours, the Court ruled that reference to this confession in summation by the prosecutor constituted a violation of the defendant's constitutional rights.\textsuperscript{26} According to the Court of Appeals for the Tenth Circuit, "unorthodox" procedures (\textit{i.e.}, a lie detector test and interrogation after sodium pentothal injections) do not automatically render a subsequent confession involuntary.\textsuperscript{27}

Other less violent factors bearing on the question of voluntariness include: unlawful arrest,\textsuperscript{28} delay in arraignment,\textsuperscript{29} request by the defendant for counsel,\textsuperscript{30} and failure to apprise the accused of his right

\textsuperscript{37} Ritz, \textit{supra} note 11, at 42-43.
\textsuperscript{18} 297 U.S. 278 (1936).
\textsuperscript{19} Id. at 287.
\textsuperscript{25} 310 U.S. 530 (1940).
\textsuperscript{26} Malinski v. New York, 324 U.S. 401 (1945).
\textsuperscript{27} Thompson v. Cox, 352 F. 2d 488 (10th Cir. 1965).
\textsuperscript{30} Prior to Escobedo v. Illinois, 378 U.S. 478 (1964), some cases indicated that the defendant's request for counsel or a request by counsel to confer with the defendant was one such important factor: Haynes v. Washington, 373 U.S. 503 (1963); Rogers v. Richmond, 365 U.S. 534 (1961); Culombe v.
to counsel and his privilege against self-incrimination.\textsuperscript{31}

Since the issue in these cases—"Is the confession the product of an essentially free and unconstrained choice by its maker?"\textsuperscript{32}—involves a question of fact,\textsuperscript{33} the courts continue to examine the propriety of police conduct in making determinations as to voluntariness.

In \textit{Haynes v. Washington},\textsuperscript{34} decided by the Supreme Court in 1963, a written confession was admitted into evidence which was obtained after the defendant was held incommunicado for sixteen hours and had been told by the police that he would not be permitted to call his wife until such time as he had signed the confession. The confession was held involuntary.\textsuperscript{35} In the same year the Court labelled a confession "coerced" that was obtained by threats that if the defendant did not cooperate with the police, the state would deprive her of financial assistance for her children and they might be permanently taken from her.\textsuperscript{36} In \textit{Townsend v. Sain},\textsuperscript{37} a narcotic addict had been administered a drug which had the effect of a "truth serum." The Court stated:

If an individual's "will was overborne" or if his confession was not "the product of a rational intellect and a free will," his confession is inadmissible because coerced. These standards are applicable whether a confession is the product of physical intimidation or psychological pressure and, of course, are equally applicable to a drug-induced statement.\textsuperscript{38}

Similar standards had been applied to a unique case\textsuperscript{39} where police officers brought a person to a hospital and an emetic was forced into his stomach against his will. He regurgitated two capsules which contained a narcotic. "To attempt in this case to distinguish what lawyers call 'real evidence' from verbal evidence," the Court stated, "is to ignore the reasons for excluding coerced confessions."\textsuperscript{40}

Even if the independent findings of fact as to voluntariness can be predicted with any degree of certainty, the rationale behind these cases is not always as certain. For example, when the \textit{Brown} decision was reached, the Supreme Court's reason for excluding a coerced confession was based on the argument that such confessions are untrust-
worthy as evidence.\textsuperscript{41} Subsequently, the Court reasoned that the admission into evidence of a coerced confession would result in a violation of fair trial conduct.\textsuperscript{42} Also advocated by the Court has been the proposition that adversaries should be equal, \textit{i.e.}, equality should exist between the interrogator and the suspect.\textsuperscript{43} Lastly, in often-cited language, the Supreme Court stated that “protracted, systematic and uncontrolled subjection of an accused to interrogation by the police for the purpose of eliciting . . . confessions is subversive of the accusatorial system. . . . [T]he Due Process Clause bars police procedure which violates the basic notions of our accusatorial mode of prosecuting crime. . . .”\textsuperscript{44}

As some of the more recent cases indicate, what theory the Court will rely on is not always certain. In \textit{Spano v. New York},\textsuperscript{45} for example, the Court’s decision utilized the evidence and the due process theories.\textsuperscript{46} In \textit{Rogers v. Richmond},\textsuperscript{47} which arose two years after \textit{Spano}, reliance was placed on the due process theory.\textsuperscript{48} However, almost immediately, the Supreme Court reverted to the evidence theory.\textsuperscript{49}

While in prior cases the Supreme Court had intimated that the privilege against self-incrimination was an underlying reason for excluding a confession, no decision was founded upon this theory until the 1964 ruling in \textit{Malloy v. Hogan}.\textsuperscript{50}

Perhaps the greatest consequences and confusion will arise from the decisions excluding confessions on the theory that they were obtained in violation of an accused’s constitutional right to the assistance of counsel. An immediate conflict of opinion stems from the fact that by this rule confessions can be excluded which are wholly voluntary.\textsuperscript{51}

To complete the circuitry of confusion, it must be pointed out that while the absence of counsel can exclude voluntary statements, it appears that it may also be a factor in determining the voluntariness of a confession. The request to contact one’s parents may be equivalent to asking for an attorney\textsuperscript{52} or it may apply solely to the question of

\textsuperscript{41} 297 U.S. at 286. See also 3 \textsc{Wigmore, Evidence} \textsection 822, at 246 (3d ed. 1940).
\textsuperscript{42} Lisenba v. California, 314 U.S. 219, 237 (1941).
\textsuperscript{44} Watts v. Indiana, 338 U.S. 49, 55 (1949).
\textsuperscript{45} 360 U.S. 315 (1959).
\textsuperscript{46} \textit{Id.} at 320-21.
\textsuperscript{47} 365 U.S. 534 (1961).
\textsuperscript{48} \textit{Id.} at 540-41.
\textsuperscript{50} 378 U.S. 1 (1964).
\textsuperscript{51} See Escobedo v. Illinois, 378 U.S. 478, 495 (1964) (dissenting opinion) and text at and accompanying notes 64-68 \textit{infra}. See also \textit{People v. Friedlander}, 16 N.Y. 2d 248, 212 N.E. 2d 533 (1965).
\textsuperscript{52} See \textit{People v. Taylor}, 22 App. Div. 2d 524, 256 N.Y.S. 944 (1st Dept. 1965). This case was modified on appeal to the extent that, in New York at the present time, a defendant’s confession is “not made inadmissible solely because his family was refused access to him but that this fact would be germane in the issue of its voluntary nature.” 16 N.Y. 2d 1038, 1040, 213
voluntariness.\textsuperscript{53} Thus the distinction between involuntary confessions and those obtained in the absence of counsel is not as clear cut as it would appear on the surface.

CONFESSIONS AND THE RIGHT TO COUNSEL

Although the right to counsel in federal prosecutions had been recognized since 1938,\textsuperscript{54} it was not until the 1963 decision in \textit{Gideon v. Wainwright}\textsuperscript{55} that the Supreme Court extended this right to state prosecutions of felonies. Of the various questions that \textit{Gideon} left unanswered,\textsuperscript{56} one of those which at the present time is causing courts and law enforcement agencies concern is “When does the right to assistance of counsel commence?”

In \textit{Massiah v. United States}\textsuperscript{57} the Supreme Court ruled that self-incriminatory statements, deliberately elicited from the defendant by federal agents after he had been indicted and in the absence of counsel, were inadmissible at his trial. Use of such evidence was a denial of the defendant’s right to due process.\textsuperscript{58}

Approximately fifteen months after the \textit{Gideon} decision the Supreme Court decided \textit{Escobedo v. Illinois}.\textsuperscript{59} Escobedo was arrested and removed to a police station where he was placed in “custody” although not formally charged with a crime. Subsequently, his retained counsel arrived and requested permission to consult with him. During the course of the interrogation, despite repeated requests by both counsel and Escobedo, they were denied the opportunity to consult with each other. Testimony by the police disclosed that Escobedo was not advised of his right to remain silent or of his right to counsel. During the trial Escobedo had moved to suppress the incriminating statements, but such motions were denied. Although upon appeal the Supreme Court of Illinois in its original opinion reversed the conviction of murder after it determined that the statements made to the police were inadmissible, on rehearing it affirmed.\textsuperscript{60}
The Supreme Court of the United States granted certiorari. In a 5-to-4 decision the Court held that:

[W]here, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied "the Assistance of Counsel" in violation of the Sixth Amendment to the Constitution as "made obligatory upon the States by the Fourteenth Amendment," *Gideon v. Wainwright*, . . . and that no statement elicited by the police during the interrogation may be used against him at a criminal trial.

The Court added: "Nothing we have said today affects the powers of the police to investigate 'an unsolved crime' . . . by gathering information from witnesses and by other 'proper investigation efforts'."

Although at first blush it might not be evident what the majority had in mind when it reached its decision, Mr. Justice White shed some illumination on the case when he stated: "The decision is thus another major step in the direction of the goal which the Court seemingly has in mind—to bar from evidence all admissions obtained from an individual suspected of crime, whether involuntarily made or not."

While the reasons for excluding involuntary confessions run to the very essence of a confession, the rationale for excluding statements wholly voluntary is not that clear. Moreover, an exclusion of voluntary confessions has enormous repercussions. Mr. Justice Stewart, in his dissenting opinion, argued that when the Court excludes confessions wholly voluntary, it "perverts those precious constitutional guarantees, and frustrates the vital interests of society in preserving the legitimate and proper function of honest and purposeful police investigation."

The force of this argument is not felt until one realizes that approximately 75 percent of all convictions for serious crimes are founded upon confessions presumably voluntary.

It should be noted that *Escobedo* involved retained counsel and that a request by the petitioner to consult with his attorney was denied, as was the attorney's request to confer with his client. Moreover, the rationale of the Supreme Court was founded upon the fact that the

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62 Id. at 490-491.
63 Id. at 492.
64 Id. at 495.
65 See text at and accompanying notes 4-5 supra.
66 See text accompanying notes 51-53 supra. See also Mr. Justice White's comments in *Escobedo*, 378 U.S. at 496-97.
67 378 U.S. at 494.
right to counsel attaches at the "critical stage" of the criminal prosecution, and that the accusatory stage is "critical." Therefore, there was no reliance by the majority on the privilege against self-incrimination in support of their position.

While some cases decided by state courts have turned on the privilege against self-incrimination, since Escobedo arose under the fourteenth amendment, it thereby compels the states to adopt the "critical stage" standard in a determination as to the admissibility of incriminating statements. However, as to when the "critical stage" standard is to be applied, and how far it is to be extended is not clear.

In People v. Sanchez, decided by the New York Court of Appeals, defendant's attorney requested to consult with his client who was in police custody. The defendant thereafter was interrogated and made incriminating statements in the absence of counsel. The trial court charged the jury that the fact that the lawyer was prevented from conferring with his client is only relevant on the issue of voluntariness of the defendant's statements. The Court of Appeals held that these statements should have been excluded, "and it matters not, insofar as application of the rule . . . [in People v. Donovan, People v. Failla, and People v. Gunner] is concerned, whether the defendant, when taken into custody, was regarded by the police as 'accused,' 'suspect' or 'witness.'" The court concluded:

The significant or operative fact in such cases is that the defendant confessed or otherwise incriminated himself while being interrogated by the police in the absence of counsel after he had requested the aid of an attorney or one retained to represent him had contacted the police in his behalf.

The concurring opinion would not have extended the court's ruling to "a mere witness." Therefore, the New York Court of Appeals, in its language, has gone beyond the Supreme Court's decision in Escobedo. It would appear that in New York, regardless of the status of the person questioned, questioning someone after his request for counsel, or after counsel has contacted the law enforcement agency, renders subsequent statements inadmissible. But this rationale, as evidenced by the court's language, is not strictly dependent upon the "no counsel" rationale, but rather upon the privilege against self-incrimination

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69 378 U.S. at 486.
74 15 N.Y. 2d 266, 205 N.E. 2d 852 (1965).
75 15 N.Y. 2d at 389, 207 N.E. 2d at 356.
76 Ibid.
77 15 N.Y. at 392, 207 N.E. 2d at 358.
which, according to *People v. Donovan*, the attorney’s function is to protect.

The direction in which the cases dealing with confessions are going is illustrated by a recent case, also decided by the New York Court of Appeals. After a lawyer consulted with a defendant, he told the police officer to “arrest and arraign” her. Hours later, but prior to any arraignment, the policeman questioned the defendant, and elicited incriminating statements. While not indicating whether the request for arraignment was a principal factor in its decision, the court in reversing the conviction stated:

> The right to counsel is fundamental... and statements obtained after arraignment not in the presence of counsel are inadmissible... as are statements where access has been denied and this is so even when counsel cannot obtain access due to physical circumstances, as in *People v. Guniner*. . . . So it is here. The authorities, knowing the defendant was represented by counsel who had requested them to “arrest and arraign” his client, nonetheless, after counsel left, took occasion to elicit damaging admissions from her.

While it is true that New York previously held that statements obtained after indictment were inadmissible where the defendant had not obtained counsel, here no logical rationale appears. If there is “no counsel” or counsel is denied access to his client, it may be that the defendant will not be apprised of his constitutional rights; but where counsel has met with the defendant and presumably tells his client not to make any statements, and the defendant later does make statements without being coerced, then there is no reason why such admissions should not be admitted into evidence.

Have we reached the point where courts will “bar from evidence all admissions obtained from an individual suspected of crime whether involuntarily made or not”? Apparently not. Instead, the New York Court of Appeals has offered a saving solution. While the police are not required to advise the defendant of his right to counsel, they may do so, and if, thereafter, the defendant voluntarily confesses, he may waive his right and thereby render the confession admissible. Simultaneously, the court determined that the right to counsel attaches to protect “post-information” statements as well as “post-indictment” statements. It would seem that good police practice would now require that all potential defendants be advised of their right to counsel and their right to remain silent. More important, such practice would seem to

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give full impetus to the Supreme Court's decision in *Escobedo*, and avoid future repercussions with respect to convictions obtained prior to the Supreme Court's amplification of its decision. If the Supreme Court should adopt the rule of *People v. Dorado* as opposed to *People v. Gunner*, many new trials could result to overburden the prosecutors and courts. A comparison of the cases delineates the divergence of these two positions.

*People v. Dorado*, decided 4-to-3 by the Supreme Court of California, had a fact situation similar to that in *Escobedo*, with the exception that the defendant did not request, and was not denied, the opportunity to confer with his lawyer. The court held:

[D]efendant's confession could not properly be introduced into evidence because (1) the investigation was no longer a general inquiry into an unsolved crime but had begun to focus on a particular suspect, (2) the suspect was in custody, (3) the authorities had carried out a process of interrogations that lent itself to eliciting incriminating statements, (4) the authorities had not effectively informed defendant of his right to counsel or of his absolute right to remain silent, and no evidence establishes that he had waived these rights.

California, therefore, would not demand, as a prerequisite to the exclusion of a confession, a request for counsel. "The defendant who does not ask for counsel," stated the court, "is the very defendant who most needs counsel." The majority also stated that they could not "penalize a defendant who, not understanding his constitutional rights, does not make a formal request and by such failure demonstrates his helplessness." However, the dissenters pointed out that Dorado had been previously convicted of criminal offenses and that a presumption exists that on those occasions he was apprised of his right to counsel upon arraignment and at trial. Furthermore, they felt that inmates of penal institutions are aware of their constitutional rights.

The Court of of Appeals of New York, on the other hand, rejected the *Dorado* decision. In *People v. Gunner*, the New York court held:

[T]he majority is of the opinion that the rule heretofore announced in our decision... [citing *People v. Failla*, *People v. Donovan*, *People v. Meyer*, *People v. Noble*, *People v.*
Waterman,95 and People v. Di Biasi96] should not be extended to render inadmissible inculpatory statements obtained by law enforcement officers from a person who, taken into custody for questioning prior to his arraignment or indictment, is not made aware of his privilege to remain silent and of his right to a lawyer even where it appears that such person has become the target of the investigation and stands in the shoes of an accused.97

The effect that both decisions had upon the law of confessions can be best illustrated by the experience of the courts in New Jersey.

The United States Court of Appeals for the Third Circuit, which encompasses Delaware, New Jersey and Pennsylvania, on May 20, 1965, excluded confessions obtained in cases where the defendants did not request counsel and could not have afforded lawyers, and reversed the convictions because the police had failed to advise the defendants of their right to counsel and right to remain silent.98 Moreover, the decision appeared to have retroactive effect.

Within two weeks of this decision, Chief Justice Joseph Weintraub of the New Jersey Supreme Court, in a "pastoral letter" directed to all lower state judges and prosecutors, ordered them to ignore the Third Circuit's ruling and follow New Jersey law which admits into evidence a voluntary confession unless the police refused the defendant permission to consult an attorney after he had requested one.99

The ramifications of the Chief Justice's decision are evident. If the New Jersey Supreme Court rules against a defendant, he can secure a writ of habeas corpus in a federal district court and have the conviction reversed on the basis of the Third Circuit's ruling.100 Upon retrial, should the state, once again, introduce the confession into evidence, the circuitry of action could continue.

As mentioned previously, the Third Circuit's opinion appeared to have retroactive effect in that the defendants were both convicted under the pre-1964 law, which excluded only coerced confessions. However, when the prosecution requested a review of their decision, the court stated that it had not, and would not determine whether the ruling had retroactive effect.101

The Pennsylvania Supreme Court rejected the New Jersey precedent of defiance and elected to follow the Third Circuit ruling.102

On November 22, 1965 the Court of Appeals for the Second Circuit held that the police before questioning an accused are not required to

96 7 N.Y. 2d 544, 166 N.E. 2d 825 (1960).
97 15 N.Y. 2d at 233, 305 N.E. 2d at 855-56.
100 See text at notes 167-177 infra.
apprise him of his right to counsel and right to remain silent. This decision has been referred to as "a tragedy of errors," in that a person convicted of a crime, who confessed without being warned of his constitutional rights, could have won a reversal if he had been convicted in Delaware, New Jersey, or Pennsylvania.

While the application of the Bodie decision would seem to avoid retroactive effects of a Supreme Court adoption of the Dorado theory, a new problem emerges. In view of those decisions which require the court to advise a defendant of his right to assigned counsel, does this mandate the same duty upon police officers in order to have an intelligent waiver of a known right which would render voluntary "no counsel" confessions admissible?

The Supreme Court heard oral arguments in March devoted to five cases that raise questions in the confession field that have split the lower courts since Escobedo:

(1) Absent a request by an accused to consult with a lawyer, must the police inform him of his right to counsel and his right to remain silent?
(2) In the case of an indigent, must an attorney be supplied by the state?
(3) Must Escobedo be given retroactive effect?
(4) Is a confession obtained in violation of the defendant's constitutional rights merely because there has been an unreasonable delay between arrest and arraignment?

Where all this has led has been commented upon by one writer: Thus, the Supreme Court which moved purposefully from the "involuntary" rule to the "no counsel" rule to escape case by case determination of voluntariness, may move back to the "involuntary" rule, but apply the stricter standard . . . of the privilege against self-incrimination.

Clearly the morass of decisions indicates the Supreme Court must amplify the meaning of Escobedo and set forth rules that will require uniform procedure in all the states and guarantee "equal rights" to all defendants of these constitutional safeguards.

**DELAY IN ARRAIGNMENT—EFFECT UPON CONFESSIONS**

Both federal and state law prohibit delay in arraignment by statute. In a federal prosecution, a delay in arraignment absolutely excludes from evidence a confession extracted during this period even if a court

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106 See text accompanying notes 85-89 supra.
110 FED. R. CRIM. P. 5(a). New York, e.g., has also enacted such a statute. See N.Y. CODE CRIM. PROC. §165 and N.Y. PENAL LAW §1844.
and jury find the confession to be wholly voluntary. This so-called McNabb rule was formulated by the Supreme Court of the United States to check "resort to those reprehensible practices known as the 'third degree' which, though universally rejected as indefensible, still find their way into use." The rule was clarified subsequently in Mallory v. United States:

The duty enjoined upon arresting officers to arraign "without unnecessary delay" indicates that the command does not call for mechanical or automatic obedience. Circumstances may justify a brief delay between arrest and arraignment, as for instance, where the story volunteered by the accused is susceptible of quick verification through third parties. But the delay must not be of a nature to give opportunity for the extraction of a confession.

It should be noted that a confession is not excluded from evidence merely because there was a delay in arraignment after the confession was made.

Since the Supreme Court declined to apply the McNabb-Mallory rule to state cases, the states were permitted to adopt or reject the "absolute rule." New York, for instance, clearly rejected it in People v. Lane, by allowing the issue of voluntariness of the confession to be submitted to the jury even though there was a delay in arraignment in violation of New York statutory provisions. Previously the New York court had stated that "illegal delay is but one circumstance to be considered along with any other evidence bearing on the question of the voluntary character of the admissions." This same view was reiterated in a case decided in 1965.

Absent a working arrangement between state and federal officers, when an accused is detained without proper arraignment by state officers, a confession obtained by federal officers during this period is admissible in a federal prosecution. The rule is otherwise when the federal officers are working under a pre-existing arrangement with the local authorities.

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112 Id. at 344.
114 Id. at 455.
118 See text at and accompanying note 110 supra.
120 People v. Vitagliano, 15 N.Y. 2d 360, 364, 206 N.E. 2d 864, 866 (1965): "It was ... error for the trial court to have refused to charge the jury that, where appellant had been confined for 34 hours before arraignment, unwarranted delay should be considered by the jury in determining whether such confession or admission was voluntarily obtained."
122 Anderson v. United States, 318 U.S. 350, 356 (1943): "There was a working
CONFESSIONS AND THE FRUIT OF THE POISON TREE DOCTRINE

Generally, evidence obtained during an unlawful search is inadmissible at trial against the victim of the unlawful police search. This same rule obtains to "the fruit of the poisonous tree." In *Wong Sun v. United States*, the Supreme Court while reaffirming the "independent source doctrine" formulated in *Silverthorne Lumber Co. v. United States*, extended the "fruit of the poisonous tree" doctrine to voluntary verbal statements obtained as a result of unlawful law enforcement activity:

Thus, verbal evidence which derives so immediately from an unlawful entry and an unauthorized arrest as the officers' action in the present case is no less the "fruit" of official illegality than the more common tangible fruits of the unwarranted intrusion.

The precise effect that *Wong Sun* has upon the confession cases is still unclear. Naturally, it is one factor considered in the "totality of circumstances" mentioned earlier. One writer noted that, although "an unlawful arrest is regarded as a small circumstance in the totality of circumstances test, if accompanied by a trespass or unlawful intrusion into the home of the accused, it may very well require exclusion as an absolute rule under the Fourth Amendment."

Since *Wong Sun* was a search and seizure case, absent the distinction between tangible evidence and verbal statements, then statements voluntarily rendered are not exempt from attack on constitutional grounds if they are procured as a result of an illegal search.

Whether the state courts are bound to exclude confessions which are the "fruit" of an unlawful arrest is not entirely clear. The Court of Appeals for the Fifth Circuit decided that "Wong Sun's exclusionary rule is equally applicable in both state and federal courts;" Maryland arrangement between the federal officers and the sheriff ... which made possible the abuses revealed by this record. Therefore, the fact that the federal officers themselves were not formally guilty of illegal conduct does not affect the admissibility of the evidence which they secured improperly through collaboration with state officers."

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124 See *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920).
126 251 U.S. 385, 392 (1920): "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it in the way proposed."
127 371 U.S. at 485.
128 See text at and accompanying note 10 supra.
129 Sobel, supra note 109, Nov. 16, 1965, p. 4, col. 6. (Emphasis in original.)
130 371 U.S. at 485.
131 Collins v. Betto, 348 F. 2d 823, 826 (5th Cir. 1965).
stated otherwise. California has held the test enunciated in *Wong Sun* “relating to evidence excludable as the product of an illegal search and seizure applies to the states.” Although this issue has not been finally decided by the Supreme Court, the interpretation of the Fifth Circuit and California was intimated by the high court in *Traub v. Connecticut*, and *Fahy v. Connecticut*. In light of *Mapp v. Ohio*, consistency would compel the Supreme Court to hold that confessions obtained as a result of an illegal search and seizure are inadmissible.

**REDACTING OF CONFESSIONS**

Defendant A is tried jointly with defendants B and C whose confessions implicate A. At the trial the confessions of B and C are admitted in evidence over the objections of counsel for B and C that the confessions were coerced. It is unclear whether a judgment convicting A is subject to reversal because the confessions were improperly admitted as against B and C.

In *Anderson v. United States*, the trial judge allowed in evidence certain confessions against all petitioners, including the two nonconfessing defendants. Even though the confessions were admitted without mention of the two defendants implicated and the trial judge appeared to limit their use against those who made them, his charge did not bind the jury to restrict the use of the confessions. The names were revealed during the course of cross-examination of the confessing parties.

The Supreme Court stated that “there is no reason to believe ... that confessions which came before the jury as an organic tissue of proof can be severed and given distributive significance by holding that they had a major share in the conviction of some of the petitioners and none at all as to the others.” Therefore, the improper acceptance of confessions as to some of the petitioners at a federal trial was held to necessitate a reversal as to all.

However, in a subsequent case involving a state conviction the Supreme Court, while reversing a judgment of conviction as to one defendant on the ground that the confession which was the basis of the

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132 Medford v. State, 201 A. 2d 824, 831 (Md. 1964): “[T]his Court has held that *Wong Sun* was not intended to, and does not, control prosecution in state courts. . . .”


137Generally, an admission by a defendant as to his participation in a crime is an admission against interest and therefore may be considered as evidence by the trier of fact. However, if the confessor implicates other defendants, as to them, the admissions are hearsay.

138 318 U.S. 350 (1943).

139 Id. at 357.

conviction was obtained in violation of due process, affirmed as to the codefendant. The confession in issue contained instead of the names of the defendants other than the confessing party, the letters “X” and “Y.” The jury was instructed that the confession was admitted against the confessor alone and that they were not to speculate as to the identity of “X” and “Y.” The trial court also submitted the case against the nonconfessor separately from the case against the confessing party. The questions raised by the nonconfessing codefendant, stated the Court, “involve matters of state procedure beyond our province to review.”

Similarly in Stein v. New York, Wissner, a codefendant who never confessed, was implicated by those who did. The Court found that there was no constitutional basis to set aside the conviction “[E]ven if the confessions were considered to have been involuntary, their use would not have violated any federal right of Wissner. Malinski v. New York was cited in support of this rule.

Delli Paoli v. United States reiterated the position that the Supreme Court adhered to in Malinski and Stein but involved a federal prosecution. The trial court had admitted in evidence a confession of a codefendant which was made after the conspiracy had terminated. The trial court instructed that the confession was to be applied only as against the confessing defendant and not the other defendants. The Supreme Court held that reversible error was not committed. The petitioner took no exception to the instructions of the trial court and the Supreme Court concluded that it “may also proceed on the basis that the jury followed these instructions. . . . It is a basic premise of our jury system that the court states the law to the jury and that the jury applies that law to the facts as the jury finds them.” However, the Court pointed out that there could be “practical limitations to the circumstances under which a jury should be left to follow instructions. . . .”

In a recent New York case, the Court of Appeals was confronted with a situation in which a confession of A was read in evidence

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141 Id. at 412.
142 346 U.S. 156 (1953).
143 346 U.S. at 194.
144 324 U.S. 401 (1945).
145 346 U.S. at 194.
147 Id. at 239-40:

When the confession was admitted in evidence, the trial court said:

“The proof of the Government has now been completed except for the testimony of the witness Greenberg as to the alleged statement or affidavit of the defendant Whitley. This affidavit or admission will be considered by you solely in connection with your determination of the guilt or innocence of the defendant Whitley. It is not to be considered as proof in connection with the guilt or innocence of any of the other defendants.”

148 Id. at 241, 242. Cf. text accompanying note 139 supra.
149 352 U.S. at 243.
over the objection of counsel for U, the confession implicating U. Counsel also requested that any statements which implicated appellant U be deleted. Notwithstanding such requests, A's entire confession was admitted. In pointing out the difficulty with such confessions, the court stated:

Where it is not possible to segregate the implication of a codefendant in a confession, for the reason that the admission of guilt is so interrelated in the involvement of the accomplice as to render it impossible for practical purposes to separate them, there is no alternative but to receive the confession and then for the court to instruct the jury to consider it only as against the one who has confessed, disregarding the implication of anyone else in the commission of the crime. Such an instruction is not a perfect solution to the problem, inasmuch as it is difficult to eliminate from the minds of the jurors the implication of the codefendant, but it is the best that can be done under the circumstances. Here there was no abuse of discretion in ordering these defendants to be tried together, but where it is possible, as here, to separate the portions of the confession in which the confessor admits his own guilt from his involvement of another, it has been held that the confession should be redacted by eliminating the portion implicating the codefendant. . . . It was, therefore, error to admit the entire confession, over the objection by appellant's counsel, without deleting the easily severable portion which charged appellant with being an accomplice.151

The Supreme Court of New Jersey, following California's example,152 has taken a more liberal position.153

In view of the following language from the Jackson v. Denno decision: "The obvious and serious danger is that the jury disregarded or disbelieved Jackson's testimony pertaining to the confession because it believed he had done precisely what he was charged with doing,"154 and the court's reservation in Delli Paoli,155 the self-limiting rule of Malinski156 is questionable. Is there not as great a danger that a jury

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152 Id. at 383.
154 324 U.S. 401 (1945).
155 19661
156 19661
could not disregard the confession of a codefendant which completely implicates a nonconfessing defendant as there is that they could not disregard an involuntary confession? If so, due process should dictate separate trials.

THE ISSUE OF VOLUNTARINESS—PROCEDURAL ASPECTS

Prior to Jackson v. Denno,158 three rules were generally applied in determining the admissibility of confessions. The former New York rule left to the jury the question of voluntariness, if a factual conflict existed as to voluntariness. Under the "orthodox rule," the judge, after hearing all the evidence, rules on the voluntariness for the purpose of admissibility. The jury then considers the voluntariness as a factor in determining the weight and the credibility of the confession. Finally, the Massachusetts or "humane rule" allows the judge, before allowing the confession into evidence, to hear all the evidence and rule on the voluntariness. Only if he finds the confession to be voluntary, is the jury permitted to receive the confession and instructed that it must find the confession voluntary before it may consider it.

In Jackson v. Denno159 the Supreme Court in reversing a judgment of the Court of Appeals for the Second Circuit denying the petition for a writ of habeas corpus stated:

In our view, the New York procedure employed in this case did not afford a reliable determination of the voluntariness of the confession offered in evidence at the trial, did not adequately protect Jackson's right to be free of a conviction based upon a coerced confession and therefore cannot withstand constitutional attack under the Due Process Clause of the Fourteenth Amendment.160

The reasons for its decision were principally threefold: (1) Since the jury in New York was presented with evidence bearing on voluntariness as well as corroborating evidence indicating that the confession is true and that the defendant in fact committed the act charged, it may therefore believe both the confession and that the defendant committed the crime charged, "a circumstance which may seriously distort judgment of the credibility of the accused and assessment of the testimony concerning the critical facts surrounding his confession."161 (2) Under New York procedure it is difficult for the court to determine what effect the confession had on the jury's verdict of guilty.162 (3) The defendant, in order to contest the voluntariness of the confession, was often compelled to testify in the presence of the jury and thereby expose himself to impeachment.163

159 Ibid.
160 378 U.S. at 377.
161 Id. at 381.
162 Id. at 379-80.
163 Id. at 389 n. 16.
The Court in rejecting the New York procedure left to the states to allocate the judge-jury functions, and the courts are free to adopt the Massachusetts or the orthodox rule.

The disruptive effect of the decision was pointed out by Mr. Justice Black who dissented in part and concurred in part:

Today's holding means that hundreds of prisoners in the State of New York have been convicted after the kind of trial which the Court now says is unconstitutional. . . . The disruptive effect which today's decision will have on the administration of criminal justice throughout the country will undoubtedly be great. Before today's holding is even a day old the Court has relied on it to vacate convictions in 11 cases. . . .

This effect is furthered by the current-day practice of appealing state court decisions through the federal courts. Chief Judge Desmond of the Court of Appeals of New York has pointed out the problems encountered as a result of federal habeas corpus proceedings which permit a defendant to appeal through the federal system even after he "appeals through the state system, petitions the Supreme Court for certiorari, takes coram nobis proceedings through the state courts with subsequent application for Supreme Court certiorari. . . .." He cites, as an example of the type of results that can be expected under the present procedure, the histories of Caminito, Bonivo and Noia who were convicted in 1942 in state courts and finally obtained relief through federal habeas corpus by 1963:

Summing up the facts: three men confessed to a killing, a state court jury refused to credit their claims that their confessions were forced ones, one defendant for his own reasons took no appeal at all, but the appeals of the other two taken on the same ground of illegally obtained confessions were rejected by the two appellate courts of the state, and as to one defendant the Supreme Court denied certiorari. Yet years later in the federal courts all three defendants obtained relief on the same old charge of coerced confessions, and all of them went free.

A similar pattern of appeals was presented in Jackson v. Denno: after Jackson's conviction was affirmed by the New York Court of Appeals the Supreme Court denied certiorari. He then filed a
petition for habeas corpus in the federal district court.\textsuperscript{171} The denial of this petition was affirmed by the court of appeals.\textsuperscript{172} The Supreme Court granted certiorari\textsuperscript{173} and finally the judgment denying Jackson's writ of habeas corpus was reversed and the case was remanded to the federal district court to allow the State of New York a reasonable time to afford the petitioner a hearing on the issue of voluntariness or a new trial, failing which he was held to be entitled to his release.\textsuperscript{174}

The relief that was granted was further questionable in that "New York's procedure was not invoked in the trial court or attacked on appeal"\textsuperscript{175} and was therefore not properly before the Supreme Court. "The New York procedure providing for a preliminary hearing could be set in motion, and its validity questioned, only if objection was made to the admissibility of the confession. It is clear, further noted the dissent, "that counsel for petitioner in the trial court . . . did not object to the introduction of the statements made by the petitioner or ask for a preliminary hearing."

What all this amounts to, in the words of Chief Judge Desmond, is that "unless some accommodation and adjustment can be worked out, much confusion, much delay and, most regrettably, a great increase in the business of already sadly overburdened courts"\textsuperscript{176} will result.

A related procedural problem arises from coram nobis petitions in which prisoners seek to extend the implications of recent Supreme Court rulings. The New York Court of Appeals has ruled that after a plea of guilty entered with the aid of counsel, the validity of a confession cannot be raised regardless of whether the petitioner alleges it was coerced and/or taken in the absence of counsel.\textsuperscript{177} This ruling will have to be passed on eventually by the Supreme Court, since the basic argument is that, but for this confession obtained by unconstitutional methods, the defendant would not have pleaded guilty.

CONCLUSION

One area not discussed is the extent to which the press, radio and television are entitled to report on a criminal case. As a result of the report of the Warren Commission\textsuperscript{178} and the Supreme Court decision in \textit{Estes v. Texas},\textsuperscript{179} a number of bar organizations, judges and others have proposed or adopted specific restrictions\textsuperscript{180} on reporting of such

\textsuperscript{172} United States \textit{ex rel.} Jackson v. Denno, 309 F. 2d 573 (2d Cir. 1962).
\textsuperscript{173} 371 U.S. 967 (1963).
\textsuperscript{174} 378 U.S. at 396.
\textsuperscript{175} \textit{Id.} at 423 (dissenting opinion of Mr. Justice Clark).
\textsuperscript{176} \textit{Ibid.}
\textsuperscript{177} Desmond, \textit{ supra} note 167, at 1167.
\textsuperscript{178} People v. Griffin, 16 N.Y. 2d 508, 208 N.E. 2d 179 (1965) (mem.).
\textsuperscript{179} \textit{Hearings Before the President's Commission on the Assassination of President Kennedy} (1964).
\textsuperscript{180} 381 U.S. 532 (1965).
\textsuperscript{181} Of interest is the discussion by the Supreme Court in the notes, \textit{id.} at 580-83 nn. 37-41.
cases. In light of the confusion existing in the area of confessions, it is of no surprise that statements in reference to confessions or incriminating admissions were singled out as examples of what should not be reported, at least in advance of their admission on trial.

Of further noteworthy interest is *Curry v. United States*\(^{182}\) wherein the Second Circuit in a unanimous decision stated:

“If the defendant offers testimony contrary to the facts disclosed by evidence which has been suppressed, the Government may in the interest of truth use this illegally obtained evidence to establish facts collateral to the ultimate issue of guilt.”\(^{183}\)

Here statements which were given by Curry in the absence of counsel and during a period of unnecessary delay prior to arraignment constituted the illegally obtained evidence which was ordered suppressed. The court warned that “the Government cannot use the fruits of illegal activities to establish the elements of the crime with which the defendant is charged,”\(^{184}\) but it can use such evidence to establish facts collateral to the issue of guilt.

Public opinion is slowly being moulded on the question of whether the pendulum has swung so far in an endeavor to protect the individual that the rights of the public have been dealt a crippling blow. Seminars for law enforcement officers, magistrates and others involved in the law enforcement process are not uncommon,\(^{185}\) and the “confession confusion” provokes considerable discussion which those charged with the duty of deciding case might wish to hear if they are interested in “grass-roots” sentiment.

Law enforcement officials, prosecuting and defense attorneys and the judiciary, not to mention the crime conscious public, eagerly await Supreme Court decisions which will hopefully reduce if not eliminate the confession confusion. It is fervently hoped that out of this re-examination and updating of the criminal law and the establishment of clear guidelines will develop a respect for both the law and those charged with its enforcement.

\(^{182}\)—F. 2d— (2d Cir. 1965).
\(^{183}\) *Id.* at —.
\(^{184}\) *Id.* at —.
\(^{185}\) A seminar on community safety principally for invited law enforcement officers and magistrates was initially conducted at University College of Syracuse University in the Spring of 1965. This was repeated in the Fall and is again scheduled for the Spring of 1966. Many other universities have conducted seminars or symposiums treating the impact of Supreme Court decisions on local law enforcement practices. The editorial pages of newspapers and magazines have carried commentaries on this general subject. As a result, many communities are becoming aware of current developments and are voicing their sentiments on these crucial problems.