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Evidence--"Fruit of the Poisonous Tree" Doctrine Held Not to Exclude Testimony of Eyewitness Whose Identity Was Obtained During Illegal Detention (Smith v. United States, 324 F.2d 879 (D.C. Cir. 1963))

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RECENT DECISIONS

EVIDENCE — "FRUIT OF THE POISONOUS TREE" DOCTRINE HELD NOT TO EXCLUDE TESTIMONY OF EYEWITNESS WHOSE IDENTITY WAS OBTAINED DURING ILLEGAL DETENTION. — The defendants, whose convictions of murder and robbery rested primarily on the testimony of an eyewitness, sought reversal of their convictions on the ground that the testimony of the eyewitness should be suppressed because his existence and identity were the "fruit" of questioning the defendants during a period of illegal detention. The alleged illegality resulted from an initial arrest on suspicion and the subsequent questioning of the defendants for sixty hours before arraignment. The Court affirmed the convictions and *held* that, although the written and oral confessions made during the illegal detention period were inadmissible, the testimony of the eyewitness need not be suppressed because there had been no violation of the constitutional guarantee of due process, and the defendants' constitutional rights had been adequately protected. *Smith v. United States,* 324 F.2d 879 (D.C. Cir. 1963).

The traditional view maintained that evidence, if pertinent to an issue, was admissible regardless of the manner in which it was obtained.[1] Despite the logic of such a rule, it has been qualified, at least in the federal courts, by far-reaching exceptions, one of which concerns evidence secured in violation of the prompt arraignment requirement of the Federal Rules of Criminal Procedure.[2] The *McNabb-Mallory* rule, a name for the body of case law concerned with this problem, actually involves two rules, one of procedure and one of evidence.

With respect to the rule of procedure, Rule 5(a) of the Federal Rules of Criminal Procedure specifies that arrested persons are to be brought before a committing magistrate without unnecessary delay.[3] It is only when this rule of procedure is violated

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[1] 8 WIGMORE, EVIDENCE § 2183 (rev. ed. 1961).

[2] FED. R. CRIM. P. 5(a).

[3] *Ibid.* This rule provides: "An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith."

that the rule of evidence suppressing confessions obtained during an unnecessary delay becomes operative.

Prior to *McNabb v. United States*,[4] involuntary confessions were excluded as a violation of the constitutional guarantee of due process.[5] In *McNabb* the United States Supreme Court exercising its supervisory authority over the administration of criminal justice in the federal courts, announced an additional rule of exclusion which did not arise from constitutional sources.[6] The Court held that any confession obtained during a period of detention made illegal by an unnecessary delay in arraignment was to be excluded. The facts in *McNabb* were not as broad as the rule stated, because of the defendants' illiteracy and lack of experience, so that the application of the rule was left in doubt. The new rule was difficult to apply because of this lack of clarity. A study of the early cases interpreting *McNabb* discloses that the courts advanced three different positions: (1) voluntariness was the sole basis of determining the admissibility of a confession; however, delay in arraignment was a factor to be considered in assessing its voluntariness;[7] (2) any confession procured in the course of a detention which later became illegal was inadmissible;[8] and (3) any confession obtained prior to arraignment was inadmissible.[9]

As a result of this confusion, the Supreme Court granted certiorari in *Mitchell v. United States*[10] in order to re-evaluate

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[4] 318 U.S. 332 (1943).

[5] *E.g.*, Purpura v. United States, 262 Fed. 473 (4th Cir. 1919); People v. Heide, 302 Ill. 624, 135 N.E. 77 (1922).

[6] The Court stated that "the principles governing the admissibility of evidence in federal criminal trials have not been restricted . . . to those derived solely from the Constitution." McNabb v. United States, 318 U.S. 332, 341 (1943). From the very beginning of its history the Court formulated rules of evidence to be applied in federal criminal prosecutions. *E.g.*, Funk v. United States, 290 U.S. 371 (1933); United States v. Palmer, 16 U.S. (3 Wheat.) 610, 643-44 (1818); see 1 WIGMORE, EVIDENCE § 6 (3d ed. 1940); Note, *Rules of Evidence in Federal Criminal Trials*, 47 HARV. L. REV. 853 (1934).

[7] *Accord*, United States v. Grote, 140 F.2d 413 (2d Cir. 1944). Those courts which subscribed to this version of the *McNabb* rule emphasized the fact that the Court painstakingly detailed all the unpleasant circumstances of the McNabbs' detention: the barren cell, the prolonged interrogation, the isolation from friends. See Gros v. United States, 136 F.2d 878 (9th Cir. 1943).

[8] This was the interpretation first given to the *McNabb* rule in the jurisdiction which it most affected. Mitchell v. United States, 138 F.2d 426 (D.C. Cir. 1943), *rev'd*, 322 U.S. 65 (1944).

[9] This reading of *McNabb* was put forward in United States v. Haupt, 136 F.2d 661 (7th Cir. 1943). It contradicts the Supreme Court's statement in the *McNabb* case that the "mere fact that a confession was made while in the custody of the police does not render it inadmissible." McNabb v. United States, 318 U.S. 332, 346 (1943).

[10] 322 U.S. 65 (1943).

the *McNabb* rule and to define it more clearly. In the *Mitchell* case, the issue was whether a confession given almost simultaneously with arrest was to be suppressed if the police illegally detained the defendant after the confession had been secured. The Court held that if the detention was legal at the time of the confession, subsequent illegal delay in arraignment would not contaminate it. This decision ended two misconceptions of *McNabb;* it squarely held that only confessions obtained during the illegal portion of the detention are objectionable, and, a fortiori, it made clear that the new rule did not ban all pre-arraignment confessions. In *Upshaw v. United States,*[11] the confession was not procured until long after the detention had become illegal. Mr. Justice Black, writing the majority opinion, eliminated another of the possible interpretations when he redefined the *McNabb* rule as follows: "A confession is inadmissible if made during illegal detention due to failure promptly to carry a prisoner before a committing magistrate, whether or not the 'confession is the result of torture, physical or psychological. . . .'"[12] In effect this statement of the rule meant that given the concurrence of unlawful detention and a confession, the former contaminates the latter.

In order to remove time-honored police investigative practice from the impact of the now clearly defined *McNabb* rule, the emphasis shifted to a determination of when a detention becomes illegal. In the period between the *Upshaw* case and the subsequent decision in *Mallory v. United States,*[13] the lower federal courts directed ever-increasing attention toward the wording of rule 5(a). This re-examination revealed one inviting method of checking the influence of the *McNabb* rule, since rule 5(a) did not specify that an accused be arraigned "forthwith" or "immediately," but only required that he be presented to the magistrate "without unnecessary delay." Subsequent cases turned on the question of when a delay is a necessary one. There are four types of delays which were classified as necessary: (1) delay occasioned by the "booking" procedure at the precinct station; (2) delay resulting when an arrest occurs late in the afternoon or after the regular office hours of the committing magistrate;[14] (3) delay caused by police investigative procedures other than an attempt to interrogate the prisoner;[15] and (4) delay resulting from the desire to interrogate the prisoner.[16]

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[11] 335 U.S. 410 (1948).
[12] *Id.* at 413.
[13] 354 U.S. 449 (1957).
[14] See, *e.g.,* Pixley v. United States, 220 F.2d 912 (10th Cir. 1955); Allen v. United States, 202 F.2d 329 (D.C. Cir. 1952).
[15] See Haines v. United States, 188 F.2d 546 (8th Cir. 1951).
[16] See, *e.g.,* Watson v. United States, 234 F.2d 42 (D.C. Cir. 1956); Tillotson v. United States, 231 F.2d 736 (D.C. Cir. 1956).

In *Mallory*[17] the Supreme Court for the first time passed directly on the question of what constituted an unnecessary delay within the meaning of rule 5(a). After his arrest on suspicion of a capital offense, the defendant, a nineteen year-old boy of limited intelligence, without being informed of his rights, was questioned by police, given a lie detector test and not arraigned until he had confessed, although arraignment easily could have been effected. The Court unanimously held that such an arraignment was not "without unnecessary delay" and clearly outlawed one type of delay—that which was solely for purposes of interrogation.[18] Just as clearly, dictum in the case approved a delay long enough to permit the police to take their prisoner through a booking procedure at the precinct office.[19] This final clarification of the *McNabb* rule would benefit the defendant by preserving the substance of the accusatorial system of criminal justice while protecting his rights from infringement.

In the cases construing *McNabb,* the issue revolved around the admissibility of confessions obtained during a period of illegal detention. Since confessions were clearly excluded, the only further means of circumventing *McNabb* was to maintain that it did not require that all evidence obtained during a period of illegal detention be excluded. The first leading case which attempted to determine what evidence other than confessions was barred by violation of rule 5(a) was *Watson v. United States.*[20] The court there held that in addition to a confession, a re-enactment of the crime and the turning over of clothing to the police were also the result of the defendant's illegal detention and as such were excluded from evidence. In *Payne v. United States,*[21] the victim had identified the defendant in a police line-up during an illegal detention and later as a witness at the trial. The court stated that the witness could identify the defendant in court even though the identification at police headquarters was barred because it occurred during a period of illegal detention. The court refused to recognize the "fruit of the poisonous tree" argument since the consequence of accepting that argument would forever preclude the victim from testifying. The court considered the rights of the accused as adequately protected in such a case when "the complaining witness takes the stand in open court, for examination and cross-examination."[22]

While in *Watson* the issue dealt with evidence directly secured during the illegal detention, subsequent cases presented the question

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[17] Mallory v. United States, 354 U.S. 449 (1957).
[18] *Id.* at 454.
[19] *Ibid.*
[20] 249 F.2d 106 (D.C. Cir. 1957).
[21] 294 F.2d 723 (D.C. Cir.), *cert. denied,* 368 U.S. 883 (1961).
[22] *Id.* at 727.

of the admissibility of evidence secured indirectly during an illegal detention. In *Bynum v. United States*,[23] the defendant's fingerprints were secured during a period of illegal questioning and were subsequently used to identify the defendant. The court stated that the prosecution could not introduce the set of illegally obtained fingerprints, but could introduce a second set which were obtained subsequent to the time when the detention became legal. Thus, the court had taken a further step in the trend away from the "fruit of the poisonous tree" doctrine by admitting the evidence despite the fact that it was tainted with some illegality.

In a more recent case, *Wong Sun v. United States*,[24] the Supreme Court seemed to return to its previous adherence to the strict interpretation of the exclusionary rule. While the case was not concerned with a question of illegal detention, the Court held that narcotics as evidence were inadmissible as "poisoned fruit" because the police learned of their possessor from an illegally arrested third party. The Court again announced a rule similar to the earlier "fruit of the poisonous tree" doctrine and stated that the more appropriate question in a case such as this is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." [25]

The Court in the instant case, however, reverted to its position in the *Bynum* case and held that the testimony of an eyewitness, whose existence and identity were learned of from the defendants during a period of illegal detention, was not inadmissible because of a violation of rule 5(a). The Court based its holding on the nature of the information obtained, and noted that the identity of a witness is of no evidentiary value per se. The evidentiary value lies in the witness' testimony, and such testimony is determined by the interaction of such attributes as "will, perception, memory and volition. . . ." [26] The majority removes the oral testimony of a witness from the "fruit of the poisonous tree" doctrine by reasoning that the decision of the witness as to what testimony he will give is a voluntary act which erases the taint of the original illegality. It is this uniqueness of the human process which distinguishes the evidentiary character of a witness from the relative immutability of inanimate evidence.

Chief Judge Bazelon, in his dissenting opinion, would exclude the witness' testimony as the "fruit" or "product" of the illegal detention, a fact "determined in the light of the need to discourage

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[23] 262 F.2d 465 (D.C. Cir. 1958).
[24] 371 U.S. 471 (1963).
[25] *Id.* at 488.
[26] Smith v. United States, 324 F.2d 879, 881 (D.C. Cir. 1963).

violation of the Rule." [27] The dissenting opinion would interpret the evidence in the light of the exclusionary rule as set down in the *Wong Sun* case. The taint of the original illegality would not be removed under this rationale because the link between the information illegally obtained from the defendants and the testimony of the eyewitness would not be attenuated.

The importance of the *Smith* case lies in its attempt to circumvent the *McNabb-Mallory* rule by rejecting the "fruit of the poisonous tree" doctrine. Unlike the *Payne* case, where the witness' identity was known by means other than information obtained during an illegal detention, the *Smith* case seems to negate the policy behind *McNabb*. While the Court makes a valid distinction between the evidentiary value of living witnesses and inanimate evidence, it fails to take into consideration the fact of the direct link between the witness' testimony and the illegal questioning of the defendants. The witness' testimony, upon which the convictions rested, would have been unavailable to the police, since they were not even aware of his existence and identity, except for the information obtained from the defendants. The dissent appears to be more cognizant of the need to discourage violation of *McNabb*, and more aware of the direct link between the testimony and the illegal questioning. The majority decision in the *Smith* case would seem to indicate an attempt to circumvent the rule laid down by the Supreme Court in the *Wong Sun* case, an attempt not unlike the earlier attempts of the lower federal courts to avoid the obvious effects of applying the *McNabb* rule. The Court, while apparently deciding the case on the basis of the probative evidence rule, seems to have lost view of the ultimate purpose of the exclusionary rule, to administer justice by fair and legal means.

The *McNabb* rule, an exclusionary rule of evidence for the federal courts [28] arising out of the violation of rule 5(a), has undergone much examination and clarification since it was first announced by the Supreme Court. The present case is notable as another step in the continual effort to define the broad, general terms of the rule. Since most of the terms have been made explicit in earlier decisions, this case is important in determining the scope of the evidence which the rule is meant to exclude. The

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[27] *Id.* at 884.

[28] The federal rule is not binding on state courts and does not apply to state criminal trials. New York has refused to adopt the federal rule. See, *e.g.*, People v. Everett, 10 N.Y.2d 500, 180 N.E.2d 556, 225 N.Y.S.2d 193, *cert. denied*, 370 U.S. 963 (1962); People v. Lane, 10 N.Y.2d 347, 179 N.E.2d 339, 223 N.Y.S.2d 197 (1961). However, the rule in New York as to the admissibility of confessions obtained prior to arraignment seems to be undergoing change. See People v. Donovan, 13 N.Y.2d 148, 193 N.E.2d 628, 243 N.Y.S.2d 841 (1963).

apparent conflict between the *Smith* case and prior decisions of the Supreme Court on this question of excluded evidence may result in the need for further clarification by the Supreme Court of the "fruit of the poisonous tree" doctrine. The reasoning behind the *Smith* case presents a novel approach to the evidentiary value of information procured during an illegal detention and may provide a new basis for determining whether or not particular forms of evidence fall within the exclusionary rule.

FEDERAL JURISDICTION — ABSTENTION DOCTRINE — RETURN TO DISTRICT COURT PRECLUDED WHEN FEDERAL CLAIM UNRESERVEDLY SUBMITTED TO STATE COURT. — Appellants, graduates of chiropractic schools, sought to practice without complying with the requirements of the Louisiana Medical Practice Act.[1] They brought an action in the federal district court[2] for an injunction and declaration that the act as applied to them was unconstitutional. The court, sua sponte, invoked the doctrine of abstention and referred the parties to the state courts since the question presented involved a principle of Louisiana law not yet decided by that state. The claims were unreservedly submitted to the state court and after final judgment was entered against the appellants they attempted to return to the district court. Respondent's motion to dismiss was granted by the district court on the ground of res judicata.[3] On direct appeal, the United States Supreme Court reversed and *held* that a litigant foregoes his right under the abstention doctrine to return to the district court by unreservedly submitting his federal claims to the state courts. However, this rule was not applied against the appellants because they had reasonably relied on the mistaken view that they were required to litigate their federal claims in the state courts. *England v. Louisiana State Bd. of Medical Examiners,* 375 U.S. 411 (1964).

The doctrine of abstention, a court-made rule, is a comparatively new concept in federal jurisdiction.[4] The doctrine as applied

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[1] LA. REV. STAT. ANN. §§ 37:1261-1290 (1950).

[2] England v. Louisiana State Bd. of Medical Examiners, 180 F. Supp. 121 (E.D. La. 1960).

[3] England v. Louisiana State Bd. of Medical Examiners, 194 F. Supp. 521 (E.D. La. 1961), *rev'd,* 375 U.S. 411 (1964).

[4] For treatments of the abstention doctrine, see 1 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 64 (1960); 1A MOORE, FEDERAL PRACTICE § 0.203 (2d ed. 1961); Wright, *The Abstention Doctrine Reconsidered,* 37 TEXAS L. REV. 815 (1959); Note, *Consequences of Abstention by a Federal Court,* 73 HARV. L. REV. 1358 (1960); Note, *Judicial Abstention From The Exercise of Federal Jurisdiction,* 59 COLUM. L. REV. 749 (1959); Note, *Abstention: An Exercise in Federalism,* 108 U. PA. L. REV. 226 (1959).