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Confessions Given More Than Six Hours after Arrest during a Delay in Arraignment Are Admissible under 18 U.S.C. 3501(c), Although the Trial Judge under Subsection 3501(b) May Take into Account Delay in Arraignment in His Determination of Voluntariness.

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CASE NOTES

CRIMINAL LAW—CONFESSIONS—DELAY IN ARRAIGNMENT—CONFESSIONS GIVEN MORE THAN SIX HOURS AFTER ARREST DURING A DELAY IN ARRAIGNMENT ARE ADMISSIBLE UNDER 18 U.S.C. § 3501(c), ALTHOUGH THE TRIAL JUDGE UNDER SUBSECTION 3501(b) MAY TAKE INTO ACCOUNT DELAY IN ARRAIGNMENT IN HIS DETERMINATION OF VOLUNTARINESS. *United States v. Halbert*, 436 F.2d 1226 (9th Cir. 1970).

On November 11, 1969, defendant was arrested by Arizona state officers on the charge of Grand Theft Auto, booked and placed in jail in Bowie, Arizona. On November 12, 1969, Special Agent Bagley of the Federal Bureau of Investigation was informed of defendant's arrest and possible Dyer Act[1] violations. Later in the day, Agent Bagley was able to confirm that the car had been stolen in California. On November 13, Agent Bagley traveled from Tucson to Bisbee, Arizona, to interview the defendant who had been transported there. During the interview, which lasted approximately twenty-six minutes, the defendant made a full confession. No complaint for a federal violation was filed on November 13, as the United States Attorney had requested that a determination be made as to whether officials in Los Angeles, California, where the vehicle had been stolen, would prosecute. Late in the afternoon, on his return from the Bisbee interview, Agent Bagley learned that local authorities would not prosecute. On November 14, Agent Bagley was assigned other duties and did nothing further on the case. On Saturday, November 15, and Sunday, November 16, the United States Attorney's office was closed and a complaint could not be obtained. On November 17, the complaint was obtained and filed before the United States Commissioner in Tucson, Arizona, who issued a warrant for defendant's arrest. The defendant was placed under arrest and taken before the United States Commissioner that afternoon. On trial of the case, defendant moved to suppress the confession. The district court granted the motion, finding (1) that a proper *Miranda* warning had been given, (2) that the confession was voluntary under 18 U.S.C. § 3501(b),[2] but (3) the delay between the state arrest and the

[1] 18 U.S.C. § 2312 (1964). The Dyer Act prohibits the interstate transportation of stolen motor vehicles and aircraft.

[2] Title II of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 3501 (Supp. IV 1965-1968).

Admissibility of confessions:

(a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it

confession and delay in holding a committing hearing was not reasonable under 18 U.S.C. § 3501(c).[3] The Government took an interlocutory appeal under 18 U.S.C. § 3731.[4] Held—*The order suppressing the confession is reversed and remanded.* Confessions given more than six hours after arrest during a delay in arraignment are admissible under 18 U.S.C. § 3501(c), although the trial judge under subsection 3501(b) may take into account delay in arraignment in his determination of voluntariness.

During the 1800's the principle of exclusion was developed and there was a general suspicion of all confessions. Exclusion became the rule and admission the exception.[5] In recent times constitutional considerations have become the single most influential element in determining the admissibility of a confession. During the morphotic years of American jurisprudence, the test of voluntariness, transported from early Anglo-American courts, was the criterion for the admissibility of confessions.[6] In 1943 the United States Supreme Court, in its decision in *McNabb v. United States,* modified the existing criterion of volun-

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shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.

(b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.

The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession.

(c) In any criminal prosecution by the United States or by the District of Columbia, a confession made or given by a person who is a defendant therein, while such person was under arrest or other detention in the custody of any law-enforcement officer or law-enforcement agency, shall not be inadmissible solely because of delay in bringing such person before a magistrate or other officer empowered to commit persons charged with offenses against the laws of the United States or of the District of Columbia if such confession is found by the trial judge to have been made voluntarily and if the weight to be given the confession is left to the jury and if such confession was made or given by such person within six hours immediately following his arrest or other detention: *Provided,* That the time limitation contained in this subsection shall not apply in any case in which the delay in bringing such person before such magistrate or other officer beyond such six-hour period is found by the trial judge to be reasonable considering the means of transportation and the distance to be traveled to the nearest available such magistrate or other officer.

[3] *Id.*

[4] 18 U.S.C. § 3731 (Supp. IV 1965-1968) provides, *inter alia,* that the United States may take an appeal from an order granting a motion to suppress evidence if the appeal is not for purposes of delay and if the evidence provides substantial proof of the charge pending against the defendant.

[5] J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 820, at 297 (Chadbourn rev. 1970).

[6] *See* U.S. v. Nott, 1 McL 501 (1839); Barnes v. State, 36 Tex. 356, 362 (1871); Nicholson v. State, 38 Md. 141, 153 (1873). *See also* Culombe v. Connecticut, 367 U.S. 568, 602, 81 S. Ct. 1860, 1879, 6 L. Ed.2d 1037, 1057 (1961).

tariness by the addition of a new rule.[7] In *McNabb* the defendants were arrested and, immediately thereafter, placed in a barren detention room for a period of fourteen hours. They were subjected to unremitting questioning by half a dozen officers for over forty-eight hours, they were not allowed to see relatives or friends and they had no lawyer. As a result of this treatment a confession was elicited. The defendants were not taken before a United States Commissioner or other judicial officer prior to interrogation as required by statute. The Court, after citing applicable statutory authority, stated: "[P]lainly, a conviction resting on evidence secured through such a flagrant disregard of the procedure which Congress has commanded cannot be allowed to stand without making the courts themselves accomplices in wilful disobedience of law."[8] In excluding the confession, the Court appeared to say that it required the exclusion of any confession obtained prior to appearance before a commissioner; but the overly broad and obviously vague language of the Court resulted in disparate interpretation and confusion in the lower federal courts.[9] Shortly after *McNabb*, in *United States v. Mitchell*[10] the Court limited the *McNabb* exclusionary rule to confessions that were the fruit of an illegal detention. In *Mitchell*, the defendant was arrested and immediately taken to a police station where he confessed within a few minutes. He was not arraigned until eight days later. The Court, in distinguishing the circumstances surrounding the confession in *Mitchell* from those in *McNabb*, stated, "[h]ere there was no disclosure induced by illegal detention, no evidence was obtained in violation of any legal rights."[11] The illegality of Mitchell's subsequent detention did not taint the circumstances under which he made the disclosures and "[t]heir admission, therefore, would not be use by the Government of the fruits of wrongdoing by its officers."[12] The decision in *Mitchell*, although more explicit than in *McNabb*, did not solve the confusion in the lower courts. They continued to be uncertain about the extent of the exclusionary rule, and were reluctant to believe that mere delay in bringing a defendant before a magistrate could, by itself, prevent the use of a confession obtained in the interim.[13] In an effort to resolve the confusion once and for all,[14] the Supreme Court, in 1957, an-

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7 318 U.S. 332, 63 S. Ct. 608, 87 L. Ed. 819 (1943).

8 *Id.* at 345, 63 S. Ct. at 615, 87 L. Ed. at 826.

9 *See* United States v. Hoffman, 137 F.2d 416 (2d Cir. 1943); Gros v. United States, 136 F.2d 878 (9th Cir. 1943); United States v. Klee, 50 F. Supp. 679 (E.D. Wash. 1943).

10 322 U.S. 65, 64 S. Ct. 896, 88 L. Ed. 1140 (1944).

11 *Id.* at 70, 64 S. Ct. at 898, 88 L. Ed. at 1143.

12 *Id.*

13 *See* Haines v. United States, 188 F.2d 546 (9th Cir. 1951), *cert. denied*, 342 U.S. 888, 72 S. Ct. 172, 96 L. Ed. 666 (1951); Pierce v. United States, 197 F.2d 189 (D.C. Cir. 1952), *cert. denied*, 344 U.S. 846, 73 S. Ct. 62, 97 L. Ed. 658 (1952).

14 In the post-*Mitchell* case, Upshaw v. United States, 335 U.S. 410, 69 S. Ct. 170, 93 L. Ed. 100 (1948), the Supreme Court further expanded the exclusionary rule by holding

nounced its decision in *Mallory v. United States.*[15] In that case, the defendant was arrested on suspicion of rape. He was questioned by police for thirty to forty-five minutes and was later asked to submit to a lie detector test. While undergoing the test he confessed. Subsequently, he was forced to repeat his confession numerous times. Although being within the vicinity of several committing magistrates, he was not taken before one until the following day. A unanimous Supreme Court rendered its most detailed discussion of what constitutes "unnecessary delay" within the meaning of Rule 5(a) of the Federal Rules of Criminal Procedure.[16] The Court held that the requirement of Rule 5(a) was a congressionally devised procedure for safeguarding individual rights without impeding effective law enforcement.[17] Speaking of delay in arraignment, the Court said, "[c]ircumstances 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."[18] While this was an attempt to end the confusion generated by *McNabb* and *Mitchell,* it was, nevertheless, an additional source of confusion as the Court, in its pluralistic opinion, failed to establish any guidelines to aid in the determination of when the delay becomes unreasonable. One paragraph of the opinion indicates that arraignment must be made as "quickly as possible,"[19] while in the latter portion of the opinion it is suggested that a delay of a longer duration might not render the confession inadmissible.[20] Thus, with this decision, the inexact and perplexing *McNabb-Mallory* rule was born. In essence, its edict provided that any confession obtained from a defendant during a period of unnecessary delay between arrest and arraignment was inadmissible. The close affiliation between the procedures established by Rule 5 and the rights of the individual under the Constitution has led some courts and commentators to declare that the *McNabb-Mallory* rule has constitutional roots.[21] However, the authorities generally regard the rule as one not invoking the constitutional provisions of due process, but rather it is an evidentiary rule applicable to federal courts only.[22]

that the arresting, holding and questioning of people on mere suspicion is in violation of the law and confessions thus obtained are inadmissible under the *McNabb* rule.

15 354 U.S. 449, 77 S. Ct. 1356, 1 L. Ed.2d 1479 (1957).

16 Comment, *Developments In The Law—Confessions,* 79 HARV. L. REV. 935, 989 (1966). Following the *McNabb* decision, statutory arraignment provisions were replaced by Rule 5(a) of the Federal Rules of Criminal Procedure. The rule requires an officer making an arrest to "take the arrested person without unnecessary delay before the nearest available" committing magistrate.

17 Mallory v. United States, 354 U.S. 449, 453, 77 S. Ct. 1356, 1359, 1 L. Ed.2d 1479, 1482 (1957).

18 *Id.* at 455, 77 S. Ct. at 1360, 1 L. Ed.2d at 1483.

19 *Id.* at 454, 77 S. Ct. at 1359, 1 L. Ed.2d at 1483.

20 *Id.* at 455, 77 S. Ct. at 1360, 1 L. Ed.2d at 1483.

21 Comment *Developments In The Law—Confessions,* 79 HARV. L. REV. 935, 987 (1966).

22 *See* C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 72, at 75 (1969); 8 MOORE'S FEDERAL

The evolution of the *McNabb-Mallory* rule, its broad, sweeping dimensions, and its overwhelming effect on customary procedures of law enforcement and criminal justice, induced a reception in legal circles which ranged from "favorable in some quarters to skeptical, or even alarmist, in others."[23] These decisions were destined to be only the forerunners of future decisions which would be established on constitutional foundations and would eventually affect all aspects of criminal justice, both state and federal.

In 1964, the case of *Massiah v. United States*[24] resulted in the pronouncement of constitutional guarantees to the criminal defendant in the area of pretrial rights to counsel. With a majority of six, the Court held that the sixth amendment prohibits federal officers' deliberate extraction of incriminating statements from an indicted person without presence of counsel. In *Massiah* the statements had not been elicited in the course of a judicial proceeding but, in fact, had been elicited without his knowledge while he was free on bail. The Court held that they were uttered during a "critical period of the proceedings."[25] Shortly thereafter in *Escobedo v. Illinois*,[26] the Court, in reversing a state court conviction for murder, again employed the right to counsel reasoning announced in *Massiah,* even though the defendant had not yet been indicted at the time he gave his confession. The Court, by a margin of one, stated, "[w]e hold only that when the process shifts from investigatory to accusatory—when its focus is on the accused and its purpose is to elicit a confession—our adversary system begins to operate, and, under the circumstances here, the accused must be permitted to consult with his lawyer."[27] This was declared to be a sixth amendment right as made obligatory on the states by the fourteenth amendment. Two years later in *Miranda v. Arizona*,[28] the Court, in a landmark decision, established definitive safeguards for the protection of the accused against self-incrimination. Mr. Chief Justice Warren's opinion in *Miranda* drew immediate praise from some and was just as quickly deplored by others as giving far too much

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PRACTICE—CIPE'S CRIMINAL RULES 5-8 ¶ 5.02[2] (2d ed. 1970); 3 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 862a, at 599 (Chadbourn rev. 1970).

23 3 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW, 619 § 862a (Chadbourn rev. 1970). *See* United States v. Haupt, 136 F.2d 661, 671 (7th Cir. 1943); United States v. Corn, 54 F. Supp. 307, 309 (E.D. Wis. 1944).

24 377 U.S. 201, 84 S. Ct. 1199, 12 L. Ed.2d 246 (1964).

25 *Id.* at 205, 84 S. Ct. at 1202, 12 L. Ed.2d at 250, *citing and reaffirming* Powell v. Alabama, 287 U.S. 45, 57, 53 S. Ct. 55, 59, 77 L. Ed. 158, 164 (1932), wherein the Court found that the most critical period of the proceedings is from the time of arraignment until the beginning of trial. It is interesting to note Mr. Justice White's dissent in *Massiah*, in which he states, "Meanwhile, of course, the public will again be the loser and law enforcement will be presented with another serious dilemma."

26 378 U.S. 478, 84 S. Ct. 1758, 12 L. Ed.2d 977 (1964).

27 *Id.* at 492, 84 S. Ct. at 1766, 12 L. Ed2d at 987.

28 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed.2d 694 (1966).

consideration to the rights of the accused and not enough consideration to the rights of the victim.[29]

The effect of *Miranda* and the decisions preceding it, coupled with public demands for more efficient methods of law enforcement,[30] prompted Congress to pass the Ominibus Crime Control and Safe Streets Act of 1968.[31] Title II of the Act[32] is Congress' answer to *McNabb-Mallory, Escobedo,* and *Miranda.* It is a legislative attempt to limit federal appellate jurisdiction over the admissibility of confessions by restoring the voluntariness test measured by the totality of circumstances, as a constitutional standard for confessions of criminal defendants. The constitutionality of 18 U.S.C. § 3501 has been a primary concern of legislators and jurists alike since the very inception of the statute.[33]

The instant case[34] is the first attempted judicial interpretation of 18 U.S.C. § 3501 and is primarily the application of subsection 3501(c). Due to a paucity of prior case law, the court was forced to forge its own trail into areas in which other courts, though presented with the opportunity, had been hesitant to enter, possibly because of the constitutional overtones of Section 3501, or possibly because they had not deemed the issue ripe for adjudication. Even here, Judge Carter, speaking for the Ninth Circuit, evidenced a note of distress because the district court in its eagerness to apply Section 3501 failed to decide the case according to a generally recognized exception to Rule 5(a).[35] This judicially created exception provides that confessions given to federal officers by an arrested person in state custody are admissible in federal prosecutions providing they are otherwise constitutional, and they are not in pursuance of a collusive working arrangement between state and federal officers for the purpose of delay in order to obtain a confession.[36] Under such circumstances the determining factor is not the period of state custody, or the time elapsing between arrest and confession but the nature of police activities during the period.[37]

A situation similar to the case at hand arose in *Grooms v. United*

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29 Comment, *Police Interrogation of Suspects: The Court Versus The Congress,* 57 CAL. L. REV. 740 (1969).

30 *See generally* S. Rep. No. 1097, 1968 U.S. Code Cong. & Ad. News, p. 2112.

31 42 U.S.C. § 3701 (Supp. V 1965-1969).

32 18 U.S.C. § 3501 (Supp. IV 1965-1968).

33 *See generally Hearings on S. 674, S. 917, et al., Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary,* 90th Cong., 1st Sess. 184 (1967) and S. Rep. No. 1097, 1968 U.S. Code Cong. & Ad. News, p. 2112.

34 United States v. Halbert, 436 F.2d 1226 (9th Cir. 1970).

35 FED. R. CRIM. P. 5(a) (1969).

36 *See* Anderson v. United States, 318 U.S. 350, 63 S. Ct. 599, 87 L. Ed. 829 (1943); United States v. Hindmarsh, 389 F.2d 137 (6th Cir. 1968), *cert. denied,* 393 U.S. 866, 89 S. Ct. 150, 21 L. Ed.2d 134 (1968); Barnett v. United States, 384 F.2d 848 (5th Cir. 1967); Butterwood v. United States, 365 F.2d 380 (10th Cir. 1966), *cert. denied,* 386 U.S. 937, 87 S. Ct. 960, 17 L. Ed.2d 810 (1967).

37 Smith v. United States, 390 F.2d 401, 403 (9th Cir. 1968).

States,[38] in which the defendant was arrested by an Arkansas state trooper. The following day, federal officers entered the case to investigate a possible Dyer Act violation and a confession was given within fifteen minutes. Grooms was not arraigned until the third day, because of the unavailability of the nearest commissioner. The court refused to apply the *McNabb-Mallory* rule on the grounds that there had been no collusive working arrangement between state and federal officers and that there had been no violation of Rule 5(a). Noting 18 U.S.C. § 3501(c) but declining to construe its meaning or apply its provisions, the court concluded that Congress did not, by its enactment, intend to broaden the scope and effect of *McNabb-Mallory*, or to alter Rule 5(a), or to nullify previous case law "which has sanctioned the in-custody interrogation and subsequent arraignment that was followed in this case."[39] In *United States v. White*,[40] the defendant sought suppression of his confession, contending that although it was admissible under *Miranda*, it was nevertheless inadmissible as a matter of law under 18 U.S.C. § 3501. Disposing of this contention, the court refused to construe Section 3501 but did maintain that it had not been Congress' intention to expand the protection afforded by *Miranda* beyond its previous scope. In *Reinke v. United States*[41] the Ninth Circuit declined to apply 18 U.S.C. § 3501 retroactively and added, "here the appellant was given the *Miranda* warnings, so the Government need not rely on the more relaxed procedures of section [3501]."[42]

With no prior decisions to guide them, the court, in reversing the district court's decision to suppress Halbert's confession, based their reasoning on an "analysis of the language of subsection 3501(c), the statutory scheme of section 3501, and the legislative history."[43] Prefacing their interpretation of subsection 3501 (c) the court first disposed of the phrase "detention in the custody of any law-enforcement officer or law-enforcement agency." The court assumed, for purposes of their decision, that Congress intended the words to include both state and federal custody, notwithstanding the fact that it could be argued that the phrase referred to arrest or detention by federal officers only. The six-hour rule contained in subsection (b), while appearing to some writers to be a criterion which would automatically exclude a confession given more than six hours after arrest,[44] was not interpreted as

38 429 F.2d 839 (8th Cir. 1970).
39 *Id.* at 843.
40 417 F.2d 89 (2d Cir. 1969).
41 405 F.2d 228 (9th Cir. 1968).
42 *Id.* at 230. Two other lower court cases, United States v. Kriz, 301 F. Supp. 1329 (D. Minn. 1969) and United States v. Schipani, 289 F. Supp. 43 (E.D. N.Y. 1968), noted the existence of 18 U.S.C. § 3501, but neither applied its provisions.
43 United States v. Halbert, 436 F.2d 1226, 1232 (9th Cir. 1970).
44 Comment, *Police Interrogation of Suspects: The Court Versus The Congress*, 57 CAL. L. REV. 740, 751 (1969); Comment, *Title II of the Omnibus Crime Control Act: A*

such a hard and fast restriction by the court. In view of the wording of subsection (c), that confessions shall not be inadmissible solely because of delay in arraignment if voluntarily made within six hours of arrest, or during periods of longer delay which are reasonable considering transportation to the nearest magistrate, the court found a realistic and practical interpretation. "[O]n its face subsection 3501(c) provides only that *some confessions shall be admitted. It does not explicitly provide that all other confessions shall not be admissible.*"[45] While not explicitly excluding all other confessions, it is possible to imply from the wording, that confessions elicited more than six hours after arrest, or after a longer period not related to transportation problems, should be excluded. The court determined that such an implication was unwarranted in view of the wording of subsections (a) and (b). Subsection (a), by providing that a confession, voluntarily given, shall be admissible taken together with subsection (b), which allows the judge considerable latitude in determining the effect of any delay in arraignment, vests him with discretion to exclude confessions as involuntary if given solely because of a delay in arraignment which exceeds six hours. Such a construction is compatible with the voluntariness test, but is not wholly compatible with the provisions of subsection 3501(c) which restricts the discretion afforded the trial judge. This conflict was explained by concluding that subsection 3501(c) clearly intended that voluntary confessions made within six hours of arrest were admissible without reference to delay. In reconciling this schematic ambiguity, that is, the grant of discretion in subsections 3501(a) and (b) and the removal of discretion in subsection 3501(c), the court rationalized its interpretation by saying, "we cannot say that Congress intended by the provision in subsection 3501(c) to undo all that it had done with the preceding subsections."[46] The court was further encouraged in their interpretation of subsection 3501(c) in that it was strongly supported by legislative history. Relying on the report of the Senate Judiciary Committee,[47] it was obvious to the court that the legislators intended the statute to be founded on a voluntariness test supported by a test incorporating the totality of the circumstances. Proper application of the voluntariness test would "assign proper weight to the *Mallory* rule,"[48] and delay in arraignment "would be a factor to consider in determining the issue of voluntariness,"[49] but it

Study in Constitutional Conflict, 57 GEO. L.J. 438, 451 (1968); Comment, *Title II of the Omnibus Crime Bill: A Study of the Interaction of Law and Politics*, 48 NEB. L. REV. 193, 195-6 (1968).

45 United States v. Halbert, 436 F.2d 1226, 1232 (9th Cir. 1970).

46 *Id.* at 1234.

47 S. Rep. No. 1097, 1968 U.S. Code Cong. & Ad. News, p. 2112.

48 *Id.* at 2127.

49 *Id.*