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POLICE DETENTION OF SUSPECTS

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The interval elapsing between the initial apprehension of a suspect in a criminal case and his appearance before a magistrate or justice of the peace is becoming a more critical factor influencing the ultimate disposition of the case, especially in the Federal courts. Two considerations of grave public concern must be reconciled and balanced. Assurance that crimes will not go unsolved and unpunished must not override individual freedom from arbitrary arrest and "third-degree" interrogations. On the other hand, the pendulum should not be permitted to swing so far in the direction of individual liberty that the interest of society as a whole is seriously damaged through the burdening of law enforcement agencies with unrealistic standards and requirements which hamper their proper functioning. The enforcement of any law, by its very nature, imposes a restriction on individual freedom; the amount of permissible restriction is the perennial problem of the courts acting as an instrument of society.

The importance of the period immediately following the initial detention of a suspect by the police has been well stated.

> The psychological moment for a voluntary confession, as Dean Wigmore has pointed out, comes immediately after arrest when the prisoner is laboring under the psychic pressure of guilt and feels most acutely the hopelessness of his position. At this precise moment, the desire for relief by making a 'clean breast' is at its height. With the passage of time and intervention of friend and counsel, a defense mechanism is set into motion.[1]

It is during this period that the police may learn details of other crimes; of the existence and whereabouts of other participants in a criminal act while it is not too late to capture them; whether a crime has been committed or the proper party is in

[1] Kauper, *Judicial Examination for the Accused—A Remedy for the Third Degree*, 30 MICH. L. REV. 1224, 1227 (1932).

custody through a routine check of the veracity of any explanation given.

But such interrogation usually takes place remote from the public eye. There is the obvious danger that the process of questioning may develop into the "third degree". Once the interrogation has begun, the police or other officials are naturally reluctant to cease until the desired information has been obtained, regardless of the prisoner's fatigue. The frustrated questioner, getting obstinate silence or evasive and impudent replies, is easily tempted to adduce answers to his questions by threats or actual violence.[2] There are seldom any disinterested witnesses to testify in court as to what occurred during the interrogation. As the length of the period between apprehension and judicial examination increases, so does the opportunity and possibility for third-degree methods ranging all the way from crude beatings and deprivation of food or sleep to the less tangible but nevertheless real effects of being held incommunicado from family and friends for a lengthy period or being questioned constantly over a great span of time. Accordingly, judicial attention has been increasingly focused on this period of initial custody and interrogation, and assorted statutes have been enacted attempting to rectify the evil.

The law concerning the length of detention prior to a magistrative hearing has primarily developed along two major lines. First, there is the liability in tort of the officers responsible. It has long been settled that unreasonable delay in taking the person arrested before the magistrate, or in releasing him without charge may constitute a false imprisonment.[3] The second legal theory prevalent in the cases is that defendants will be entitled to a new trial because the duration of the detention was such as to allow a finding that the defendant's confession was coerced, or that certain other evidence obtained during that period was inadmissible.

On the Federal level, the Federal Rules of Criminal Procedure provide that "an officer making an arrest under a

[2] IV NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT. REP. No. 11, *Lawlessness in Law Enforcement,* 174 (1931).

[3] 35 C.J.S. *False Imprisonment* §§ 30, 31.

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."[4] The crucial words "without unnecessary delay" have been held not to preclude "booking," quick verification of the "story" volunteered by the accused and search of his person[5] nor a reasonable period needed to reduce to writing an oral confession.[6] Moreover, mere delay, although illegal, will not invalidate a conviction in the absence of prejudice arising from the detention.[7] Obviously, the federal statute does no more than sketch a bare outline. The courts must weigh the facts and circumstances of individual cases.

What has come to be known as the McNabb rule was formulated by the Supreme Court in 1943.[8] The rule, as subsequently explained and applied,[9] requires that any confession "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' . . . " must be excluded.[10] This broad exclusionary rule was carried over to include violations of Rule 5(a) of the Federal Rules of Criminal Procedure in *Upshaw* and in *Mallory* v. *United States*,[11] and so would seem to overrule by implication the lower federal court holding in *Morse*[12] that prejudice to the defendant must be shown in addition to the illegal detention. Some limitation on the McNabb rule results from the holding that confessions made during the period immediately

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[4] Fed. R. Crim. P. 5(a).

[5] Muldrow v. United States, 281 F.2d 903 (9th Cir. 1960); Ginoza v. United States, 279 F.2d 616 (9th Cir. 1960).

[6] Goldsmith v. United States, 277 F.2d 335 (D.C. Cir. 1952).

[7] Morse v. United States, 256 F.2d 280 (5th Cir. 1958).

[8] McNabb v. United States, 318 U. S. 332 (1943).

[9] Upshaw v. United States, 335 U. S. 410 (1948).

[10] *Id.* at 413.

[11] Mallory v. United States, 354 U. S. 449 (1957).

[12] *Supra*, note 7.

following arrest and before delay becomes unlawful are not to be excluded under the rule.[13] The McNabb exclusionary rule applies only to Federal prosecutions, however; it is not a Fourteenth Amendment Due Process Limitation on state prosecutions.[14] Insofar as confessions in state prosecutions are concerned, the test of the Supreme Court remains the test of the voluntariness and uncoerced nature of the confession.[15] Coercion may be found, however, where the confession comes after a lengthy interrogation, with the "purpose and under such circumstances, as to make the whole proceeding an effective instrument for extorting an unwilling admission of guilt.[16] This is a violation of due process."[17]

Against the vague generalizations of the federal statutes and Supreme Court cases, the practice of some states in setting definite time limits for permissible detention prior to examination by a magistrate provides a stark contrast. Even under these statutes however, judges continue to decide cases by scrutinizing the particular facts, with the result that the decisions are frequently as conflicting as those under the broadly worded federal statute and of the majority of states, which provide simply for judicial examination "without unnecessary delay."

Examples of the latter type state statutes would be those of New York and Virginia. The New York statute provides:

> The defendant must in all cases be taken before the magistrate without unnecessary delay, and he may give bail at any hour of the day or night.[18]

New York cases construing "unnecessary delay" have held delays of twenty-four hours and above illegal.[19] The Virginia

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13 United States v. Mitchell, 322 U. S. 65 (1944).

14 Stein v. New York, 346 U. S. 156, 187, 188 (1953).

15 Culombe v. Connecticut, 363 U. S. 826 (1961).

16 *Id.* at 1076.

17 *Ibid.*

18 New York Code of Criminal Procedure § 165.

19 People v. Alex, 265 N. Y. 192, 192 N.E. 289 (1934); People v. Snyder, 297 N. Y. 81, 74 N.E.2d 657 (1947); People v. Calebress, 233 App. Div. 79, 151 N. Y. Supp. 851 (1935); People v. Kelly, 264 App. Div. 14, 35 N. Y. Supp.2d 55 (1942).

statute, on the other hand, does not mention time; it merely provides:

> . . . and an officer arresting a person under a warrant for an offense shall bring such person before and return such warrant to a court of appropriate jurisdiction of the county or corporation in which the warrant is issued, unless such person be let to bail . . . [20]

However, it has long been held in Virginia that, under this section, an officer cannot hold a prisoner for an unreasonable time before making a return of the warrant.[21]

Statutory references to specific time limitations may be found in California,[22] Missouri,[23] Rhode Island,[24] and New Hampshire.[25] There are no wide variations in these statutory schemes. California provides a two day maximum limitation on what can be a reasonable time, but provides in a related statute that in any event there must be no unnecessary delay.[26] California decisions under these statutes have not enlarged upon them.[27] Missouri provides a twenty-hour maximum[28] while New Hampshire[29] and Rhode Island[30] have set twenty-four hour limits for pre-examination detention.

State cases at common law vary greatly as to what constitutes a reasonable, and therefore permissible, detention time. Five hours has been held lawful in North Dakota[31] but not

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[20] VA. CODE ANN. § 19.1-98 (1950) (Repl. Vol. 1960).

[21] Sands & Co. v. Norvell, 126 Va. 384, 101 S.E. 569 (1919).

[22] Calif. Penal Code § 825.

[23] Mo. Rev. Stat., 1959 § 544.170.

[24] R. I. Gen. Laws, 1956 §§ 12-7-1, 12-7-13.

[25] N. H. Rev. Stat., 1955 §§ 594:2, 594:19, 594:20, 594:22, 594:23.

[26] Calif. Penal Code § 849.

[27] Dragna v. White, 45 Cal.2d 469, 289 P.2d 428 (1955); People v. Sewell, 95 Cal. App.2d 850, 214 P.2d 1136 (1950).

[28] *Supra* note 23.

[29] *Supra* note 25.

[30] *Supra* note 24.

[31] Haggard v. First National Bank, 72 N.D. 434, 8 N.W.2d 5 (1942).

permissible in Idaho.[32] Four hours was legal in Michigan.[33] Slightly over an hour was held illegal in Massachusetts.[34] The discrepancies are partially explained by the peculiar facts of the cases, such as the necessity for "sobering up" the defendant prior to an investigation and voluntary consent to remain in police custody for questioning. Moreover, in some cases the time limit has been set by the jury while in others the delay has been found reasonable or unreasonable by the court as a matter of law, there being no facts in dispute. Delays of two and three days in presenting the arrested person before a magistrate have been found legal where such delays were needed to apprehend co-defendants who were still at large[35] in order to conduct a full investigation.

In view of the apparent divergence of the state laws relating to pre-examination detention, it is interesting to note that a uniform law on the subject was proposed as early as 1942.[37] The text of the proposed Uniform Arrest Act dealing with pre-examination delay reads as follows:

SECTION 11. PERMISSIBLE DELAY IN BRINGING BEFORE MAGISTRATE.

> If not otherwise released every person arrested shall be brought before a magistrate without unreasonable delay, and in any event he shall, if possible, be so brought within twenty-four hours of arrest, Sundays and holidays excluded, unless a judge of the [district] court of the [district] where he is detained or of the [district] court of the [district] where the crime was committed for good

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[32] Madison v. Hutchison, 49 Idaho 358, 290 P.2d 208 (1930).

[33] Lynn v. Weaver, 251 Mich. 265, 231 N.W. 579 (1930).

[34] Keefe v. Hart, 213 Mass. 476, 100 N.E. 558 (1913).

[35] People v. Kelly, 404 Ill. 281, 89 N.E.2d 27 (1949); *Cf.:* Commonwealth v. Banuchi, 335 Mass. 649, 141 N.E.2d 835 (1957) (necessity for "sobering up" process to obtain coherent story); Mulberry v. Fuellhart, 203 Pa. 573, 53 Atl. 504 (1902) (doubt as to detained person's sanity, necessity for medical examination and report); Peloquin v. Hibner, 231 Wis. 77, 285 N.W. 380 (1939) (person agreed to remain in police custody).

[37] Warner, *The Uniform Arrest Act,* 28 VA. L. REV. 315 (1942).

> cause shown orders that he be held for a further period of not exceeding forty-eight hours.[38]

The core of the Uniform Arrest Act was enacted into state law by the legislature of New Hampshire and Rhode Island in 1941.[39] The Uniform Arrest Act has not been approved by the National Conference of Commissioners on Uniform State Laws nor have any other states enacted it. Apparently most states prefer to allow their judiciary freedom to apply and develop the law in the light of particular fact situations and the changing attitudes of society, rather than to bind the courts with a hard and fast rule of law.

Most proposals for removing the possibility of mischief by the police during detention, while still allowing a fair investigation into criminal activities, have centered around the substitution of judicial inquiry for police interrogation.[40] These proposals recognize the inherent defects of existing laws which merely provide for tort actions against guilty officers or for reversals of criminal convictions. They are operative only after the initial wrong has occurred; they are frequently bent or not applied by courts and juries, who believe a solution to a crime to be the paramount interest of society; they create disrespect for all law in the minds of laymen. Other courts, perhaps not completely aware of the practical problems of law enforcement agencies, frequently apply these statutes too strictly. Both extreme positions, that is the too-strict enforcement of concepts of individual liberties on the one hand and the over-zealous investigation of suspects by some police agencies on the other, may be corrected if proposals for something more than a perfunctory and automatic examination of detained persons were implemented. By removing from law enforcement agencies the temptation to overstep the bounds of legality in their eagerness to keep the

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[38] *Id.* at 347.

[39] *Id.* at 316.

[40] Kauper, *supra* note 1; Pound, *Legal Interrogation of Persons accused or Suspected of Crime*, 24 J. CRIM. L. & CRIMINOLOGY 1014 (1934); McCormick, *Some Problems and Developments in the Admissibility of Confessions*, 24 TEX. L. REV. 239 (1946).

level of crime down, the individual will be assured the constitutional guarantees of due process. By the same token, a closer exposure of the judiciary to every-day problems of crime detection and prevention would perhaps have the effect on some courts of tempering their mercy with justice. In both events, society would be the winner.