Washington and Lee Law Review

Volume 21 | Issue 2 Article 15

Fall 9-1-1964

# Derivative Evidence Under Mcnabb-Mallory

a driver has committed the offense of drunk driving, though it afterward appears the offense was not committed.

Third, no statutory changes would be required, of course, if the courts follow the accepted law of arrest, as exemplified by the New York and Nebraska decisions.[34] By this view, an arrest based upon probable cause is lawful, and the license of a driver so arrested could be revoked if he refuses to submit to a chemical test, regardless of the outcome of any subsequent criminal proceeding.

Since the general powers of arrest are presently adequate under existing statutes, when interpreted properly, it seems there is no justification for broadening them. It is therefore submitted that the third approach is the most logical approach to fair and effective enforcement of Implied Consent Laws.

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## DERIVATIVE EVIDENCE UNDER McNABB-MALLORY

For the past several years an interesting development in the application of the *McNabb-Mallory*[1] exclusionary rule has been taking place in the federal judiciary. This court-born rule excludes all confessions procured in violation of the Federal Rules of Criminal Procedure,[2] and requires the bringing of all arrested persons before a committing magistrate *without unreasonable delay*.[3] The rule has gradually been expanded into areas of derivative evidence, that is, evidence discovered from information contained in statements and confessions. One specific type of such derivative evidence of considerable interest is testimony of a witness whose identity was learned solely as a result of a period of illegal detention.

In the recent case of *Smith v. United States*,[4] the Circuit Court of Appeals for the District of Columbia was presented with a rather

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[34]Supra note 21.

[1]McNabb v. United States, 318 U.S. 332 (1943); Upshaw v. United States, 335 U.S. 410 (1948); Mallory v. United States, 354 U.S. 449 (1957).

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

[3]Ibid. "An officier 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."

[4]324 F.2d 879 (D.C. Cir. 1963).

novel question. While walking through a park, Miksa Merson, a sixty-five year old resident of the District of Columbia, was attacked by two men, robbed, and beaten to death. The defendants, Smith and Bowden, were arrested. Interrogation during the period of their detention produced the victim's watch, the confessions of both defendants, and the identity of a witness to the crime.[5] Smith was finally brought before a magistrate some sixty hours after his arrest.

At the trial, the prosecution attempted to introduce the confessions, the victim's watch, and the witness Holeman's testimony. All three were objected to under the *McNabb-Mallory* rule. The court ruled that due to the unnecessary delay in arraignment the confessions and the watch were inadmissible, but held that the testimony of the witness Holeman was admissible.[6]

The Circuit Court in a two-one decision upheld the District Court's admission of Holeman's testimony. The majority reasoned that the testimony was so far removed from the illegal detention that it did not provide a rational basis for exclusion.[7] The Court distinguished between real evidence and a witness's testimony; the evidentiary value of the former is obvious upon discovery; while that of the latter is manifest only if and when the individual witness decides to tell the truth. The human personality and free will of the witness, which alone determine what testimony will be given, is said to be an intervening factor sufficient to free any actual testimony from the tainted source.[8]

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[5]The appellants, Smith and Bowden, were arrested for questioning about another robbery. When the victim failed to identify either man, Bowden was released. Smith, however, was held overnight for presentation in the police lineup. The following morning at the lineup, a detective working on the Merson case became interested in Smith and began interrogating him. The next day, and while in custody, Smith confessed to the Merson crime and along with Bowden (who had again been arrested) named one Holeman as a witness to it. A watch was taken from Bowden which later was identified as belonging to Merson. After arraignment Bowden signed a second confession.

[6]United States v. Smith, 31 F.R.D. 553 (D.D.C. 1962). The court declared that while it believed the testimony to be subject to exclusion under McNabb-Mallory reasoning, it was in doubt as to the continuing validity of the "fruit of the poisonous tree" doctrine. The court's uncertainty was due to the decision in Killough v. United States, 315 F.2d 241 (D.C. Cir. 1962) where the "fruit" argument was upheld, but even so, the court allowed testimony procured solely through leads obtained during an illegal detention. The details of this case are more fully discussed later in the body of this comment.

[7]324 F.2d at 881.

[8]In concluding, the court pointed out that the "fruit of the poisonous tree" argument propounded by the defendant had previously been rejected by this same court in Payne v. United States, 294 F.2d 723 (D.C. Cir. 1961). This case is discussed more fully later in the body of this comment.

The basis of all exclusionary rules, regardless of whether they pertain to illegal search and seizure, coerced confessions, or illegal detention, is the need to protect the fundamental liberties of the individual citizen against unjust police interference.[9] Such rules are formulated with the idea that if the benefits from violations of these liberties are denied, the incentive to employ these procedures will be removed. The relation between the exclusionary rule is apparent upon an historical analysis of these protections.[10] It is significant that in most of the major decisions involving admissibility in the detention cases, the courts revert back to the search and seizure cases for support. By virtue of a common purpose, a common reasoning, and a common result, there is in effect but one exclusionary rule.[11]

The underlying principles concerning the exclusion of derivative evidence stem from search and seizure cases.[12] The rule formed there is that if there is proof of the primary illegality, any evidence derived

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[9]As to illegal search and seizure: "The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." Elkins v. United States, 364 U.S. 206, 217 (1960).

As to coerced confessions: "[T]he admission into evidence of confessions which are involuntary,... cannot stand. This is so not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law; that ours is an accusatorial and not an inquisitorial system—a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charges against an accused out of his own mouth." Rogers v. Richmond, 365 U.S. 534, 540-41 (1961).

As to illegal detention: "Legislation such as this, requiring that the police must with reasonable promptness show legal cause for detaining arrested persons, constitutes an important safeguard—not only in assuring protection for the innocent but also in securing conviction of the guilty by methods that commend themselves to a progressive and self-confident society. For this procedural requirement checks resort to those reprehensible practices known as the 'third degree' which, though universally rejected as indefensible, still find their way into use." McNabb v. United States, 318 U.S. 332, 343-44 (1943).

[10]Perhaps the best statement of the fundamental relationship was made by Justice Clark when he declared: "We find that, as to the Federal Government, the Fourth and Fifth Amendments and, as to the states, the freedom from unconscionable invasions of privacy and freedom from convictions based upon coerced confessions do enjoy as 'intimate relation' in their perpetuation of 'principles of humanity and civil liberty [secured]... only after years of struggle,'... They express 'supplementing phases of the same constitutional purpose—to maintain inviolate large areas of personal privacy'." Mapp v. Ohio, 367 U.S. 643, 656-57 (1961).

[11]For a detailed study of the exclusionary rule and the interrelation among these three areas, see Wolf, A Survey of the Expanded Exclusionary Rule, 32 Geo. Wash L. Rev. 193 (1963).

[12]Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920); Nardone v. United States, 308 U.S. 338 (1939).

solely from that illegal source will be excluded unless the causal connection between the original illegality and the proffered evidence was so attenuated as to free the evidence from its tainted origin.[13] Of course, if the evidence was obtainable from an independent source, this basis for suppression would not be operative.[14] More recently, Mr. Justice Brennan stated the rule as follows:

> "[T]he more apt question in such a case 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'."[15]

Very few cases have arisen involving the admissibility of derivative evidence when the evidence offered is in the form of a witness's testimony. Until recently, all the cases involved leads gained by illegal searches and seizures. The first seems to be the Illinois case of *People v. Martin*,[16] where in an abortion prosecution it was held to be reversible error to admit the testimony of witnesses whose names and addresses have been discovered solely through an illegal search of the defendant's premises. In *People v. Albea*,[17] the same court's views on the propriety of excluding such testimony were expressed as follows:

> "[W]e cannot be unmindful of the principles established by long precedent which have sought to preserve the sanctity of the home and the right of privacy of the individual merely because the evidence has been changed from inanimate to animate form. It has been held that an illegal search cannot later be justified by the discovery of contraband property.... We can see no reason for a different rule in this case when the ends of justice sought to be maintained are the same."[18]

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[13]Nardone v. United States, 308 U.S. 338, 341 (1939).

[14]Ibid. The procedure followed by the courts is explained thusly: The burden at first is on the accused to prove the primary illegality. Once that is accomplished the court must give the defendant opportunity to prove that the evidence objected to was a "fruit" of that illegality. If this is done, the government must convince the court that the evidence had an origin independent of the illegal act.

[15]Wong Sun v. United States, 371 U.S. 471, 488 (1963). For examples of admissibility and inadmissibility of evidence under this reasoning see McGuire, Evidence of Guilt, 221-22 (1959).

[16]382 Ill. 192, 46 N.E.2d 997 (1942).

[17]2 Ill. 2d 317, 118 N.E.2d 277 (1954).

[18]118 N.E.2d at 279-80. Here the witness was not found by leads procured during the illegal search, but was herself discovered during such a search. The quoted passage is offered to explain the thinking of the court as concerns the admissibility of human evidence illegally procured, since in the Martin case, supra note 17, the court failed to clarify this distinction.

In *Abbott v. United States*,[19] a District of Columbia case, an illegal search of a suspected bawdy house produced two patrons, and at the police station both admitted the nature of the business carried on inside. The lower court allowed a police officer to testify as to these admissions on the ground that they were too remotely connected with the search to be considered illegally obtained. The appellate court reversed on the ground that these men were brought to the attention of the police as a direct result of the illegal search and not by information independently obtained.[20]

While *Mapp v. Ohio*[21] presumably subjects all jurisdictions to a uniform rule of exclusion in search and seizure cases, such uniformity has not existed in the detention cases.[22] The *McNabb-Mallory* rule applies only to the federal administration of criminal justice,[23] but almost every state has a statutory counterpart to Rule 5(a).[24] Only Michigan, however, has gone so far as to exclude evidence obtained in violation of its statute.[25] In the other states, delay in arraignment is but one of several factors considered in determining admissibility.[26] The Supreme Court has refused to interfere with these state illegal detention decisions.[27]

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[19]138 A.2d 485 (D.C. Munic. Ct. App. 1958).

[20]See also People v. Mickelson, 30 Cal. Rptr. 18, 380 P.2d 658 (1963); Silverman v. United States, 365 U.S. 505 (1961), where police testimony as to what was overheard through a listening device hidden during an illegal invasion was suppressed; and McGinnis v. United States, 227 F.2d 598 (1st Cir. 1955), where the court refused to draw any distinction between the introduction of illegally obtained evidence and testimony of objects illegally observed.

[21]367 U.S. 643 (1961).

[22]In the field of coerced confessions only California excludes evidence obtained from leads arising out of such a confession. Cf. People v. Ditson, 20 Cal. Rptr. 165, 369 P.2d 714 (1962).

[23]The Supreme Court has declined to make the Constitution a basis for exclusion in illegal detention cases, but instead exercised its supervisory powers over the federal judiciary in instituting the rule. Mallory v. United States, Upshaw v. United States, and McNabb v. United States, supra note 1.

[24]For a list of these states see 318 U.S. at 342.

[25]People v. Hamilton, 359 Mich. 410, 102 N.W.2d 738 (1960); "[A]n unnecessary and so unlawful delay of compliance with either of said sections 13 and 26 [of the Michigan Code of Criminal Procedure], when done for prolonged interrogatory purposes and without proven justification of the delay, [cites Mallory] renders involuntary and so inadmissible whatever confessional admissions the detained person may have made while so unlawfully detained." 102 N.W.2d at 742. See People v. Harper, 365 Mich. 494, 113 N.W.2d 808 (1962), where the above rule is seemingly limited. However, see People v. McCager, 367 Mich. 116, 116 N.W.2d 205 (1962) where the rule of Hamilton is restated.

[26]Annot., 1 L. Ed. 2d 1735, 1747-48 (1957).

[27]See Holt v. City of Richmond, 204 Va. 364, 131 S.E.2d 394 (1963); cert. denied, 376 U.S. 917 (1964); where the court admitted that the defendant was illegally detained, but convicted him in spite of this violation of his rights.

Admissibility of derivative evidence in illegal detention cases, as distinguished from search and seizure cases, is a relatively recent problem, and so decisions are few in number. One of the first cases after *Mallory* to deal with derivative evidence was *Bynum v. United States*,[28] where fingerprints taken during a period of illegal detention were suppressed. In declaring the exclusion, the court said: "If one such product of illegal detention is proscribed [confessions under *Mallory*], by the same token all should be proscribed."[29] On re-trial,[30] a set of fingerprints obtained from the F.B.I. was admitted into evidence. The court found no derivative evidence problem involved in this situation, since the fingerprints were obtained from an independent legal source.

*Payne v. United States*,[31] also from the District of Columbia, was the next case, to be decided in this area. Here the victim of a swindle pointed out the fleeing defendant to a policeman who gave chase and captured him. Later, during a period of illegal detention, the victim identified the defendant, who confessed to the swindle. Both the confession and the identification were held inadmissible. The complaining witness, however, was allowed, over objection, to identify the defendant in the courtroom. The admission of this testimony was upheld by the Court of Appeals, it being under the impression that the second *Bynum*[32] case had rejected the "fruit of the poisonous tree" argument.[33] Since the second *Bynum* case made no mention of such a rejection, the *Payne* decision casts some doubt on the continuing validity of the "fruit" argument.

The derivative evidence question was again brought up in the District of Columbia Circuit in *Killough v. United States*,[34] but this case did nothing to clear up the confusion. The defendant, during a period of illegal detention, made a confession and told where the murder victim's body could be found. While the confession was excluded,[35] the District of Columbia Circuit Court refused to decide the

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[28]262 F.2d 465 (D.C. Cir. 1958).

[29]Id at 467.

[30]Bynum v. United States, 274 F.2d 767 (D.C. Cir. 1960).

[31]294 F.2d 723 (D.C. Cir. 1961).

[32]Supra note 30.

[33]294 F.2d at 726-27. The court claims that in Bynum the fingerprints were obtained from the F.B.I. only because the police knew of Bynum's identity as a result of the fingerprints taken during the illegal detention, therefore the admission of the fingerprints was a rejection of the "fruit of the poisonous tree" argument.

[34]315 F.2d 241 (D.C. Cir. 1962).

[35]After arraignment the defendant signed another confession. The court held the second confession to be inadmissible as "fruit" of the first. This decision is based on the similar holding in Jackson v. United States, 273 F.2d 521 (D.C. Cir.

question of the admissibility of the coroner's testimony concerning the body because the case was being reversed on the confession ground.[36] However, in its opinion, the majority of the Circuit Court stated that "evidence which is due to a violation by the police of their duty under Rule 5(a)"[37] must be excluded. On remand, the District Court held such testimony admissible because it in no way connected the defendant with the body, even though it was a product of the illegal detention.[38] There seems, therefore, to be a basic inconsistency in this case.

The District Court, in *United States v. Smith,*[39] after noting the confusion in the cases just discussed, stated:

> "Solely because of the uncertainty which these statements leave in the Court's mind, this court will admit into evidence the testimony of Holeman. Nevertheless, this Court wants to make it abundantly clear that in its firm belief, the basic principle of Mallory, as extended in Killough, is that in order to make effective the important protections of Rule 5(a), the courts must exclude *all* evidence *directly produced* by a violation of that Rule.... [T]here appears to this Court to be no rational basis for distinguishing between a tainted confession which *produces* a later confession, and a tainted confession which *produces* a witness who participated in the crime."[40]

Thus we arrive at the principal case with no clear cut principles upon which to rely coming from previous detention cases. The court claimed that the *Payne* and *Killough* situations are analogous to the instant case. However, such analogy seems remote. In *Payne,* the testimony may be taken out of the derivative evidence category as it was independently derived from the pre-arrest identification to the police officer and therefore not solely dependent upon the identification at the police station during the illegal detention. In the principal case, the challenged testimony had no independent derivation but it entirely resulted from the admission made during the illegal detention.

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1959). It should also be noted that the District Court in Smith suppressed a confession after arraignment on similiar ground citing both Jackson and Killough as authority.

[36]Since the majority reversed because they found the post-preliminary hearing confession inadmissible, four of them refused to discuss the testimony questioned. The concurring judge would also exclude all evidence of the body and the coroner's testimony. The four dissenting judges were of the belief that such testimony was admissible.

[37]315 F.2d at 246.

[38]United States v. Killough, 218 F. Supp. 339 (D.D.C. 1963).

[39]United States v. Smith, 31 F.R.D. 553 (D.D.C. 1962).

[40]Id at 564-65.

Furthermore, in *Payne* the identity of the testifying witness did not come into being solely because of the admissions of the defendant, as was the case in *Smith*. *Killough* would be analogous to the instant case had the District Court admitted the testimony as a rejection of the "fruit of the poisonous tree" argument. However, that case decided the question on the grounds that the testimony did not in fact harm the defendant in any way; thus it can be distinguished. The testimony in *Smith* certainly was the most damaging evidence against the defendant. Thus the instant case decided that a witness's testimony, as such, is admissible derivative evidence. The holding is unique: because a human may decide not to testify to the truth, such possibility makes admissible evidence which, had it been tangible, would have been excluded.

It is submitted that the testimony in the instant case is not "sufficiently distinguishable" from the illegal detention so as to be "purged of the primary taint."[41] Since the purpose of the exclusionary rule is to protect individual liberties from improper police methods, it is clear that this reasoning requires the exclusion of such evidence as was admitted in *Smith*. Further, it is submitted that the reasoning of the search and seizure cases provides the better answer. It seems anomalous that evidence is allowed, which would otherwise have been excluded, on the ground that some mysterious human element is present. The human will is no more an attenuating circumstance than the possibility that a murder weapon, confessed to be hidden in a certain place, may have disappeared. Such holdings can but encourage illegal detentions and improper police conduct for the purpose of obtaining leads to possible witnesses. They open detours around *McNabb-Mallory, Mapp,* and the entire exclusionary rule, and by doing so, flaunt the principles upon which these decisions were decided.[42]

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[41]Wong Sun v. United States, 371 U.S. at 488.

[42]This comment aims merely to point out the inconsistencies in the cases and the logical conclusions evident under the McNabb-Mallory reasoning. The soundness of that reasoning itself is not a point of discussion here as it has already been subject to much controversial discussion among legal writers.