Recent Decisions (Criminal Law-Confessions-Reaffirmation of Inadmissible Confession Also Held Inadmissible)

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not, however, a unique holding. There are several other ways in which the same result could have been reached with equal aplomb and support of the authorities. Most of the cases which have found that options violate the rule against perpetuities, including the progenitor of all such decisions, have involved options which by their terms were inheritable or assignable, and therefore, likely to endure far too long. But where the option is simply given to a named party and no time limit is specified, it has been frequently held that the option is presumptively personal and cannot extend beyond some life in being, namely the option holder himself, although it is not so clear that a lifetime option would not constitute an unreasonable restraint of alienation. There is some authority for the proposition that options are to be considered an exception to the rule against perpetuities. In a few other cases it has been held that an option is either not an interest in land, or is a presently vested interest, both of which conclusions will avoid the rule. At least one court seems to have allowed an option to stand on the express basis of social utility, whereas others have concluded that an option is not an absolute restraint to alienation and, therefore, not within the intent of the rules. Finally, there are a number of decisions in which the question has been ignored entirely.

The rule against perpetuities has demonstrated all of the indestructable perennial tenacity of crab grass, in spite of almost continual attack. It seems then, that its existence must be endured at least for the time being. The Mattern case doubtless is not the herald of a new trend, but it does clearly show the danger in the use of options in which a time limit has not been unambiguously asserted. It is, in addition, further authority for the salvage of options improvidently drawn.

John W. Beatty

Criminal Law — Confessions — Reaffirmation of Inadmissible Confession Also Held Inadmissible. — Killough, arrested on suspicion of murdering his wife, signed a confession before being taken, some thirty-four hours following the arrest, before a committing magistrate. Following arraignment, he orally reaffirmed the written confession. The federal trial court held the first confession inadmissible under the Mallory rule, which requires the automatic ex-

24 E.g., Saraceno v. Carrano, 92 Conn. 563, 103 Atl. 631 (1918); In re Champion’s Estate, 15 N.Y. Supp. 768 (1890).
26 See, e.g., Barton v. Thaw, 246 Pa. 348, 92 Atl. 312 (1914); Sween v. Clinchfield Coal Co., 137 Va. 397, 119 S.E.89 (1923); Starcher Bros. v. Duty, 61 W. Va. 373, 56 S.E. 524 (1907).
28 In re Water Front on Upper N.Y. Bay, 246 N.Y. 1, 157 N.E. 911 (1927).
30 People’s St. Ry. v. Spencer, 156 Pa. 85, 27 Atl. 113 (1893); Wall v. Minneapolis, St. P. & S.S.M. Ry., 86 Wis. 48, 56 N.W. 367 (1893).
33 Daly v. Daly, 299 Ill. 268, 132 N.E. 495 (1921); Hornaday v. Hornaday, 229 N.C. 164, 47 S.E.2d 857 (1948).

clusion in federal trials of any inculpatory expression obtained during an illegal detention, but accepted the second on the basis of its voluntariness. Subsequently the Court of Appeals for the District of Columbia Circuit, held: Manslaughter conviction reversed. The oral reaffirmation of the day-old confession obtained from the defendant without representation by counsel was inadmissible in a federal trial. Killough v. United States, 315 F. 2d 241 (D.C. Cir. 1962).

Contrary to the prediction of one authority, who felt that the abnormal expansion of the exclusionary principle during the nineteenth century would be followed by a period of deep reaction, the Killough decision marks a further extension of that principle. Until the 1943 ruling in McNabb v. United States, federal courts had looked upon confessions through the acid tests of voluntariness or trustworthiness, which became in time indistinguishable, rendering academic the inability of historians to agree as to the historically accurate one. Until then, no distinction was drawn between confessions obtained prior to arraignment and those obtained after. The McNabb holding, embryo to that finally crystallized in Mallory, marked the initial instance of a confession's inadmissibility being based upon the illegal detention during which it was obtained. Because of that Court's preoccupation with the other forms of coercion exerted in that case, however, the rule did not reach the maturity of automaticity until further expounded in Upshaw v. United States, in which the criterion of the detention's illegality became Rule 5(a) of the Federal Rules of Criminal Procedure, and, finally, in Mallory. The rule, in its adult form, demanded the exclusion, regardless of whether or not coerced, of any confession procured during an illegal detention unless the delay in commitment occurred after the incriminating statement. But the Court in those cases emphasized that such exclusions are not Constitutionally-based but stem from that Court's inherent supervisory power over lower federal courts and federal law enforcement officers, enabling it to set, within its discretion, desirable admissibility standards without legislation. The Mallory rule, then, and its Killough extension, are not applicable to state proceedings, wherein, to effect exclusion, the Court must still resort to the minimal standard of the Fourteenth Amendment, set out in Brown v. Mississippi, and a long line of succeeding cases. The suggestion has been made, however, that commitment without unnecessary delay might soon be held to be a due process requirement.

3 Wigmore, Evidence § 817 (3d ed. 1940).
5 Inbau & Reid, Lie Detection and Criminal Interrogation 198 (3d ed. 1953).
7 335 U.S. 410 (1948).
8 Fed. R. Crim. P. 5(a): Appearance before the Commissioner — 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.
9 Supra note 6, at 1440.
12 Inbau & Reid, op. cit. supra note 5, at 199.
There are, then, two classes of confessions which a federal court will clearly exclude: those found to have been coerced, and those ipso facto inadmissible because acquired during a period of illegal detention. The reaffirmation of a confession of the former class presents, theoretically at least, little difficulty since it is to be judged by the very same criterion as the first, namely, its voluntariness, although the coercion employed in obtaining the initial disclosure is to be considered along with all other circumstances. Hence such reaffirmations have been deemed acceptable unless found to have been involuntary by their own circumstances or so intimately related to the reaffirmed confessions as to be inseparable therefrom.

The significance of the Killough decision is that the reaffirmation was excluded not due to a link with a coerced confession but with one excluded by Mallory, although, it is true, the situation had been faced before. In United States v. Bayer, the Supreme Court, assuming the first confession inadmissible under McNabb although it was never actually introduced at the trial, held the reaffirmation voluntary and therefore admissible, yet conceded that:

[After an accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantage of having confessed. He can never get the cat back in the bag. The secret is out for good. In such a sense, a later confession always may be looked upon as fruit of the first.]

The Killough majority was able to dismiss Bayer's holding in a footnote, remarking that the six-month lapse between the two confessions in Bayer makes its inapplicability to Killough "obvious," while a dissenter argued for admissibility a fortiori since in Killough the magistrate's warnings were even fresher in the accused's mind. A third stand on this point, and perhaps the most convincing, was set out in a concurring opinion which observed that, in any event, "Mallory supersedes Bayer, and its command cannot be avoided by expanding the rule of an earlier case."

The strongest precedent for the Killough result, the first Jackson v. United States opinion, held a postarraisonment confession unacceptable in that "Jackson's signing of the document cannot in any way be considered an independent act based upon proper counsel or as occurring after time for deliberate reflection." But on a second appeal, after a new trial, the confession was allowed on a finding that the accused had indeed been duly warned by a judge and represented by counsel, the "time for deliberate reflection" factor apparently being minimized.

Two other decisions, uttered by the very same Killough court, passed upon the same issue. In Goldsmith v. United States, the admissibility of the reaffirmation was predicated upon the fact that it occurred shortly after arraignment and that the accused had legal counsel prior to it. The court in Naples v. United States did not have to face the admissibility aspect of the reaffirmation squarely since

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16 Lyons v. Oklahoma, supra note 14.
17 Id. at 603.
19 331 U.S. 532 (1947).
20 Id. at 540. See 72 YALE L.J. 1434, at 1442 (1963): "The impact of the Commissioner's warning will be much weaker than it would have been absent a prior confession, for one cannot be expected effectively to deny, even after repeated warnings, that which he has just admitted."
21 315 F.2d 241, 244 n.4 (D.C. Cir. 1962).
22 Id. at 254.
23 Id. at 251.
25 Id. at 523.
it was able to reverse the conviction on the basis of the initial confession. It did, however, intimate that the follow-up confession had been procured in a deliberate attempt to circumvent the Mallory rule.

If advice of counsel is to be taken as the decisive criterion, it is true, as the majority contends, that the Killough decision is not inconsistent with either the second Jackson opinion or Goldsmith, for both Jackson and Goldsmith had the aid of counsel, while Killough did not. But the treatment of the deliberation-time factor is not quite so uniform. While the majority finds support for the Killough result in the fact that the accused had such little time for deliberation between arraignment and reaffirmation, (and distinguishes Bayer primarily because in that case the time lapse was so much longer!), it fails directly to meet the point that both Goldsmith and Jackson based admissibility, in part at least, precisely on the fact that the second confessions occurred so shortly after arraignment when the magistrate’s warnings were still ringing in the accused’s ears.

Certainly the rationale behind the exclusion of Killough-type reaffirmations can be no stronger than, nor very different from, that underlying the Mallory rule itself, but, even at this late date, the justification for the latter is still not altogether clear. The judicial opinions and legal comments, taken together, suggest not a specific raison d’être, but a curious interplay of purposes.

First of all, clearly, the desire to avoid receiving involuntary confessions played a significant role. Indeed, it cannot be denied that the automatic rule which Mallory purports to wring from the McNabb opinion is actually a violent restatement of the McNabb teaching, if a restatement at all. The deliberately vague McNabb ruling was initially thought by many to have said little more than that a prolonged detention was to be but an added consideration in passing on a confession’s voluntariness.30 The precise basis of the McNabb majority opinion was difficult to determine, because it recited facts about lack of schooling and worldly experience on defendants’ part, uncomfortable conditions of their confinement, prolonged questioning, lack of legal advice, etc.31 The critical question left by McNabb as to whether delay in itself was reason enough for exclusion32 was answered in the affirmative by Upshaw’s explanation that McNabb was not a mere extension of the involuntariness doctrine.33 But all three opinions, McNabb, Upshaw and Mallory, emphasize the important role extended detention might play in eliciting coerced confessions,34 and the realization that third-degree practices are common even today35 is undoubtedly an important block in the rule’s foundation. In any event, the idea has survived36 that the main difference between a coerced confession and a Mallory-prohibited one is that the coercion in the latter is presumed.

Secondly is the view, perhaps the most popular, that the Mallory rule was designed as a sanction imposed on law enforcement officers for violation of Rule 5(a).37 the belief that only by rendering the fruits of police illegality useless can that rule be effectively enforced. The Supreme Court has denied the use of exclusion

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30 Id. at 6.
33 Upshaw v. United States, supra note 7, at 412.
36 Hogan & Snee, supra note 29, at 28. See 3 Wigmore, Evidence § 851 (Supp. 1962). Professor Wigmore cites as a corollary to Upshaw that, nothing more appearing, it will be assumed that such illegal detention was for the inducement of a confession.
37 Hogan & Snee, supra note 29, at 29.
as a punitive measure against unrelated wrongdoing by the police. Our duty in shaping rules of evidence relates to the propriety of admitting evidence. This power is not to be used as an indirect mode of disciplining misconduct.\textsuperscript{38}

The \textit{Mallory} decision, however, listed the inadmissibility rule as a means "adequately to enforce the congressional requirement of prompt arraignment."\textsuperscript{39} This was reiterated by the \textit{Killough} majority in its statement that "the exclusionary rules are the only effective deterrent to police wrongdoing."\textsuperscript{40} Whether one agrees that the foregoing is a valid purpose will depend, of course, on where he feels the line should be drawn to maintain that precarious balance between the individual's rights and the efficient protection of society, a balance which, argues the dissenter, is upset by \textit{Killough}.\textsuperscript{41} The danger is such that any prospective enlargement of protection for the accused must be sharply and critically examined, for [W]e sometimes tend to forget that every extension of the rights of the individual in the criminal field must necessarily and proportionately diminish the ability of society as a whole to protect itself against the criminal.\textsuperscript{42}

The feeling remains strong that the automatic exclusion called for by \textit{Mallory} is too dear a price to pay for police discipline.\textsuperscript{43}

A third proffered rationale attributes the rules of exclusion to a judicial desire to protect "the citizen against the violation of his privileges of immunity from bodily manhandling by the police, and from the other undue . . . pressures . . . of the third degree."\textsuperscript{44} This view occupies a sort of middle-ground between the first two in that, while relying wholly on neither voluntariness nor police discipline, it does suggest both these elements insofar as the protection of these privileges must in part be to prevent coercion and such protection presupposes the means to preclude police violations. While all three rationales present a difference in emphasis rather than in kind, the third comes closest to McNabb's concern for "maintaining civilized standards of procedure and evidence."\textsuperscript{45} Adherents of all three views should agree, however, with the statement that the rule prevents the appearance of court complicity by refusing to allow government illegality to "debase the processes of justice."\textsuperscript{46}

The \textit{Killough} holding, it must be remembered, is hardly as automatic as that of \textit{Mallory}. While \textit{Mallory} excludes all confessions obtained during a period of illegal detention, \textit{Killough} does not do the same for reaffirmations of such confessions. Two factors are indispensable: 1) a lack of counsel,\textsuperscript{47} and 2) an insufficient time lapse between the two confessions to override the presumption that the second was the fruit of the first.\textsuperscript{48} The former circumstance clearly weighed the heavier, and its presence in the \textit{Killough} case was "decisive,"\textsuperscript{49} although lack of counsel before\textsuperscript{50} or after\textsuperscript{51} arraignment has been held not to be a violation of

\begin{itemize}
\item \textsuperscript{38} United States v. Mitchell, \textit{supra} note 10, at 70-71.
\item \textsuperscript{39} Mallory v. United States, \textit{supra} note 1, at 453.
\item \textsuperscript{40} 315 F.2d 241, 253 (D.C. Cir. 1962).
\item \textsuperscript{41} \textit{Id.} at 260 (dissenting opinion).
\item \textsuperscript{42} McGarr, \textit{The Exclusionary Rule: An Ill-Conceived and Ineffective Remedy}, in \textit{POLICE POWER AND INDIVIDUAL FREEDOM} 100 (Sowle ed. 1962).
\item \textsuperscript{43} See 3 Wigmore, \textit{EVIDENCE} \S 851 (3d ed. 1940):
\item \textsuperscript{44} But, it is argued, there are abuses by the police. Very true — here and there, at least. It does not follow, however, that a stricter rule of exclusion for confessions is the proper remedy. . . . The first remedy is to improve police personnel. The second one is to provide a means of speedy confession which shall be less susceptible to abuses, while still taking advantage of the inherent psychological situation.
\item \textsuperscript{45} Maguire, \textit{op. cit.} \textit{supra} note 31, at 229.
\item \textsuperscript{46} McNabb v. United States, \textit{supra} note 4, at 341.
\item \textsuperscript{47} Hogan & Snee, \textit{supra} note 29, at 32.
\item \textsuperscript{48} See 315 F.2d 241, 243 (D.C. Cir. 1962).
\item \textsuperscript{49} See 315 F.2d 241, 244 (D.C. Cir. 1962).
\item \textsuperscript{50} 31 Geo. Wash. L. Rev. 859 (1963).
\item \textsuperscript{51} Cicenia v. Lagay, \textit{supra} note 14; Grooker v. California, \textit{supra} note 14; Ashdown v. Utah, \textit{supra} note 14.
\end{itemize}
due process. But strong dissents have called for the presence of counsel at all stages of interrogation,\textsuperscript{52} in spite of the persistent claim that such a procedure would cripple police investigation. The counsel issue is thus but another aspect of the dialogue concerning the maintenance of that “precarious balance”\textsuperscript{53} already mentioned.

This presents a real dilemma in a free society. To subject one without counsel to questioning... is a real peril to individual freedom. To bring in a lawyer means a real peril to solution of the crime, because... any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances.\textsuperscript{53}

Regardless of whether due process requires pre-trial counsel,\textsuperscript{54} however, it seems clear that the \textit{Killough} majority consider legal representation an important component of civilized procedural standards, since absence of counsel in \textit{Killough} was the only substantial factual difference from \textit{Goldsmith} and \textit{Jackson}.

Because the time lapses between confession and reaffirmation in these three cases were so similar, however, it is arguable that the significance of that element was merely supplementary to the counsel issue, and was emphasized by the \textit{Killough} court only to reinforce a conclusion already assured by the latter.

Perhaps the most disconcerting element in \textit{Killough} is that, despite its obvious dependence upon these two factual circumstances, the court is reluctant to concede \textit{Killough}’s applicability to any situation not identical with or at least closely parallel to the situation before it.

[Nowhere have we said that a posthearing confession, following one illegally procured before the hearing, must necessarily await the entry of counsel; nor do we predetermine that the passage of no amount of time could remove the taint of a confession obtained in defiance of the exclusionary rule.\textsuperscript{55}]

With such a guardrail qualification, then, the opinion sets the stage for an \textit{ad hoc} determination of reaffirmation situations. After setting out these two factors as the hinges of inadmissibility, it withholds sufficient clarifying lubrication to enable the courtroom door to slam shut on such reaffirmations with authority and uniformity.

It is, of course, too early to assess \textit{Killough}’s impact. Despite its hedging, however, the footings have been laid, and it is likely that its mandate will be extended rather than restricted. In \textit{United States v. Smith},\textsuperscript{56} the sole instance of a \textit{Killough} situation to date, the trial court for the District of Columbia, in one short paragraph, refused to admit in a prosecution for murder the oral reaffirmations of a confession obtained in defiance of Rule 5(a), holding that there was not present between the two “either a sufficient lapse of time, or the meaningful advice of counsel... There was in short, no event... sufficiently decisive to erase the effects of the first confession.”\textsuperscript{56\textsuperscript{1}} The indication seems to be that the courts will come to matter-of-factly disallow reaffirmation when the two critical elements are found not present.

It has been said that future generations will be puzzled looking back upon a system of criminal procedure which will not permit a single question to be asked of a defendant at his trial without his consent yet tolerates the most one-sided struggle during the pre-trial interrogation.\textsuperscript{58} Professor Wigmore has suggested that the interrogating be carried on by a skilled magistrate, as is done in other “civilized countries.”\textsuperscript{59} For the present, the \textit{Killough} reasoning strikes one as both a desirable

\textsuperscript{52} \textit{E.g.}, Culombe v. Connecticut, \textit{supra} note 18 (dissenting opinion); Crooker v. California, \textit{supra} note 14, at 447 (dissenting opinion): “He has the right to receive the benefit of the advice of his own counsel at the trial... That same right should extend to the pre-trial stage.”

\textsuperscript{53} Watts v. Indiana, 338 U.S. 49, 59 (1949).

\textsuperscript{54} \textit{Beaney}, \textit{op. cit. supra} note 34, at 211: “To attack a coerced statement or confession effectively, counsel must appear earlier than he does at present.”

\textsuperscript{55} 315 F.2d 241, 246 (D.C. Cir. 1962).


\textsuperscript{57} \textit{Id.} at 561.

\textsuperscript{58} \textit{Hogan} & \textit{Snee}, \textit{supra} note 29, at 25-26.

\textsuperscript{59} \textit{3 Wigmore, op. cit. supra} note 3, at § 851.
and necessary corollary to the Mallory rule, for the right which it and Rule 5(a) affords the accused is worth little if it can be "vitiated by a transparent ruse of the type here employed."  

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LABOR RELATIONS — UNFAIR LABOR PRACTICES — UNION PICKETING TO FORCE EMPLOYER'S ACCEPTANCE OF "HOT-CARGO" CLAUSE NOT UNLAWFUL IN CONSTRUCTION INDUSTRY, BUT EMPLOYER MAY BREACH CLAUSE WITH IMPUNITY. — In a recent circuit court case, Local 383 had picketed the general contractor to secure a collective bargaining agreement which contained a "hot-cargo" clause providing that any subcontracted construction work would be made subject to the terms of the agreement. There were existing subcontracts with nonunion subcontractors. On petition for review of a National Labor Relations Board order to cease and desist from engaging in picketing found unlawful under section 8(b) (4) (A)-(B), it was held: order reversed, case remanded for dismissal. Picketing by a construction union against a general contractor to secure an agreement to cease doing business with certain persons is not unlawful, since the construction-industry proviso of section 8(e), and section 8(b) (4) (A), authorize use of coercion to secure such agreements, and section 8(b) (4) (B) only proscribes coercion to enforce them. Construction Laborers Local 383 v. NLRB, 323 F.2d 422 (9th Cir. 1963).

In a recent district court case, Local 48 sued the Hardy Corporation for alleged violation of a "hot-cargo" provision voluntarily and legally entered into by the parties under the construction-industry proviso of section 8(e), seeking enforcement of the provision and damages for its breach. No picketing or work stoppages had been induced by the union. Held: specific enforcement by the court, or an award in damages for the breach, would be "coercion or restraint" violative of section 8(b) (4) (ii) (B); the provision may be "enforced" only by voluntary compliance of the employer, without union conduct prohibited by section 8(b) (4). Local 48, Sheet Metal Workers v. Hardy Corporation, 218 F. Supp. 556 (N.D. Ala. 1963).

A "hot-cargo" clause may be best described in terms of section 8(e) of the

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1. Labor Management Relations Act (Taft-Hartley Act) § 8(b) (4) (A)-(B), 73 Stat. 542 (1959), 29 U.S.C. § 158(b) (4) (Supp. IV 1963), amending 61 Stat. 141 (1947), which makes it an unfair labor practice for a labor organization or its agents — (4) (i) to engage in, or to induce or encourage ... a strike or a refusal ... to use ... or otherwise ... handle or work on any goods, ... or to perform any services; or (ii) to threaten, coerce, or restrain any person ..., where in either case an object thereof is — (A) forcing or requiring any employer ... to enter into any agreement which is prohibited by section 8(e); (B) forcing or requiring any person ... to cease doing business with any other person ....

2. Labor Management Relations Act (Taft-Hartley Act) § 8(e), 73 Stat. 543 (1959), 29 U.S.C. § 158(e) (Supp. IV 1963), which provides:

It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: Provided, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction ... or other works: Provided further, That for the purposes of this subsection (e) and section 8(b) (4) (B) the terms ... shall not include persons ... in the apparel and clothing industry: Provided further, That nothing in this Act shall prohibit the enforcement of any agreement which is within the foregoing exception.