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POST-ARRAIGNMENT SAFEGUARDS FOR JAILHOUSE INTERROGATION*

The principal objectives of criminal procedure—effective prosecution of offenders and protection of individual liberties—are frequently incompatible. This dilemma becomes critical when police secure confessions from persons in custody. Since such confessions are potent evidence, law enforcement officers are eager to obtain them to facilitate prosecutions. But if the statements are extracted by coercion, their admission in evidence against the confessor denies him due process of law. Using the test of "involuntariness," courts exclude from evidence confessions induced by coercive police techniques.

*Carignan v. United States, 185 F.2d 954 (9th Cir. 1950), cert. granted 341 U.S. 934 (1951).

1. See 3 WIGMORE, EVIDENCE § 866 (3d ed. 1940).

2. In cases where there are no eye-witnesses to the crime and where the circumstantial evidence is inconclusive, it may be impossible to obtain a conviction without a confession. But a finding of guilty generally must be based on more than a confession; there must be some independent corroborative evidence of the confessor's guilt. See 4 WIGMORE, EVIDENCE §§ 2070, 2071 (3d ed. 1940).

3. Brown v. Mississippi, 297 U.S. 278 (1936). This was the first of a series of cases in which the Supreme Court reversed convictions in state courts on the ground that admission of a coerced confession violated the due process clause of the 14th Amendment. See cases cited in note 5 infra. In barring forced confessions, federal courts generally do not cite the due process clause of the 5th Amendment, but merely base their exclusions on long-standing rules of evidence. See, e.g., Wilson v. United States, 162 U.S. 613, 621-3 (1896).

The reasons given for such exclusion vary. Some explanations for rejection of coerced confessions are: (1) untrustworthiness and possible falsity, Hopt v. Utah, 110 U.S. 574, 585 (1884), 3 WIGMORE, EVIDENCE § 822 (3d ed. 1940); (2) "fundamental unfairness" to the accused, "whether true or false," Lisenba v. California, 314 U.S. 219, 236 (1941); (3) a violation of the constitutional prohibition against compulsory self-incrimination, Bram v. United States, 168 U.S. 532, 542 (1897), but see 3 WIGMORE, EVIDENCE § 823 (3d ed. 1940); (4) representative of "inquisitorial system [of justice] without its safeguards," Watts v. Indiana, 338 U. S. 49, 55 (1949).

4. This test has been described by the United States Supreme Court as follows:

"The voluntary or involuntary character of a confession is determined by a conclusion as to whether the accused, at the time he confesses, is in possession of 'mental freedom' to confess to or deny a suspected participation in a crime. . . .

"When conceded facts exist which are irreconcilable with such mental freedom, regardless of the contrary conclusions of the triers of fact, whether judge or jury, this Court cannot avoid responsibility for such injustice by leaving the burden of adjudication solely in other hands." Lyons v. Oklahoma, 322 U. S. 596, 602 (1944).

For a description of how this test is made at the trial court level, see Anderson v. United States, 318 U.S. 350, 351 n.1 (1943). For discussion of variant uses of the term "voluntary," see 3 WIGMORE, EVIDENCE §§ 843-46 (3d ed. 1940).

5. Such techniques include physical beating, Brown v. Mississippi, 297 U.S. 278 (1936), protracted interrogation without opportunity for rest, Ashcraft v. Tennessee, 322 U.S. 143 (1944), incommunicado detention of ignorant prisoners or members of minority
In recent years, federal courts have employed an additional test of admissibility—the legality of detention at the time of confession. In a series of decisions climax ed by \textit{Upshaw v. United States}\textsuperscript{6} the Supreme Court ruled that confessions obtained during a period of unnecessary delay in arraignment were inadmissible.\textsuperscript{7} The \textit{Upshaw} decision was based on Rule 5 of the Federal Rules racial groups, Haley v. Ohio, 332 U.S. 596 (1948), Chambers v. Florida, 309 U.S. 227 (1940), threats or inducements leading to confession, Bram v. United States, 168 U.S. 532 (1897). More comprehensive and detailed catalogues of these methods appear at 4 Nat'l Commn on Law Observance & Enforcement, Lawlessness in Law Enforcement 164-9 (1931), and Hopkins, Our Lawless Police 189-277 (1931).


7. The \textit{Upshaw} case, \textit{supra} note 6, cleared up great confusion among courts and commentators which had been created by McNabb v. United States, 318 U.S. 332 (1943), and United States v. Mitchell, 322 U.S. 65 (1944). In the McNabb case, defendants were arrested after the killing of an officer of the Alcohol Tax Unit and were then questioned by federal agents for long periods before they confessed. This interrogation took place in apparent violation of statutes requiring that arrested persons be brought promptly before a United States commissioner or other judicial officer to determine whether or not detention was justified. 20 Stat. 341 (1879), 18 U.S.C. § 593 (1940); 28 Stat. 416 (1894), as amended, 18 U.S.C. § 595 (1940); and see 48 Stat. 1006 (1934), 5 U.S.C. § 300a (1940). But see note 14 \textit{infra}. In reversing the conviction, the Court emphasized the assumed violation of the prompt arraignment requirement, which "aims to avoid all the evil implications of secret interrogation of persons accused of crime." McNabb v. United States, 318 U.S. 332, 344 (1944). However, references to coercive questioning methods in \textit{McNabb}, \textit{id.} at 344-5, and in the companion case of Anderson v. United States, 318 U.S. 335, 356 (1943), left unclear whether or not illegal detention was the sole basis for the exclusion. \textit{Compare}, e.g., United States v. Hoffman, 137 F.2d 416, 421 (2d Cir. 1943); United States v. Haupt, 136 F.2d 661 (7th Cir. 1943) (illegal detention \textit{per se} makes confession inadmissible) \textit{with} United States v. Klee, 50 F. Supp. 679 (E. D. Wash. 1943) (illegal detention only extra factor in standard "voluntariness" test). And dicta in the later Supreme Court decision of United States v. Mitchell, \textit{supra}, suggested that the "coercion" test alone prevailed and that delayed arraignment was only an element of coercion. \textit{Id.} at 67. See also Hasson v. United States, 158 F.2d 649 (D. C. Cir. 1946); Ruhl v. United States, 148 F.2d 173 (10th Cir. 1945); Moscovitz, \textit{Trends in Federal Law and Procedure}, 5 F.R.D. 361, 370 (1946). Note, 47 Col. L. Rev. 1214 (1947).

In the \textit{Upshaw} decision, \textit{supra}, defendant confessed to grand larceny during a post-arrest period of 30 hours without arraignment. There was no other evidence of coercion. Yet the Supreme Court reversed conviction, interpreting the \textit{McNabb} rule as proscribing 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 . . .'" \textit{Id.} at 413.

Application of the \textit{Upshaw} doctrine, however, was restricted to federal courts by the Supreme Court's statements that it was not settling a constitutional question but was only exercising supervisory power over federal justice. McNabb v. United States, \textit{supra} at 341; \textit{Upshaw} v. United States, \textit{supra} at 414 n.2; cf. United States \textit{ex rel.} Weber v. Ragen, 176 F.2d 579 (7th Cir. 1949), \textit{cert. dismissed} 338 U.S. 809 (1949) (use in state court of confession secured in violation of state arraignment statute not denial of due process under 14th Amendment). But failure of state officers to comply with prompt arraignment laws is apparently a factor to be considered by the Supreme Court in examining the "voluntariness" of confessions in state courts. See \textit{Turner} v. Pennsylvania,
of Criminal Procedure. Rule 5 provides that an arrested suspect must be brought "without unnecessary delay" before a United States commissioner. At that time the commissioner must advise the accused of his rights and provide a preliminary hearing. If the commissioner finds "probable cause" to believe the accused guilty, he either jails him or releases him on bail. If probable cause is lacking, the commissioner must discharge the prisoner.

Neither the Upshaw decision nor Rule 5, however, dealt with the situation where federal officers question a prisoner lawfully arraigned on one criminal charge about a second crime for which he has not been arraigned. Such questioning is a frequent police practice which often yields fruitful results.


State courts, however, have not been quick to pick up the Supreme Court's hints. Legislation requiring prompt arraignment after arrest exists in at least 45 states. See McNabb v. United States, supra at 342 n.7. But violation of these statutes has not by itself resulted in exclusion of confessions, even in those states which normally bar evidence gained illegally. For compilation of state decisions, see Note, 2 VAND. L. REV. 472 n.12 (1949).

This clause represented a fusing of existing federal prompt arraignment statutes, cited note 7 supra. The combined effect of Rule 5 and Upshaw v. United States, supra note 6, is to allow pre-arraignment interrogation only during the period considered "necessary delay." This period is very brief during weekday, daytime hours. Cf. Ackowskey v. United States, 158 F. 2d 649, 650 (D.C. Cir. 1946) (delay of seven hours became unreasonable after first one or two hours). It may be longer, however, at night and on Sunday, when commissioners are not at their desks. See Garner v. United States, 174 F.2d 499, 502 (D.C. Cir.), cert. denied, 337 U.S. 945 (1949). The frequently severe time limitation thus placed on police questioning has led to requests for longer periods of pre-arraignment detention than those allowed either by judicial interpretation of earlier statutes, or by Rule 5. See, e.g., Waite, Police Regulation by Rules of Evidence, 42 MICH. L. REV. 679, 689-91 (1944); Comment, 53 YALE L.J. 758, 769 (1944) (suggesting 24-hour period); Warner, The Uniform Arrest Act, 28 VA. L. REV. 315, 339-41, 347 (1942). And see discussion of H.R. 43, 79th Cong., 1st Sess. (1944) (providing "reasonable time"), in Dession, The New Federal Rules of Criminal Procedure, 55 YALE L.J. 694, 711-713 (1946).

The entire procedure prescribed in Rule 5 is frequently referred to in judicial decisions as "arraignment" and is so designated herein. The Federal Rules, however, use the term to refer only to the later ceremony, held in open court, when the indictment or information is read and the defendant pleads. Fed. R. CRIM. P. 10.

Rule 5 requirements are also incorporated into Fed. R. CRIM. P. 40, which governs preliminary proceedings following arrest in a district other than the district where the warrant was issued or the offense was committed.

10. For opinions that this practice is frequent, see communications to the YALE LAW JOURNAL from Robert J. Barrett, Superintendent, District of Columbia Police, dated April 23, 1951; George Morris Fay, United States Attorney for District of Columbia, dated April 25, 1951; C. C. Garner, Chief Post Office Inspector, Post Office Department, dated April 17, 1951; Howard V. Calverley, United States Commissioner, Los Angeles, California, dated April 11, 1951, in Yale Law Library. But for opinion that
may clear the prisoner of the new offense, thus saving futile investigation,\textsuperscript{11} or it may furnish clues pointing to the guilty parties. Sometimes it ends in a confession to the second crime.\textsuperscript{12}

In \textit{Carignan v. United States},\textsuperscript{13} such confessions first came under the scrutiny of a federal court.\textsuperscript{14} Police arrested Carignan on a charge of assault with intent to commit rape. In accordance with Rule 5, he was promptly arraigned before a commissioner, who thereafter placed him in the custody of a United States Marshal.\textsuperscript{15} The Marshal proceeded to interrogate Carignan about another crime—a killing.\textsuperscript{16} After three days of sporadic questioning, and without arraignment on the murder charge, Carignan confessed to the slaying. With the confession serving as the principal evidence, he was subsequently convicted of murder.\textsuperscript{17}

\textsuperscript{11} See communication from Robert J. Barrett, supra note 10.

\textsuperscript{12} See communications from George Morris Fay, Howard M. Calverley, Robert J. Barrett, supra note 10, and from M. L. Harney, Assistant to the Commissioner of Narcotics, Treasury Department, dated April 19, 1951, in Yale Law Library.

\textsuperscript{13} 185 F.2d 954 (9th Cir. 1950), \textit{cert. granted} 341 U.S. 934 (1951). This case arose in Alaska, where federal courts have general jurisdiction over criminal causes. 48 U.S.C. § 101 (1946).

\textsuperscript{14} The issue in the \textit{Carignan} case should have been settled in \textit{McNabb v. United States}, supra note 7. In that case defendants had in fact been arraigned for violation of internal revenue laws prior to the bulk of interrogation concerning a murder. See \textit{McNabb v. United States}, 142 F.2d 904, 905-907 (6th Cir. 1944), \textit{cert. denied} 323 U.S. 771 (1944) (on re-trial of case). In considering the McNabbs' confession to the murder, however, the Supreme Court mistakenly assumed that the confession had been preceded by no arraignment at all. \textit{McNabb v. United States}, 318 U.S. 332, 334, 337 (1943). On re-trial, the McNabbs were convicted of voluntary manslaughter; on appeal the court noted that there had been an arraignment but did not discuss at length the fact that the arraignment was on a different charge than the one to which the defendants confessed. It disposed of this problem by stating: "[T]here is no substantial evidence that the confessions were elicited by means of illegal procedure. As pointed out in the McNabb case, [\textit{supra} at 346] . . ., "The mere fact that a confession was made while in custody of the police does not render it inadmissible.'" \textit{McNabb v. United States}, 142 F.2d 904, 907.

\textsuperscript{15} Transcript of Record, pp. 44, 231, 232, \textit{Carignan v. United States}, \textit{supra} note 13.


\textsuperscript{17} \textit{Carignan v. United States}, \textit{supra} note 13, at 955, 956.
On appeal the Ninth Circuit reversed the conviction, with three judges revealing disparate interpretations of the *Upshaw* case and Rule 5. The lead opinion stated that the gravity of the murder charge plus the use of psychological pressure were circumstances which required re-arrangement on the murder charge to afford the prisoner further judicial advice.\(^\text{18}\) A concurring opinion, after sharply criticizing the *Upshaw* rule, reluctantly concluded that interrogation about any charge must always be preceded by timely arraignment on that charge. The opinion correctly pointed out that under *Upshaw* it is timing alone, rather than circumstances, that determine admissibility of a confession.\(^\text{19}\) The dissenting judge argued forcefully that only one arraignment was required by Rule 5 as construed in *Upshaw*.\(^\text{20}\)

Viewed as an attempt to follow the *Upshaw* ruling, the *Carignan* decision seems unsound. The initial Rule 5 arraignment lacking in *Upshaw* was clearly present here.\(^\text{21}\) This factual distinction is crucial because the initial arraignment fulfills the main objectives of Rule 5: judicial review of the detention and legal commitment or discharge.\(^\text{22}\) But although not violative of the principal policies of *Upshaw* and Rule 5, the police procedure followed in Carignan's

18. Language in the opinion indicates that if these or similar circumstances had not been present, the author (Healy, J.) might not have voted to reverse:

   "And we assume also, however debatable the point, that where an individual is simultaneously suspected of two crimes and has been arrested and regularly taken before a magistrate and committed in respect of one of them, he is not, while so confined, necessarily immune from questioning on the other absent a repetition of the procedure outlined by the Rule." *Id.* at 957.

Judge Healy believed, however, that re-arrangement here would have notified Carignan of the gravity of the murder charge and of the necessity of obtaining counsel and would thus have been consistent with the "spirit and intent" of Rule 5 and the *Upshaw* decision. This belief was apparently influenced by a feeling that the defendant's confession was the product of psychological coercion, *id.* at 958 n.4, and his "youth and inexperience." *Id.* at 957.

19. *Id.* at 960.

20. The dissent, *id.* at 962, seconded the concurring judge's distaste for the *Upshaw* decision and his belief that Carignan's rights had in fact been adequately protected. See *id.* at 959. Judge Pope, however, did not agree that the *Upshaw* case required reversal. He wrote that Carignan's imprisonment, preceded as it was by an arraignment, complied with Rule 5. Hence interrogation about other crimes was not restricted, and any resulting confessions fell outside of the scope of the *Upshaw* decision.


22. Rule 5 was based largely on earlier statutes cited at note 7 *supra*. Fed. R. Crim. P. 5, notes of Advisory Committee on Rules. In compelling obedience to these statutes, the Supreme Court emphasized that speedy arraignment requires a prompt showing of "legal cause for detaining arrested persons," *McNabb* v. United States, *supra* note 7, at 344, and "checks resort to those reprehensible practices known as the 'third degree'" by placing prisoners under judicial supervision. *Id.* at 343-44; and see, for further explanation, notes 34-36 *infra*. 
case is nevertheless undesirable; it may easily defeat the spirit of three other important safeguards in the Rule. 23

Rule 5 guarantees a suspect at arraignment full knowledge of the charge against him. 24 The prisoner needs similar information on any new and separate crime about which he is to be questioned. 25 Otherwise police may lead him into trapping himself with careless or erroneous answers to their seemingly aimless questions. 26 Moreover, ignorance of the gravity of the crime, coupled with a desire to placate officials or to shield another, may cause the prisoner to make a deliberately false confession. 27

Under a second Rule 5 provision, the commissioner must "inform the defendant that he is not required to make a statement and that any statement made by him may be used against him." 28 The prisoner, however, may not know that the right to silence extends to all subsequent interrogations about other crimes. 29 Since federal agents do not always explain this privilege

23. The McNabb decision, supra note 7, and the Upshaw decision, supra note 6, did not stress the three safeguards provided by the commissioner's instructions as influential reasons for insistence on timely arraignment. See note 22 supra and Upshaw v. United States, supra note 6. Yet by forcing compliance with Rule 5, the Supreme Court, in the Upshaw decision, lent support to these three Rule 5 protections provided as part of the arraignment process.

24. Fed. R. Crim. P. 5(b). This provision is related to the Constitutional guarantee of full disclosure: "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation." U. S. Const. Amend. VI.

25. Historically, the requirement of disclosure at arraignment stemmed from the liberalizing of the preliminary examination process and was designed principally to help the accused prepare for examination. See Indictable Offences Act, 1848, 11 & 12 Vict., c. 42, § 18; and for background, see I Holdsworth, History of the English Law 295-97 (6th ed. 1938). Yet such disclosure helps also to prepare the prisoner for police interrogation. This preparatory function should not be limited to interrogation about the one crime for which the prisoner was initially arraigned.

26. The same safeguards which pertain to confessions should also cover any admissions not expressly acknowledging guilt but prejudicial to the accused. See Ashcraft v. Tennessee, 327 U.S. 274 (1946); Comment, 39 J. Crim. L. & Criminology 743 (1949).

27. Neither true guilt nor overpowering coercion are the only causes of confession. Other possible motives are the desire to protect a friend or relative or the hope that acknowledging what is thought to be a trivial offense will save the confessor a stiffer penalty on some other charge. See Wigmore, Principles of Judicial Proof §§ 222, 223 (2d ed. 1931). Promises of gentle treatment may also bring about false confessions. But "[i]f the threat of inducement was held out, actually or constructively, by a person in authority, it [the confession] cannot be received, however slight the threat or inducement." Reg. v. Moore, 2 Der. 522, 527, 169 Eng. Rep. 608 (1852); Accord: Bram v. United States, 168 U.S. 532 (1897) (mere implication that defendant could take weight off his shoulders by confessing). And see cases cited id. at 552-4, 559-61; 3 Wigmore, Evidence §§ 835, 836 (3d ed. 1940). These motives for false confession may be dispelled if the prisoner knows the gravity of the charge he faces.


29. The caution provided by the magistrate at arraignment traditionally pertained to the accused's right to silence at the preliminary examination. See Indictable Offences Act, 1848, 11 & 12 Vict., c. 42, § 18; Criminal Practice Act, 1925, 15 & 16 Geo. V., ch.
adequately to persons they question, repeated cautions by a commissioner are desirable to ensure that a prisoner is fully aware of his rights before he answers questions concerning a second offense.

Rule 5 also requires the commissioner to advise the accused of his right to counsel. But the commissioner's advice is sometimes unemphatic when the offense involved is a light one, so that a prisoner may be unaware of his right when he later finds himself entangled in questions about a grave or complex second crime. Hence he should be told once more of his right to a lawyer and given a fresh opportunity to secure one.

86, § 12; American statutes cited in Code of Criminal Procedure 289-93 (1930). Yet this right also covers the prisoner who is questioned later on; he need not answer the questions of federal officers when not under oath. See United States v. Kallas, 272 F. 742, 752 (W.D. Wash. 1921).

30. Cautions administered by police may often be feeble or merely ritualistic. See, e.g., Supreme Court's comments on the effectiveness of the advice given to an accused in Haley v. Ohio, 332 U.S. 596, 601, 604 (1948). And there is no severe pressure on officers to give any caution at all, for failure to caution does not by itself cause exclusion of a subsequent confession in federal courts. Wilson v. United States, 162 U.S. 613, 623 (1896); Himmelfarb v. United States, 175 F.2d 924, 938 (9th Cir.), cert. denied 338 U.S. 860 (1949), and cases cited 175 F.2d at 938 n.6; Gerard v. United States, 61 F.2d 872 (7th Cir. 1932). But cf. United States v. Kallas, 272 F. 742 (W.D. Wash. 1921). Failure to caution, however, may be one of several factors entering into a finding of "involuntariness." See Harris v. South Carolina, 338 U.S. 68, 70 (1949); Turner v. Pennsylvania, 338 U.S. 62, 64 (1949).


32. See communications from Robert J. Barrett and Howard V. Calverley, supra note 10. But see communication from M.L. Harney, supra note 12.

33. Congress recognized the added importance of assistance of counsel in cases of extreme gravity when it provided, in 1790, for assignment of counsel in federal trials for "treason, or other capital crime." Rev. Stat. § 1034 (1790), as amended, 18 U.S.C. § 3005 (Supp. 1951). And Supreme Court insistence on assignment of counsel in state courts has depended largely on the gravity or complexity of the charge involved. E.g., Powell v. Alabama, 287 U.S. 45 (1932) (capital case requires assigned counsel); Rice v. Olson, 324 U.S. 786, 789-91 (1945) (complexities of charge necessitate services of counsel); see Uveges v. Pennsylvania, 335 U.S. 437, 440-1 (1948). But a few apparently inconsistent Supreme Court decisions have caused confusion in this field. See Frank, Cases on Constitutional Law 762 (1950).
The hearing and commitment requirement in Rule 5 is, however, not appropriate in the Carignan situation. This provision protects the accused by requiring that his detention be justified in a "probable cause" hearing based on a formal complaint, and by transferring him from police control to the custody of a United States Marshal. Both of these aims are fully achieved at the original arraignment. Hence repetition of the hearing and commitment would give the accused no additional protection. And such repetition might unduly hamper law enforcement, since officers could do no questioning at all on other crimes unless they already possessed sufficient evidence of a second crime for a showing of probable cause.


The preliminary hearing may be waived by the defendant. If not waived, the hearing must be held "within a reasonable time." Fed. R. Crim. P. 5 (c).

35. Rule 5 does not specify who shall take custody of the accused after commitment; it merely says that "the commissioner shall forthwith hold him to answer in the district court. . . ." Fed. R. Crim. P. 5 (c). But Congress has given custody of temporarily detained prisoners to the Marshal, 18 U.S.C. § 4086 (Supp. 1951) and to the Bureau of Prisons, 18 U.S.C. § 4042 (Supp. 1951). (the Bureau is charged with running federal penal institutions.)

The varieties of mistreatment listed supra note 5 thrive on conditions of complete police control of the prisoner. See 4 National Commission, op. cit. supra note 5 at 208-12, tables 7, 8, 10, 11. This exclusive—and occasionally abusive—control is generally not possible after commitment under Rule 5 for two reasons:

1. The prisoner's location is then known to his friends and counsel, who may visit him while in custody.

2. Although a Marshal may make arrests without warrant, 18 U.S.C. § 3053 (Supp. 1951), exercises all law-enforcement powers of a state sheriff, 28 U.S.C. § 549 (Supp. 1951), and is supervised by the Attorney General, 28 U.S.C. § 547 (c) (Supp. 1951), he is nevertheless an officer of the district court and responsible to it. 28 U.S.C. § 547 (a), (b) (Supp. 1951). Moreover, the Marshal has no special reason to crave convictions and will generally not tolerate official abuse of his prisoners. See Comment, 53 Yale L.J. 758, 769 n.73 (1944). And even interrogation of prisoners by Marshals is probably rare. See communication from Ernest Volkart, note 10 supra. In the District of Columbia, in fact, police have accused Marshals of blocking all post-arraignment interrogation. See Hearings before Subcommittee No. 2 of Committee on Judiciary, House of Representatives, on H.R. 3690, 78th Cong., 1st Sess., p. 6 (1943); and see id. at 5, 7, 10. But see testimony of Judge Harold M. Stephens, id. at 13: "[I]n my view, the third degree is applied as often after presentation [before a commissioner] as before. . . ."

36. The only purpose of the preliminary examination is to determine whether or not there is sufficient evidence to warrant the prisoner's detention. See Barber v. United States, 142 F.2d 805, 807 (4th Cir.), cert. denied, 322 U.S. 741 (1944). And see Keegwin, Cases in Criminal Procedure 167 (1939). But such sufficiency is examined when the prisoner is arraigned on the first charge, and at that time the legality of detention is established. A preliminary hearing on a second crime would merely afford additional—and superfluous—proof of this legality. On the other hand, if the government failed to establish "probable cause" at a re-arraignment, the detention would still remain proper because based on the earlier valid commitment.

37. The "probable cause" standard is far less demanding than that required for conviction in a criminal trial, but it does require enough evidence to convince the
For a prisoner facing interrogation about a second and unrelated crime, limited re-arraignment, consisting of a renewal of the commissioner’s instruction without formal commitment procedures, would best protect individual rights while allowing federal officers reasonable latitude for investigation. This procedure would also precede questioning of previously-arraigned prisoners not suspected of a second crime but merely regarded as informers or witnesses. Police often start interrogation thinking that a prisoner is merely an informer. But the exact course of interrogation is unpredictable, and the

commissioner that the complaint must be investigated. See 1 BISHOP, CRIMINAL PROCEDURE § 233 (4th ed. 1895).

Communications from Robert J. Barrett and C. C. Garner, note 10 supra, indicate the difficulties posed by necessity of a new formal commitment. In some cases, “it could well be that investigation of other offenses possibly chargeable to the prisoner will simply be dropped and therefore the full culpability of the defendant never brought to the court’s attention.” Communication from C. C. Garner, note 10 supra.

The specific effect of a full re-arraignment requirement might be to prevent police from conducting even such interrogation as would be proper prior to any arraignment. Officers can ask questions after arrest so long as the interrogation is not coercive and takes place before the delay in arraignment becomes “unnecessary.” See Symons v. United States, 175 F.2d 615 (9th Cir. 1949), cert. denied 339 U.S. 985 (1950). “[T]he mere fact that the confession is made to a police officer, while the accused was under arrest in or out of prison, or was drawn out by questions, does not render the confession involuntary, but, as one of the circumstances, such imprisonment may be taken into account in determining whether or not the statements of the prisoner were voluntary.” Bram v. United States, 168 U.S. 532, 558 (1897), citing Sparf v. United States, 156 U.S. 51, 55 (1895), and Hopt v. Utah, 110 U.S. 574 (1884).

A prisoner questioned prior to any arraignment will not, however, have the benefit of the commissioner’s instruction before answering questions. But the permissible period of such pre-arraignment interrogation is usually short, due to the “unnecessary delay” regulation. See note 8 supra. Yet despite the brevity of this period, some sort of magisterial enlightenment of the accused—similar to that here proposed for post-arraignment interrogation concerning other crimes—would be advisable. In federal law the new Uniform Code of Military Justice, 64 STAT. 108 (1950), 50 U.S.C. §§ 551-736 (Supp. 1951), comes closest to providing such enlightenment. Art. 31 (b) provides: “No person subject to this code shall interrogate, or request any statement from, an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement . . . and that any statement made by him may be used as evidence against him in a trial by court-martial.” (See also this provision’s predecessor, Article of War 24, 41 STAT. 792 (1920), as amended 62 STAT. 631 (1948), 10 U.S.C. § 1495 (Supp. 1951).) Art. 31 (d) of the new Code excludes from evidence any statement gathered in violation of subsection (b), supra.

38. If the prisoner is originally arraigned and committed on more than one charge, however, it should be assumed that he is prepared to face questioning on any of these charges. For although only one writ of commitment is necessary to imprison the person for all charges, 18 U.S.C. § 3047 (Supp. 1951), a separate complaint is filed for each charge on which commitment is based. See MILLS, U. S. COMMISSIONERS MANUAL § 30 (3d ed. 1932). And it is likely that the prisoner will understand that the commissioner’s advice as to the right to silence and the right to counsel covers all charges for which he has seen a complaint at arraignment and for which he has been committed.

supposed "informer" may become a "suspect" in a matter of minutes, and a confessor shortly thereafter.\footnote{See People v. Perez, 300 N.Y. 208, 90 N.E.2d 40 (1949), \textit{cert. denied} 338 U.S. 952 (1950); 1 Svy. L. Rev. 521 (1950). Here defendant was held for 24 hours, questioned about a murder, without arraignment, and then committed by a General Sessions judge to the city prison as a material witness in default of bail. Thereafter he was questioned over a period of five and one-half days, and at one point was refused permission to consult counsel. At the end of this period, Perez confessed to the murder and was then arraigned. At trial the judge refused to charge the jury that it might consider the post-arrest detention as an unnecessary delay in arraignment and thus a factor involved in determining voluntariness. In affirming defendant's conviction, the Court of Appeals upheld the trial judge's refusal, stating, "Certainly at the time of commitment there was ample reason to hold him as a witness, and the police then did not have sufficient information to arraign him on a murder charge." 300 N.Y. at 219, 90 N.E.2d at 46.}

Limited re-arraignment need not, however, be a prerequisite to questions about offenses closely related to the original charge. For example, if a suspect arraigned on a counterfeiting charge has not been arraigned before questioning on the technically separate crime of passing counterfeit money,\footnote{The following activities connected with counterfeiting are separate offenses, yet all are intimately related and all involve the same maximum penalties: the act of counterfeiting government obligations, 18 U.S.C. § 471 (Supp. 1951); passing or attempting to pass such counterfeit obligations with intent to defraud, 18 U.S.C. § 472 (Supp. 1951); buying or selling such counterfeit obligations with the intent that they shall be used as true, 18 U.S.C. § 473 (Supp. 1951); possessing plates or stones for purposes of counterfeiting, 18 U.S.C. § 474 (Supp. 1951).} a confession to the latter crime should still be admissible. An exception to re-arraignment requirements should thus be made for crimes based on the same act or transaction or on two or more acts or transactions connected together or constituting

40. See People v. Perez, 300 N.Y. 208, 90 N.E.2d 40 (1949), \textit{cert. denied} 338 U.S. 952 (1950); 1 Svy. L. Rev. 521 (1950). Here defendant was held for 24 hours, questioned about a murder, without arraignment, and then committed by a General Sessions judge to the city prison as a material witness in default of bail. Thereafter he was questioned over a period of five and one-half days, and at one point was refused permission to consult counsel. At the end of this period, Perez confessed to the murder and was then arraigned. At trial the judge refused to charge the jury that it might consider the post-arrest detention as an unnecessary delay in arraignment and thus a factor involved in determining voluntariness. In affirming defendant's conviction, the Court of Appeals upheld the trial judge's refusal, stating, "Certainly at the time of commitment there was ample reason to hold him as a witness, and the police then did not have sufficient information to arraign him on a murder charge." 300 N.Y. at 219, 90 N.E.2d at 46.

41. The circumstances of the \textit{Perez} case, supra, point up the necessity for placing two other classes of federal prisoners under the protection of limited re-arraignment: material witnesses committed under \textit{FED. R. CRIMX. P.} 46(b) and prisoners detained on a bench warrant under \textit{FED. R. CRIMX. P.} 9. Since prisoners in neither group enter into Rule 5 arraignment proceedings before commitment, they may not be aware of their rights unless instructed by a commissioner. Thus they should receive such instruction before they undergo any interrogation—even though the questioning concerns the offense which caused their detention. See note 43 \textit{infra.} (It would be technically inaccurate, however, to call this process limited re-arraignment.) A similar precaution might also be advisable for prisoners serving sentences in federal prison who are questioned about other crimes.

Limited re-arraignment may, in practice, be more important for some types of prisoners than for others. Prisoners new to jails and policemen would gain substantial protection from such a requirement. But repeated instructions might not teach experienced and knowledgeable criminals anything they did not already know. See Carignan v. United States, supra note 13 at 959 (concurring opinion). The seasoning of these veteran offenders, however, means that exempting them from limited re-arraignment would provide the police with no psychological advantage in questioning them. Moreover, any attempt at exemption would involve the monumental task of sifting those prisoners who need limited re-arraignment from those who do not, or require an arbitrary distinction between professional and other types of criminals.
a common scheme or plan. This definition might cause occasional confusion among federal officers, but it does provide a rational and practical method to obviate incessant interruption of law enforcement routine.

When the Carignan decision comes before the Supreme Court this term, the Court should consider the problem in terms of all the policies of Rule 5. The Carignan decision may not be warranted by precedent, yet scrupulous protection of prisoner rights requires amendment of Rule 5 to provide for limited rearraignment. Although the present rule might be extended by a Supreme Court decision, formal amendment would lend the new requirement statutory standing and put federal agents on clear notice of their increased obligations. Such an amendment would ensure that prisoners receive ade-

42. This description of crimes for which limited re-arraignment would be unnecessary comes from Fed. R. Crim. P. 8(a): “Joinder of Offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.” The entire set of joinder criteria might be employed in the re-arraignment rule were it not for the “same or similar character” criterion; use of this test would permit quizzing, without limited re-arraignment, on a crime wholly apart from, though “similar” to, the original offense, thus unduly widening the exceptions to the new requirement.

43. The Supreme Court has “the power to prescribe . . . rules . . . with respect to any or all proceedings prior to and including verdict, or finding of guilty or not guilty . . . in criminal cases . . . in the United States district courts . . . and in proceedings before United States commissioners. . . . All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.” 62 Stat. 846 (1948), as amended, 64 Stat. 158 (1950), 18 U.S.C. § 3771 (Supp. 1951).

The suggested amendment might read as follows:

“(d). (1). Before an officer shall question any prisoner committed under the terms of this Rule or Rule 40 about any offense not described in the original complaint or complaints, the officer shall bring the prisoner before a commissioner. The commissioner shall inform the prisoner of the nature of the offense about which questions are to be asked and inform him of his right to retain counsel; the commissioner shall also inform the prisoner that he is not required to make a statement and that any statement made by him may be used against him. But the above provisions shall be unnecessary if the offense described in the original complaint or complaints and the other offense under investigation are based on the same act or transaction or on two or more acts connected together or constituting parts of a common scheme or plan.

“(2). Before an officer shall question any prisoner committed under the terms of Rule 9 or Rule 46 (b) about any offense, he shall bring the prisoner before a commissioner for the instruction described in paragraph (1) of this section. This procedure shall be repeated before interrogation of the prisoner concerning any other offense, unless such other offense and the first offense are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.”

See, as to paragraph (2), note 40 supra.
quate instruction and opportunity to consult counsel before they face jailhouse questioning.\textsuperscript{44}

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44. Controversy persists as to the proper techniques for enforcement of Rule 5 provisions. Criticism of the rigid exclusion policy has been widespread and often angry. \textit{E.g.}, Reed, J., dissenting in Upshaw v. United States, \textit{supra} note 6, at 414, and cases cited \textit{id.} at 434, n.29; state cases cited in Note, 2 \textit{VAND. L. REV.} 472 n.12 (1949); Inbau, \textit{The Confession Dilemma in the United States Supreme Court}, 43 \textit{ILL. L. REV.} 442 (1948); Waite, \textit{Police Regulation by Rules of Evidence}, 42 \textit{MICH. L. REV.} 679 (1944).

Summarized, the objections to the exclusion rule are: (1.) Merely excluding the confession does not always protect the prisoner against unlawful methods, since a confession produced during illegal detention may be used to secure other damaging evidence. See, \textit{e.g.}, United States v. Bayer, 331 U.S. 532 (1947). (2.) Exclusion may punish the public by freeing a guilty man. (3.) The reason for the exclusion often has no relation to the voluntariness or trustworthiness of the confession. (4.) Examination of the legality of detention or questioning may focus attention of trial participants on police conduct rather than on the guilt or innocence of defendant. For further discussion of these objections, see \textit{Memorandum, supra} note 31, at 41-4.

Critics of the exclusion rule have taken several approaches. Some have attempted to scrap the exclusion rule without suggestion of an alternative. A bill introduced by Representative Hobbs of Alabama, H.R. 3690, 78th Cong., 1st Sess. (1943) provided that tardy arraignment should not "render inadmissible any evidence . . . otherwise admissible." See \textit{Hearings, supra} note 35. The bill was unsuccessful. For history of this attempted legislation, see Dession, \textit{supra} note 8, at 710-712; 38 \textit{J. CRIM. L. \\& CRIMINOLOGY} 136 (1947). For criticism of this approach, see \textit{Memorandum, supra} note 31, at 17-19.

Another approach, recommended in \textit{Memorandum, supra} note 31, at 44-5, and in Comment, 53 \textit{YALE L. J.} 758, 772 (1944), would retain exclusion "in a more flexible form," with the trial judge possessing discretion to bar the confession "when the nature of the imprisonment and the interrogation gives him doubts about trustworthiness, even though these doubts are not enough to convince him that the confession is involuntary. . . ." \textit{Memorandum, supra} note 31, at 45. But such a flexible exclusion policy has been recommended only if it is buttressed by subjection of offending officers to summary contempt proceedings. If necessary this could be accomplished by amending 18 U.S.C. 401 (Supp. 1951) to bring within its express coverage officers who violate the requirements of Rule 5.

If limited re-arraignment is incorporated into Rule 5, legislative or judicial consideration of these and other exclusion or contempt techniques will have to take into account enforcement problems raised by the amendment to Rule 5.

Whatever the enforcement scheme ultimately adopted, it should not provide for the exclusion from evidence of completely spontaneous and unsolicited statements made after the initial arraignment but prior to limited re-arraignment. In such a situation, officers would have no chance to execute limited re-arraignment; moreover, in the absence of any interrogation, the prisoner would have less need for the commissioner's instruction. The limited re-arraignment amendment, however, should govern any questioning which follows and concerns the prisoner's spontaneous statement.