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Constitutional Law—Due Process—Psychologically Coerced Confession

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would logically seem to belong with the other two. However, without commenting on the soundness of the reasoning, it is submitted that these three cases and others stand as authority for the proposition that the Supreme Court of Montana, under certain circumstances, has original jurisdiction grounded upon its appellate function. The court has said that even without objection it could not assume original jurisdiction unless authority to do so could be found in the constitution.[18] Therefore, it would seem implicit in the *Gullickson*, *Bottomly*, and *Carey* cases that, before hearing the petitions, the court had first decided it had original jurisdiction under the Montana Constitution.

Moreover, it is submitted that the instant case stands for the same proposition even though the court has not seen fit to expressly set it forth. Here the question has been evaded with the excuse that the petition prayed for an injunction, a specifically enumerated writ. Yet the declaratory relief sought was granted, although not *eo nomine*.

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CONSTITUTIONAL LAW—DUE PROCESS—PSYCHOLOGICALLY COERCED CONFESSION—After a series of housebreakings involving rape or attempted rape, petitioner, a 27 year old negro service station attendant, was arrested after midnight in a white neighborhood and jailed on an "open charge of investigation." Though no physical coercion was applied, petitioner was not presented for preliminary hearing but was kept practically incommunicado for five days, during which time he was interogated two to three hours each morning and afternoon. At that point a confession was made consisting mainly of yes-or-no answers to questions, some of which were quite leading. Five more days of incarceration with continuation of the same treatment culminated in a second confession. Defendant was convicted of burglary with intent to rape and sentenced to death largely on the weight of the two confessions. In connection with a pleaded defense of insanity, psychiatrists testified he was a schizophrenic and highly suggestible, and his mother testified he had always been "thickheaded," having entered school at age eight and left at sixteen while still in the third grade. On appeal the Supreme Court of Alabama affirmed. On certiorari to the Supreme Court of the United States, *held*, reversed. Confessions obtained as in this case are involuntary, notwithstanding the absence of physical brutality and long continued interrogation, and their use is a denial of due process. *Fikes v. Alabama*, 77 Sup. Ct. 281 (1957) (Justice Frankfurter, joined by Justice Brennan, concurring separately; Justice Harlan, joined by Justices Reed and Burton, dissenting).

This is the latest in a line of cases[1] involving the Court's declared rule

[18] *cf.* State *ex rel.* City of Helena v. Helena Waterworks Co., 43 Mont. 169, 115 Pac. 200 (1911).

[1] Principal United States Supreme Court cases in this series are: Brown v. Mississippi, 299 U.S. 278 (1936); Chambers v. Florida, 309 U.S. 227 (1940); White v. Texas, 310 U.S. 530 (1940); Lisbena v. California, 314 U.S. 219 (1941); Ward v. Texas, 316 U.S. 547 (1942); Ashcraft v. Tennessee, 322 U.S. 143 (1944); Lyons v. Oklahoma, 322 U.S. 596 (1944); Malinsky v. New York, 324 U.S. 401 (1945); Haley

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that it will reverse criminal convictions in the state courts based on involuntary confessions, as being a denial of due process of law guaranteed by the fourteenth amendment.[3]

The coerced confession rule based on the due process clause was first invoked in 1936 in *Brown v. Mississippi*.[3] There the defendants, all ignorant negroes, were convicted principally by means of confessions secured through repeated beatings, brutality, and physical torture which was admitted by witnesses at the trial, and the Supreme Court inaugurated this precept by finding the confessions to be involuntary and the convictions void. Affirmative brutality thus clearly became a basis for reversal, and subsequently the Court found little difficulty in reversing convictions involving confessions tainted by physical abuse.[4] The problem has been in the application of the rule where the physical element is absent, or at least not so obvious, and the decision must be based on principally psychological coercion or a combination of physical and psychological factors. This is illustrated by a brief consideration of a few of the principal cases.

In 1941, in the *Lisbena*[5] case, a murder suspect was taken from his house to another, where a dictaphone was concealed, "slapped" around and continuously questioned for 48 hours without sleep. After arraignment he was held incommunicado, finally promising to confess if he could eat. Given food he confessed at about 3:00 a.m. His conviction was affirmed, two justices dissenting. Although the Court stated it would have reversed if the confessions had been found to be coerced, apparently it was reluctant to so find in the absence of more physical pressure. Significant here is the Court's disregard of such elements as deprivation of rest and food; the original concept of physical brutality prevailed.

In 1944 a conviction based on a confession was reversed where the defendant was repeatedly grilled over a four day period while kept naked in a hotel room. There was a sharp conflict in the evidence as to physical punishment, but the other methods employed—denial of rest, long continued interrogation during unusual hours, and illegal detention without clothes—were considered sufficient to place the stamp of "involuntary" on the confession.[6] This opinion also declared that the Court would determine the question of due process independently from the evidence and where coersion was present the conviction would be reversed, notwithstanding the ad-

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v. Ohio, 332 U.S. 596 (1948); Lee v. Mississippi, 333 U.S. 742 (1948); Watts v. Indiana, 338 U.S. 49 (1949); Turner v. Pennsylvania, 338 U.S. 62 (1949); Harris v. South Carolina, 338 U.S. 68 (1949); Johnson v. Pennsylvania, 340 U.S. 881 (1950); Gallegos v. Nebraska, 342 U.S. 55 (1951); Stroble v. California, 343 U.S. 181 (1952); Stein v. New York, 346 U.S. 156 (1953); Leyra v. Denno, 347 U.S. 557 (1954), and the instant case.

[2]A distinction should be made here between authority to supervise state courts and authority to supervise federal courts. This latter power is based on the fourth and fifth amendments and on the power to supervise generally federal criminal proceedings. McNabb v. United States, 318 U.S. 332 (1943); United States v. Mitchell, 322 U.S. 65 (1944).

[3]299 U.S. 278 (1936).

[4]See White v. Texas, 310 U.S. 530 (1940); Ward v. Texas, 316 U.S. 535 (1942).

[5]Lisbena v. California, 314 U.S. 219 (1941).

[6]Malinsky v. New York, 324 U.S. 409 (1945).

ditional evidence may have been sufficient to convict standing alone.[7] It is important to note that this decision was not grounded on physical brutality, and after this case the physical element was not considered a prerequisite of coercion. The same reasoning was applied shortly thereafter in reversing the *Ashcraft* case[8] upon a finding that constant interrogation by relays for 36 hours amounted to coercion.

Reversal was ordered in 1948 in the *Haley* case, when a 15 year old boy was convicted of murder after being arrested at midnight and questioned by relays of police until he signed a confession early the next morning.[9] This established the willingness of the court to condemn lengthy interrogation at unusual hours, especially where facilitated by relay tactics. Implicit here also is a consideration of the subjective ability of the accused to resist the methods employed.[10] Another conviction was reversed the same year where a 17 year old negro boy was found guilty of assault with intent to rape upon the testimony of two detectives who stated he had orally confessed to them shortly after arrest.[11] The defendant assailed the confession as being involuntary, following intimidation and maltreatment. The reasoning here appears to be largely an extension of that in the *Haley* case, especially in connection with the consideration of age and ability to resist.

The *Leyra*[12] case turned on a peculiarly psychological point. The defendant was suffering from a sinus affliction and after a long period of questioning, was taken to a highly trained psychiatrist for the purported purpose of medical aid. Instead, while pretending to help the accused, he secured a confession which led to conviction. The Supreme Court had little difficulty in finding a violation of due process in the methods used and reversed the conviction. The psychological aspect of this case is probably nearer the instant case than any other; the only punishment approaching "physical" being that of deprivation of rest.

The decision in the instant case is based primarily upon the accused's inability to resist methods which heretofore have not been sufficient to render a confession involuntary. Conspicuous is the absence of such factors as deprivation of food and rest, long continued interrogation, relay tactics, and questioning during unusual hours. These are the factors which have appeared in greater or lesser degree in the foregoing cases to bridge the gap between the affirmative physical brutality in the *Brown* case and the purely psychological coercion in the instant case. Considering this case in the light of this "bridge" it is readily apparent that the decision rests solely and entirely upon the psychological aspect, and thus is the most liberal decision on coerced confessions yet handed down. In delivering the majority opinion Justice Warren stated:

> There is no evidence of physical brutality, and particular

[7]Stein v. New York, 346 U.S. 156 (1953), apparently overruled this declaration, at least where the question has been presented to a jury, by holding that the jury may consider the confession, reject it as involuntary, and still convict on the weight of the remaining evidence.

[8]Ashcraft v. Tennessee, 322 U.S. 143 (1944).

[9]Haley v. Ohio, 332 U.S. 596 (1948).

[10]Subsequently this policy was expressed in Stein v. New York, 346 U.S. 156 (1953), and is quoted in the principal case. See note 14, *infra*.

[11]Lee v. Mississippi, 333 U.S. 742 (1948).

[12]Leyra v. Denno, 347 U.S. 557 (1954).

> elements that were present in other cases in which this Court ruled that a confession was coerced do not appear. . . . The totality of the circumstances that preceded the confessions in this case goes beyond the allowable limits. The use of confessions secured in this setting was a denial of due process. . . . 'The limits in any case depend upon a weighing of the circumstances of pressure against the power of resistance of the person confessing. What would be overpowering to the weak of will or mind might be utterly ineffective against an experienced criminal[a]. . . .' We hold that the circumstances of pressure applied against the power of resistance of this petitioner, who cannot be deemed other than weak of will or mind, deprived him of due process of law.'"[14]

Historically, the determination of admissibility of the involuntary confession in the state courts has been through application of the test of reliability—whether it is as likely to be false as true.[15] The application of the fourteenth amendment by the Supreme Court of the United States to coerced confession cases has presented a new concept. In the earlier cases the Court's rationale seems to be that it was the accused's constitutional right to have a fair trial, and that coercion, not being conducive to truth and accuracy, constituted a denial of due process of law. But after the *Ashcraft* case it appears that if the confession be the product of coercion it is inadmissible per se, without regard to its veracity.

Underlying all the coerced confession cases are two principal questions. First, to what degree ought the Supreme Court of the United States supervise criminal proceedings in the state courts? This issue was squarely presented for determination in *Chambers v. Florida.*[16] Counsel for the state challenged the power of the Court on the ground that the nature of the confession had already been examined by the state courts and found as a matter of fact to be voluntary, and that any attempt to set aside this finding would be a usurpation of jurisdiction. In rejecting this contention and reversing the conviction, the Court declared that *it* would determine the nature of all such confessions independently from the evidence.[17] The second problem, the factual prerequisites for a finding that a particular confession is "involuntary" and "coerced," concerns the unfolding, increasingly liberal doctrine previously discussed herein.

That these two questions constitute the principal difference of opinion in the majority and dissenting views throughout the coercion cases is nicely illustrated by the instant case.[18] Here, the dissenting opinion maintains that (1) this is simply a set of facts over which reasonable men might differ as to conclusion, and (2) reversal oversteps the boundary between the rightful provinces of the state courts and the Supreme Court. The concurring

[13]Quoting Stein v. New York, 346 U.S. 156, 185 (1953).

[14]Instant case at 284-85.

[15]This is true in Montana. State v. Dixson, 80 Mont. 181, 260 Pac. 138 (1927); State v. Walsh, 72 Mont. 110, 232 Pac. 194 (1924); State v. Gule, 56 Mont. 485, 186 Pac. 329 (1919). See also 7 WIGMORE, EVIDENCE § 2070 (3d ed. 1940).

[16]309 U.S. 227 (1940).

[17]This was affirmed subsequently in Malinsky v. New York, 324 U.S. 401 (1945), and has been the procedure followed in each of the above cases.

[18]See also Ashcraft v. Tennessee, 322 U.S. 143 (1944) (dissenting opinion).

opinion recognized the delicacy of the Supreme Court's position, but decided that the circumstances taken as a whole justified reversal.

The foregoing considerations demonstrate the extent to which the instant case exceeds those which preceded it. The question which remains is the outlook for the future. It is submitted that the decision in the instant case represents one further stage in the liberal evolution of the coerced confession rule, finally grounding a decision on totally psychological coercion, and that this doctrine will persist as a basis of condemnation in future involuntary confession cases.

CHARLES C. LOVELL

CRIMINAL LAW—FELONY-MURDER RULE—RESPONSIBILITY FOR DEATH OF FELLOW ARSONIST—Defendant service station lessee hired Donald Freestone to burn his station. Freestone, unknown to defendant, induced Mervin Bishop to help commit the arson. Defendant was not present when the arson was committed. Bishop acted as a look-out while Freestone spread gasoline about the station. The pilot light of a water heater caused the gasoline to explode, and both Freestone and Bishop died as a result of burns received in the explosion. Defendant was convicted of first degree murder for the death of Bishop. On appeal to the Supreme Court of Montana, *held,* affirmed. Any death directly attributable to a plot to commit arson makes all the conspirators equally guilty of first degree murder. *State v. Morran,* 306 P.2d 679 (Mont. 1957) (Justice Davis concurring; Justices Angstman and Anderson dissenting on a question of evidence).

At the common law, a homicide committed while perpetrating a felony was murder,[1] and from an early date Montana has provided a similar rule by statute. The applicable statutes provide that murder is the unlawful killing of a human being with malice aforethought,[2] and that all murder committed in the perpetration or the attempt to perpetrate arson, rape, robbery, burglary, or mayhem, is murder in the first degree.[3] When a homicide results unintentionally from the perpetration or the attempt to perpetrate a felony, the malice necessary to make the homicide murder is supplied by the intent to commit the felony, and is transferred by operation of law to the act which caused the death.[4] Thus, any death, though unin-

[1]Mansell and Herbert's Case, 2 Dyer 128b, 73 Eng. Rep. 279 (K.B. 1555).

[2]REVISED CODES OF MONTANA, 1947, § 94-2501 (Hereinafter the REVISED CODES OF MONTANA are cited R.C.M.).

[3]R.C.M. 1947, § 94-2503.

[4]26 AM. JUR., *Homicide* § 39 (1940). An interesting question at this point is the effect of the Montana statutes upon the existence of malice as an ingredient in the felony-murder rule. It could be argued that the requirement of malice is dispensed with through the enumeration in section 94-2503 of the five felonies to which the felony-murder rule applies, or, in other words, that the statute creates a felony-murder rule, limits it to the five named felonies and does away with the traditional position that malice is an essential ingredient in the crime of murder. Another effect of this construction would be that except as provided by the statute there is no felony-murder rule in Montana.

However, section 94-2501 provides that "murder is the unlawful killing of a human being with malice aforethought." This appears to make malice an essential ingredient in all cases of murder. Also, section 94-2503 says "all murder" committed in the course of the named felonies is first degree murder. This appears to