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CRIMINAL PROCEDURE — EXCLUSIONARY RULE — EVIDENCE OBTAINED FROM DEFENDANT DURING PERIOD OF UNNECESSARY DELAY IN PRESENTING HIM BEFORE A JUDICIAL OFFICER SUBJECT TO EXCLUSION UNDER M.D.R. 723(a). *JOHNSON v. STATE,* 282 Md. 314, 384 A.2d 709 (1978).

## I. INTRODUCTION

In *Johnson v. State*[1] the Court of Appeals of Maryland held in a 4-3 decision that failure to comply with Maryland District Rule 723(a),[2] which requires prompt arraignment of a criminal defendant after his arrest, will result in the exclusion of all statements made by the defendant during the period of impermissible delay[3] and those made subsequent thereto which are tainted by breach of the rule.[4] Prior to *Johnson,* Maryland had espoused the traditional test of voluntariness with regard to the admission of confessions and statements made during a delay in presentment of a defendant. In abandoning this less severe test, the court of appeals aligned Maryland with a small minority of states[5] which have adopted a position similar to the *McNabb-Mallory* Rule,[6] a rule once applicable in federal prosecutions, but which has since been modified by Congress.[7] This Note discusses the exclusionary rule adopted by the *Johnson* court, examines the differences between the majority and dissenting opinions, and explores the portent of the *Johnson* decision for future criminal procedure adjudication.

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1. 282 Md. 314, 384 A.2d 709 (1978).
2. See text accompanying notes 13-14 *infra.*
3. *Id.* at 328-29, 384 A.2d at 717. Judge Levine delivered the opinion of the court. Chief Judge Murphy filed a dissenting opinion with which Judges Smith and Orth concurred. *Id.* at 342-51, 384 A.2d at 724-29. Judge Orth also filed a dissenting opinion with which Chief Judge Murphy and Judge Smith concurred. *Id.* at 333-42, 384 A.2d at 719-24.
4. *Id.* at 329, 384 A.2d at 717.
5. Delaware, Florida, Montana, and Pennsylvania have abandoned use of the voluntariness standard to determine admissibility of statements obtained during a pre-arraignment delay. *E.g.,* Webster v. State, 59 Del. 54, 213 A.2d 298 (1965); Vorhauer v. State, 59 Del. 35, 212 A.2d 886 (1965); Oliver v. State, 250 So. 2d 888, 889 (Fla. 1971); State v. Bentos, 570 P.2d 894, 900 (Mont. 1977); Commonwealth v. Davenport, 471 Pa. 278, 370 A.2d 301 (1977); Commonwealth v. Dixon, 454 Pa. 444, 311 A.2d 613 (1973); Common wealth v. Tingle, 451 Pa. 241, 301 A.2d 701 (1973); Commonwealth v. Futch, 447 Pa. 389, 290 A.2d 417 (1972).
6. The *McNabb-Mallory* rule is derived from the Supreme Court decisions in McNabb v. United States, 318 U.S. 332 (1943), Upshaw v. United States, 335 U.S. 410 (1948), and Mallory v. United States, 354 U.S. 449 (1957). See text accompanying notes 32-67 *infra.*
7. The *McNabb-Mallory* rule was modified by Congress with the passage of 18 U.S.C. § 3501 (1976). For a full discussion of the modification, see text accompanying notes 61-67 *infra.*

## II. THE FACTS

The events culminating in the *Johnson* decision began on January 13, 1975, when a man matching defendant Johnson's description committed a robbery. Subsequently, on January 24, 1975, Johnson allegedly was involved in a second robbery. Warrants for Johnson's arrest were obtained by the police on January 25, 1975.[8] He voluntarily surrendered to the police at 3:15 p.m. on January 30, 1975, and was immediately taken into custody, processed, and informed that he was under arrest. At approximately 3:20 p.m. he was given *Miranda*[9] warnings, but he nonetheless waived his right to remain silent and to have the advice of counsel. Johnson was then taken to an interrogation room where, as soon as the questioning began, he complained of stomach pains. The interrogation was immediately halted and the police offered to take Johnson to the hospital. Johnson declined this offer, but asked for permission to rest. He was then taken to a cell where he remained for the rest of that day and night.

The following morning, Johnson's condition seemed to have improved, and interrogation was resumed at 9:45 a.m. Johnson was given a second set of *Miranda* warnings, and again he waived his rights. The interrogation resulted in a ten page statement which Johnson signed at 3:45 p.m. In this statement Johnson incriminated himself in the first robbery of January 13, 1975.

At 4:00 p.m. on January 31st Johnson was taken before a commissioner for the first time, having been in police custody for over 24 hours.[10] After his appearance before the commissioner, Johnson was read his *Miranda* warnings for a third and final time. He again waived his rights and at 6:55 p.m. confessed outright to both the January 13th and January 24th crimes.

At a pretrial hearing Johnson sought to have the January 31st statements suppressed on the ground that the confessions were

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8. No arrest warrants were served on Johnson. He was, however, orally informed that he was under arrest. This constituted a possible violation of former M.D.R. 706(d), which requires an arresting officer to give an accused a copy of the arrest warrant "promptly after his arrest." The court of appeals, however, did not decide this issue. *See* Johnson v. State, 282 Md. 314, 319 n.3, 384 A.2d 709, 712 n.3 (1978).
9. *See* Miranda v. Arizona, 384 U.S. 436 (1966).
10. At the trial, a police officer was asked why Johnson, after his arrest, had not been promptly presented before a commissioner. He replied:

> A. Because he hadn't been interrogated then, sir, and we were still investigating the case.
>
> Q. In other words you wanted to keep him at the Annapolis Police Department, in a detention cell there, until you had such time and opportunity to interrogate him, is that correct?
>
> A. And not only that, Anne Arundel County Detention Center will not admit or take anybody that is sick.

Johnson v. State, 282 Md. 314, 318, 384 A.2d 709, 711-12 (1978).

inadmissible due to the delay in presenting him before a judicial officer, in violation of M.D.R. 723(a).[11] The trial court rejected this contention, admitted the statements, and Johnson was subsequently convicted. The Court of Special Appeals of Maryland affirmed.[12]

## III. THE PURPOSE OF THE STATUTE

The central inquiries presented to the *Johnson* court were the construction and remedy, if any, for a violation of M.D.R. 723(a),[13] which provides that:

> A defendant who is detained pursuant to an arrest shall be taken before a judicial officer without unnecessary delay and in no event later than the earlier of 1) 24 hours after arrest or 2) the first session of court after the defendant's arrest upon a warrant or, where an arrest has been made without a warrant, the first session of court after the charging document is filed. A charging document shall be filed promptly after arrest if not already filed.[14]

The purposes of the Maryland prompt presentment statute are twofold: it assures a defendant, that once taken into custody, he will receive impartial judicial supervision of his rights at the earliest possible stage of detention,[15] and prevents secret interrogation of the

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11. Johnson also argued that the statements were inadmissible because the confessions were tainted by the illegal delay in presenting Johnson before a judicial officer and were therefore inadmissible on the basis of Brown v. Illinois, 422 U.S. 590 (1975), which held that giving a *Miranda* warning does not alone purge the taint from a statement given after an illegal arrest. Johnson v. State, 282 Md. 314, 319, 384 A.2d 709, 712 (1978). The Court of Appeals of Maryland did not rule on these arguments, as it decided the case on M.D.R. 709(a). *Id.* at 319 n.3, 384 A.2d at 712 n.3.
12. 36 Md. App. 162, 373 A.2d 300 (1977).
13. The Court of Appeals of Maryland was actually confronted with a violation of M.D.R. 709(a). Since the time of Johnson's conviction, however, Chapter 700 of the Maryland District Rules has undergone extensive revision. M.D.R. 709(a) was changed to M.D.R. 723(a), but with only slight modifications. Therefore, for the sake of clarity, the court of appeals made references to M.D.R. 723(a), rather than M.D.R. 709(a), throughout the opinion. Johnson v. State, 282 Md. 314, 316 n.1, 384 A.2d 709, 710, n.1 (1978).
    M.D.R. 709(a) provided:
    > A defendant shall be taken before a conveniently available judicial officer without unnecessary delay and in no event later than the earlier of (1) twenty-four hours after arrest or (2) the first session of court after the charging of the defendant. Such charging shall take place promptly after arrest.
14. M.D.R. 723(a).
15. Johnson v. State, 282 Md. 314, 323, 384 A.2d 709, 714 (1978). It should be noted that M.D.R. 723(a) requires adherence to the provisions of M.D.R. 723(b). M.D.R. 723(b) provides that a judicial officer shall (1) inform the defendant of the offense with which he is charged; (2) advise the defendant of his right to counsel; (3) determine the defendant's eligibility for pretrial release pursuant to M.D.R. 721;

defendant by the police after his arrest. In essence, the rule assures that a judicial officer, not merely the police, will advise an arrested person of his constitutional rights.[16] Thus, underlying the rule is the assumption that police warnings given to a suspect after arrest are inadequate safeguards of his rights because "such warnings may well be meaningless in the coercive milieu of secret police interrogation."[17]

The prompt presentment requirement is not, however, a mere statutory rule of criminal procedure because, although not itself a constitutional right, it is the means by which the state implements procedures that guarantee an accused those rights. One of the most important functions of prompt presentment, for example, is to provide an immediate determination of probable cause.[18] Furthermore, prompt presentment assures that the time spent in custody by an individual "unreasonably seized" is kept to a minimum, in accordance with the fourth amendment proscription against unreasonable seizures.[19] In addition, one of the salutory effects of prompt presentment is to curtail the incidence of "round-up" or "dragnet" arrests.[20] By having an arrested person brought promptly before a magistrate, there will be a natural reluctance by the police to charge

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(4) make a determination of probable cause; (5) advise the defendant that he has the right to request a preliminary hearing, if the defendant is charged with a felony that is not within the jurisdiction of the court; and (6) advise the defendant of the date for trial or inform the defendant that he will be advised by clerk as to the date of the trial.

16. Alston v. United States, 348 F.2d 72, 73 (D.C. Cir.) (quoting Greenwell v. United States, 336 F.2d 962, 966 (D.C. Cir. 1964)), *cert. denied*, 380 U.S. 923 (1965).
17. *Id.*
18. The fourth amendment, as interpreted by the Supreme Court in Gerstein v. Pugh, 420 U.S. 103 (1975), requires a judicial determination of probable cause as a prerequisite to any extended restraint on liberty. M.D.R. 723(b)(4) requires that a defendant be released if a judicial officer finds that the defendant was arrested without probable cause.

    In Maryland, prompt presentment also ensures that a defendant will receive a prompt bail determination pursuant to M.D.R. 723(b), even though the "excessive bail" portion of the eighth amendment has not yet been deemed applicable to the states by the Due Process Clause of the fourteenth amendment. *But see* Schilb v. Kuebel, 404 U.S. 357, 365 (1971).
19. The fourth amendment to the United States Constitution states:

    > The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

    U.S. CONST. amend. IV. In Weeks v. United States, 232 U.S. 383 (1914), the Supreme Court held that illegally seized evidence was inadmissible in a federal trial. The Court applied the exclusionary rule to illegally seized evidence to state proceedings in Mapp v. Ohio, 367 U.S. 643 (1961).
20. Hogan & Snee, *The McNabb-Mallory Rule: Its Rise, Rationale and Rescue*, 47 GEO. L. J. 1 (1958) [hereinafter cited as HOGAN].

numerous individuals with the same crime.[21] The rule, in effect, "acts as a barrier to abuses of the criminal process."[22]

Prompt presentment also serves a second function in that it safeguards the fifth amendment privilege against self-incrimination[23] and the due process right to be free from coercive investigative methods.[24] By precluding secret detention the rule diminishes the opportunity for the police to use illegal tactics when interrogating the accused.

Critics of the prompt presentment requirement point out that if the police use coercive tactics, the evidence or confession obtained will be excluded even absent the rule.[25] It is not easy, however, for a defendant to prove that force, especially psychological coercion, was used against him. Certainly the police officer who is willing to use such methods can readily aver that he did not use coercive pressure.[26]

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21. *Id.* at 23. "The police would look rather ridiculous parading a regiment of arrestees before a committing magistrate and endeavoring to convince him that there is probable cause to link them all with a crime admittedly committed by one or two." *Id.*
22. Commonwealth v. Tingle, 451 Pa. 241, 248, 301 A.2d 701, 704 (1973) (Eagen, J., concurring).
23. The fifth amendment of the United States Constitution states that a defendant shall not be compelled to be a witness against himself in any criminal proceeding. The privilege against self-incrimination was held applicable to the states in Malloy v. Hogan, 378 U.S. 1 (1964).
24. Section four of the fourteenth amendment of the United States Constitution states that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law. . . . " U. S. CONST. amend. XIV, § 4. *See also* Brown v. Mississippi, 297 U.S. 278 (1936) (voluntariness is a requirement for any confession in a state proceeding, under the Due Process Clause of the fourteenth amendment).
25. Jackson v. Denno, 378 U.S. 368 (1964); Haynes v. Washington, 373 U.S. 503 (1963). Even if such a confession is excluded, however, the exclusion has done nothing to bar the use of the coercion, as it has already taken place. HOGAN, *supra* note 20, at 26-27.
26. HOGAN, *supra* note 20, at 27. Mr. Justice Frankfurter summed up the rationale for the rule in *McNabb v. United States* as follows:

> The purpose of this impressively pervasive requirement of criminal procedure is plain. . . . The lawful instruments of the criminal law cannot be entrusted to a single functionary. The complicated process of criminal justice is therefore divided into different parts, responsibility for which is separately vested in the various participants upon whom the criminal law relies for its vindication. 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. It aims to avoid all the evil implications of secret interrogation of persons accused of crime.

McNabb v. United States, 318 U.S. 332, 343-44 (1943).

Finally, prompt presentment ensures that a defendant is apprised of his constitutional right to counsel[27] by a neutral judicial officer, not merely the police. It has been argued that prompt presentment is not needed if the police advise a suspect of his right to counsel during the initial *Miranda* warnings.[28] Such a police warning, however, is not a substitute for prompt presentment because the police lack the impartiality of a neutral judicial officer.[29]

In summary, prompt presentment represents more than a mere statutory proscription. It is a legislative vehicle designed to protect fundamental constitutional rights. Consequently, prompt presentment acquires a *quasi-constitutional* basis.[30]

## IV. THE *McNABB-MALLORY* RULE

The exclusionary rule adopted in *Johnson* is similar to that fashioned by the Supreme Court in *McNabb v. United States,*[31] *Upshaw v. United States,*[32] and *Mallory v. United States.*[33] A discussion of these federal decisions, therefore, is appropriate for a full understanding of the Maryland decision.

The *McNabb-Mallory* rule required the exclusion[34] of any incriminating statement or confession, voluntary or otherwise,[35]

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27. The sixth amendment of the United States Constitution grants a defendant the right to have the assistance of counsel for his defense. In Gideon v. Wainwright, 372 U.S. 335 (1963), the Supreme Court ruled that the sixth amendment right to counsel was applicable in state court proceedings. The Court also stated that counsel must be appointed to represent an indigent defendant. *Id.* at 339-45. In Miranda v. Arizona, 384 U.S. 436 (1966), the Court ruled that a defendant in custody must be advised of his right to counsel prior to being questioned.
28. O'Neal v. United States, 411 F.2d 131, 136-37 (5th Cir.), *cert. denied,* 396 U.S. 827 (1969).
29. The Supreme Court, in its *Miranda* opinion, indicated that a police warning will not supplant prompt arraignment. Miranda v. Arizona, 384 U.S. 436, 463 n.32 (1966).
30. *Cf.* Wainwright v. City of New Orleans, 392 U.S. 598 (1968) (Douglas, J. & Warren, C.J., dissenting) (suggesting that the common law right to resist unlawful arrest has a quasi-constitutional basis because it is a means by which the fourth amendment is protected). At least one scholar has suggested that the right to prompt presentment is of a constitutional nature. *See* McCormick, Evidence §§ 340-41 (2d ed. 1972).
31. 318 U.S. 332 (1943).
32. 335 U.S. 410 (1948).
33. 354 U.S. 449 (1957).
34. In deciding that inculpatory statements or confessions obtained during "unnecessary delay" and thus illegal detention, were inadmissible, the Court fashioned a *per se* exclusionary rule. Upshaw v. United States, 335 U.S. 410, 413 (1948).
35. In *Upshaw* the Court stated that "a confession is inadmissible if 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. . . . ' " Upshaw v. United States, 335 U.S. 410, 413 (1948) (quoting United States v. Mitchell, 322 U.S. 65, 68 (1944)). Thus, the Court abolished voluntariness as the standard for admitting a confession obtained during illegal detention. *See also* Mallory v. United States, 354 U.S. 449, 453 (1957).

obtained from a defendant during a period of illegal detention.[36] Illegal detention, in the *McNabb-Mallory* context, was the period of time that constituted an "unnecessary delay" in presenting a defendant before a magistrate.

The *McNabb-Mallory* rule found its genesis in the case of *McNabb v. United States*.[37] Five members of the McNabb clan were arrested for the murder of a federal revenue agent.[38] The McNabbs, who were poorly educated Tennessee mountaineers, were held for two days during which intensive interrogation of each defendant was conducted. The confessions obtained by the police were held inadmissible by the Supreme Court, not on constitutional grounds,[39] but because of the violation of federal policy embodied in the federal statute requiring prompt arraignment.[40] The aftermath of *McNabb,* however, was judicial confusion, as some lower federal courts limited the exclusionary rule fashioned in *McNabb* to its facts.[41]

Two years after *McNabb* the Supreme Court refined the holding of *McNabb* in *Mitchell v. United States*.[42] In *Mitchell,* the defendant confessed shortly after arrest, but was held for eight days before being arraigned. The Court held that his confession was admissible because the "illegality of Mitchell's detention [did] not retroactively change the circumstances under which he made the disclosures."[43] Some courts interpreted *Mitchell* to mean that the delay must have induced the confession and that a confession not causally related to an unnecessary delay was admissible.[44] In essence, the decisions applied the exclusionary rule only when the delay had been accompanied by aggravating circumstances such as in *McNabb*.[45]

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36. "In effect it means, and can only mean, that given the concurrence of unlawful detention and a confession, the former contaminates the latter." HOGAN, *supra* note 20, at 11.
37. 318 U.S. 332 (1943).
38. Only three members of the McNabb family, two brothers and a cousin, actually petitioned the Supreme Court. Two of the other McNabbs charged with murder were acquitted by the trial court.
39. McNabb v. United States, 318 U.S. 332, 340 (1943). The petitioners had urged that the Court rule the confessions inadmissible under the fifth amendment. *Id.* at 339.
40. *Id.* at 345. The statute violated in *McNabb* was 18 U.S.C. § 595 (1934). Rule 5(a) of the Federal Rules of Criminal Procedure had not been promulgated at the time of *McNabb*.
41. HOGAN, *supra* note 20, at 5. In analyzing the *McNabb* decision, Hogan and Snee correctly point out that Justice Frankfurter contributed to the confusion surrounding the *McNabb* decision. The *McNabb* opinion is replete with phrases such as the "circumstances disclosed here," McNabb v. United States, 318 U.S. 332, 341 (1943), and the "circumstances in which the statements admitted in evidence against the petitioners were secured." *Id.;* HOGAN , *supra* note 20, at 4-5.
42. 322 U.S. 65 (1944).
43. *Id.* at 70.
44. Alderman v. United States, 165 F.2d 622 (D.C. Cir. 1947).
45. This position is difficult to reconcile with *McNabb* because the Court declined to decide *McNabb* on the basis of a possible fifth amendment violation. McNabb v. United States, 318 U.S. 332, 340 (1943).

The Supreme Court purported to settle the meaning of unnecessary delay in *Upshaw v. United States*[46] and *Mallory v. United States*.[47] In *Upshaw,* the Court ruled that any prearraignment detention for the purpose of obtaining a confession constituted an "unnecessary delay" under Rule 5(a) of the Federal Rules of Criminal Procedure.[48] In *Mallory,* the Court stated that the duty to arraign "without unnecessary delay," did not call for "mechanical or automatic obedience."[49] There could be brief delays for example, to verify the story or alibi of an accused through third parties. The delay in presentment, however, could not be for the purpose of extracting a confession.[50] This was the crux of the *McNabb-Mallory* rule. It was not the span of hours that was critical, but what happened during the delay. So long as the delay was not for the purpose of extracting a confession, it was not considered unnecessary.[51]

The Court's rationale for the *McNabb-Mallory* rule was based, in part, on the recognition that one of the purposes of Federal Rule 5(a)[52] was to avoid secret interrogations of a defendant.[53] Accordingly, the Court reasoned that admitting evidence that was the product of an illegal detention would frustrate the very purpose of the rule. In addition, although Congress had never explicitly defined the remedy for failure to comply with prompt presentment, the Supreme Court justified application of an exclusionary rule by reasoning that admission of evidence obtained by delay would not only "stultify the policy which Congress has enacted into law,"[54] but would also make the judiciary an accomplice to illegal behavior.[55] A final point in the Court's rationale for the *McNabb-Mallory* rule further illuminates its underlying policy considerations. The Court

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46. 355 U.S. 410 (1948).
47. 354 U.S. 449 (1957).
48. Upshaw v. United States, 335 U.S. 410, 414 (1948).
49. Mallory v. United States, 354 U.S. 449, 455 (1957).
50. *Id.*
51. *Id.*
52. FED. R. CRIM. P. 5(a). The rule provides that:
> 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 federal magistrate or, in the event that a federal magistrate is not reasonably available, before a state or local judicial officer authorized by 18 U.S.C. § 3041. If a person arrested without a warrant is brought before a magistrate, a complaint shall be filed forthwith which shall comply with the requirements of Rule 4(a) with respect to the showing of probable cause. When a person, arrested with or without a warrant or given a summons, appears initially before the magistrate, the magistrate shall proceed in accordance with the applicable subdivisions of this rule.
53. McNabb v. United States, 318 U.S. 332, 343-44 (1943).
54. *Id.* at 345.
55. *Id.*

never intended the rule to be a penalty for police misconduct.[56] It merely reasoned that the rule was the best method of enforcing a Congressional mandate for prompt presentment.[57]

The Supreme Court did not decide *McNabb, Upshaw,* or *Mallory* on constitutional grounds,[58] but rather on the Court's supervisory authority over "the administration of criminal justice in the federal courts."[59] Consequently, the *McNabb-Mallory* rule was held not to be binding on the states.[60]

The *McNabb-Mallory* rule was modified legislatively in 1968 when Congress passed Title II of the Omnibus Crime Control and Safe Streets Act. Passage of Title II, now codified in 18 U.S.C. § 3501,[61] which sets forth the criteria to be used in determining whether a confession obtained after a delay in presentment is admissible,[62] marks the return of the federal courts to the voluntari-

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56. Upshaw v. United States, 335 U.S. 410, 421 (1948) (Reed, J., dissenting) (citing United States v. Mitchell, 322 U.S. 65 (1944)).
57. *See* Mallory v. United States, 354 U.S. 449, 453 (1957).
58. Upshaw v. United States, 335 U.S. 410, 414 n.2 (1948); McNabb v. United States, 318 U.S. 332, 340 (1943). The Court did not comment on the issue of constitutionality in *Mallory.*
59. McNabb v. United States, 318 U.S. 332, 341 (1943).
60. Culombe v. Connecticut, 367 U.S. 568, 600-02 (1961). *See* Fayne v. Arkansas, 356 U.S. 560, 567 (1958); Fikes v. Alabama, 352 U.S. 191, 194 n.2 (1957). Although the arguments for applying the exclusionary rule to statements obtained during pre-arraignment delay have often been advanced to state courts, most have rejected the rule. *See e.g.,* People v. Carbonaro, 21 N.Y.2d 271, 234 N.E.2d 433, 287 N.Y.S.2d 385 (1967); Rogers v. Superior Court of Alameda County, 46 Cal. 2d 3, 291 P.2d 929 (1955); and cases cited in Annot., 19 A.L.R.2d 1331 (1951).
61. 18 U.S.C. § 3501(c) (1976) states in pertinent part:
> In any criminal prosecution by the United States or by the District of Columbia, a confession made or given by a person who is a defendant therein, while such person was under arrest or other detention in the custody of any law-enforcement officer or law-enforcement agency, shall not be inadmissible solely because of delay in bringing such persons before a magistrate or other officer empowered to commit persons charged with offenses against the laws of the United States or of the District of Columbia if such confession is found by the trial judge to have been made voluntarily and if the weight to be given the confession is left to the jury and if such confession was made or given by such person within six hours immediately following his arrest or other detention: *Provided,* That the time limitation contained in this subsection shall not apply in any case in which the delay in bringing such person before such magistrate or other officer beyond such six-hour period is found by the trial judge to be reasonable considering the means of transportation and the distance to be traveled to the nearest available such magistrate or other officer.
62. It should be noted that the *McNabb-Mallory* rule is a rule of evidence. It only comes into existence when a rule of procedure, Rule 5(a), is violated. Thus, 18 U.S.C. § 3501 is a rule of evidence that must be read together with Rule 5(a). *See* United States v. Gaines, 555 F.2d 618, 622 (7th Cir. 1977) (quoting United States v. Davis, 532 F.2d 22, 25 (7th Cir. 1976)). Rule 5(a) of the Federal Rules of Criminal Procedure still prohibits an unnecessary delay in bringing a defendant before a magistrate. It seems, however, that 18 U.S.C. § 3501 has removed the sanctions for failure to obey Rule 5(a) and has made delay another factor in determining voluntariness. 18 U.S.C. 3510(b) (1976).

ness test[63] as a remedy for a violation of Rule 5(a) of the Federal Rules of Criminal Procedure.[64]

Admissibility under the voluntariness test is determined by weighing all facts and circumstances at the time a statement is made.[65] If not coerced, the statement is admissible notwithstanding a violation of a statutory rule of presentment.[66] Under this test, delay is but one factor to be weighed in determining voluntariness. This standard was abandoned by the Court of Appeals of Maryland in *Johnson v. State*.[67]

## V. THE *JOHNSON* DECISION

The *Johnson* court faced three questions: (1) was there a violation of M.D.R. 723(a)?; (2) given a violation, what remedy should be applied?; and (3) did Johnson, by waiving his constitutional rights under *Miranda v. Arizona*,[68] also waive his right to be brought promptly before a judicial officer?

### *A. The Violation of 723(a)*

In arguing that there had been no violation of the statute, the state followed the reasoning of the court of special appeals. That court held that M.D.R. 723(a) was not mandatory, but merely directory.[69] Because prompt presentment was not mandatory, the

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63 The legislative history of 18 U.S.C. § 3501 indicates that Congress desired to modify the *McNabb-Mallory* rule. *See* S. REP. NO. 1907, 90th Cong., 2d Sess., *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 2123-27. *See also* United States v. Halbert, 436 F.2d 1226 (9th Cir. 1970) (for a good discussion of the legislative history of 18 U.S.C. § 3501); Comment, *Admissibility of Confessions Obtained Between Arrest and Arraignment: Federal and Pennsylvania Approaches*, 79 DICK. L. REV. 309, 330-41 (1975); Annot., 12 A.L.R. Fed. 378 (1972).

64. *See, e.g.*, United States v. Gaines, 555 F.2d 618 (7th Cir. 1977); United States v. Shoemaker, 542 F.2d 561 (10th Cir.), *cert. denied*, 429 U.S. 1004 (1976); United States v. Davis, 532 F.2d 22 (7th Cir. 1976); Government of Virgin Islands v. Gereau, 502 F.2d 914 (3rd Cir. 1974), *cert. denied*, 420 U.S. 909 (1975); United States v. Collins, 462 F.2d 792 (2d Cir.), *cert. denied*, 409 U.S. 988 (1972); United States v. Hathorn, 451 F.2d 1337 (5th Cir. 1971); United States v. Marrero, 450 F.2d 373 (2d Cir. 1971), *cert. denied*, 405 U.S. 933 (1972); United States v. Halbert, 436 F.2d 1226 (9th Cir. 1970).

65. *See* 18 U.S.C. § 3501(b) (1976).

66. *See* Taylor v. State, 238 Md. 424, 209 A.2d 595 (1965).

67. 282 Md. 314, 384 A.2d 709 (1978). The leading case in Maryland on the voluntariness test was Taylor v. State, 238 Md. 424, 209 A.2d 595 (1965). There are many Maryland cases that discuss violations of prompt arraignment in the context of a voluntariness issue. *See* Prescoe v. State, 231 Md. 486, 191 A.2d 226 (1963); White v. State, 201 Md. 489, 94 A.2d 447 (1953); Edwards v. State, 194 Md. 387, 71 A.2d 487 (1950); Grear v. State, 194 Md. 335, 71 A.2d 24 (1950); James v. State, 193 Md. 31, 65 A.2d 888 (1949); Cox v. State, 192 Md. 525, 64 A.2d 732 (1949). These cases were overruled *sub silento* by the *Johnson* decision to the extent they held that pre-arraignment delay was not itself grounds for excluding a confession given during such delay.

68. 384 U.S. 436 (1966).

69. Johnson v. State, 36 Md. App. 162, 172, 373 A.2d 300, 305 (1977).

court of special appeals reasoned that there should be no sanction for failing to comply with the rule. The court of appeals, however, rejected this argument.[70] Focusing upon the portion of the statute requiring that the "defendant shall be taken . . . without unnecessary delay," the court concluded that the word *shall* is presumed to have a mandatory meaning,[71] and "thus denotes an imperative obligation inconsistent with the exercise of discretion."[72]

In deciding that *shall* had a mandatory meaning, the court of appeals did not rely exclusively upon statutory construction.[73] It stated that prompt presentment must be mandatory in order to safeguard a defendant's constitutional rights. Additionally, the court of appeals noted that prompt presentment had been described as a *sine qua non* "in any scheme of civil liberties."[74] In his dissent, Judge Orth argued that the majority had incorrectly implied a constitutional, or at least a *quasi-constitutional,* basis for prompt presentment.[75] Both the dissenting and majority opinions agreed, however, that the statute should be construed to be mandatory.[76]

### *B. The Proposed Remedies*

Having decided that there had been a violation of M.D.R. 723(a), the court of appeals next addressed the problem of what remedy, if any, should be applied to the violation. The state advanced three alternative theories to the court: (1) that the court should keep the present voluntariness test,[77] (2) if the court adopted an exclusionary rule, a confession or statement should only be suppressed "if the defendant . . . was unfairly prejudiced"[78] and (3) that the exclusionary rule should be applied only where the police had committed a substantial violation of the prompt presentment rule.[79]

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70. Johnson v. State, 282 Md. 314, 323, 384 A.2d 709, 714 (1978).
71. *Id.* at 321, 384 A.2d at 713 (citing Moss v. Director, 279 Md. 561, 564-65, 369 A.2d 1011, 1013 (1977)).
72. *Id.* (citing Bright v. Unsat. Claim & Judgment Fund Bd., 275 Md. 165, 169, 338 A.2d 248 (1975)). Since *Johnson* was decided, the court of special appeals has had an opportunity to comment on the issue of *mandatory* versus *directory* construction of the word "shall" in statutes. Hopkins v. Md. Inmate Griev. Comm'n, 40 Md. App. 329, 334-35, 391 A.2d 1213, 1216 (1978).
73. 282 Md. 314, 321, 384 A.2d 709, 713 (1978).
74. *Id.* The court of appeals quoted from Hogan & Snee, *The McNabb-Mallory Rule: Its Rise, Rationale and Rescue*, 47 GEO. L. J. 1, 27 (1958).
75. 282 Md. 314, 339, 384 A.2d 709, 723 (1978) (Orth, J., dissenting). Judge Orth asserted that all rules governing prompt presentment are derived from the court's supervisory powers over the administration of criminal justice, and not from the federal or state constitutions. *Id.*
76. *Id.* at 339, 350-51, 384 A.2d at 723, 729 (Orth, J. & Murphy, C.J., dissenting).
77. *Id.* at 325, 384 A.2d at 715.
78. *Id.* at 327, 384 A.2d at 716.
79. *Id.*

The court of appeals refused to retain the voluntariness standard,[80] notwithstanding the wide acceptance of that test.[81] The court concluded that it was "a *hopelessly inadequate* means of safeguarding a defendant's right of prompt presentment," as it would in no way prevent a gross violation of prompt presentment, so long as a defendant had given a pre-initial appearance statement voluntarily.[82] The dissenters, in contrast, would have adhered to prior Maryland precedents applying the voluntariness standard to confessions obtained in violation of the statute.[83]

The state's proposal that "a confession or statement [should] be suppressed, only if the defendant could demonstrate that he was unfairly prejudiced by reason of police failure to obey the prompt presentment rule,"[84] was rejected as being nothing more than a mere reformulation of the voluntariness test.[85] Furthermore, the court reasoned this test would place an almost impossible burden upon the defendant to prove that the detention was "deliberately prolonged in order to extract a confession."[86] The court concluded that "a defendant suffers prejudice whenever a statement procured during an illegal delay is used against him at trial or leads directly to other evidence ultimately employed to convict him."[87]

Under the third proposal advocated by the state, application of the exclusionary rule would be required only in cases in which the police had committed *substantial violations* of the prompt presentment rule.[88] This remedy is similar to that proposed by the American Law Institute in its Model Code of Pre-Arraignment Procedure.[89]

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80. The State exhorts us to . . . apply a voluntariness standard to statements obtained in violation of M.D.R. 723 a. We decline to do so. To say that an unlawful postponement of the intial appearance may be merely a factor in assessing the admissibility of a statement, is to imply that an unnecessary delay may be overlooked entirely if other indicia of voluntariness exist. Under this analysis, even a gross violation of the presentment requirement can be disregarded altogether.
Johnson v. State, 282 Md. 314, 325, 384 A.2d 709, 715 (1978).
81. Only Pennsylvania, Montana, Florida and Delaware do not use the voluntariness test. See cases cited in note 5 *supra*.
82. 282 Md. 314, 325, 384 A.2d 709, 715 (1978) (emphasis added).
83. In his dissent, Judge Orth stated that he was opposed to applying the exclusionary rule to violations of M.D.R. 723(a). He concluded that if such a remedy was intended for a violation of the rule, the legislature would have manifested such an intention. Johnson v. State, 282 Md. 314, 335, 384 A.2d 709, 720 (1978) (Orth, J. dissenting).
84. *Id.* at 327, 384 A.2d at 716.
85. *Id.*
86. *Id.*
87. *Id.* (citing Commonwealth v. Futch, 447 Pa. 389, 393, 290 A.2d 417, 419 (1972)).
88. *Id.* at 327-28, 384 A.2d at 716-17.
89. ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 150.3 (1975).

Under the Model Code, statements would be excluded only if the violation of prompt presentment was:

> (1) gross, wilful and prejudicial to the accused (2) of a kind likely to lead accused persons to misunderstand the positions or legal rights and to have influenced the defendant's decision to make the statement or (3) created a significant risk that an incriminating statement may have been untrue.[90]

The court's rationale for rejecting the test comports with its rationale for adopting the exclusionary rule for violations of M.D.R. 723(a). By excluding only substantial violations of the rule, the test might actually encourage less than substantial violations of the rule.

### C. *The* Johnson *Holding*

In lieu of the state's proposed theories, the court of appeals applied a *per se* exclusionary rule to the violation of Maryland's prompt presentment statute.[91] The decision was tripartite in nature. First, the court held that the rule places a maximum limit on permissible delay, which, when exceeded, will automatically result in the exclusion of all statements obtained during the delay, regardless of the reason for the delay. Second, it established a rigorous compliance standard within the outer "hours" perimeter which if not complied with, will also result in the exclusion of any statements or confessions obtained during the delay. Third, the rule requires the exclusion of statements tainted by the delay. Dicta in the decision also indicated that a derivative evidence rule will be applied to exclude evidence obtained from leads acquired during an impermissible delay.[92]

The court of appeals interpreted M.D.R. 723(a) to mean that the earlier of the first session of court or 24 hours after arrest is the

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90. *Id.*

91. We . . . hold that any *statement, voluntary or otherwise,* obtained from an arrestee during a period of *unnecessary delay* in producing him before a judicial officer, thereby violating M.D.R. 723 a, is subject to exclusion when offered into evidence against the defendant as part of the prosecution's case-in-chief. A statement is *automatically excludible* if, at the time it was obtained from the defendant, he had not been produced before a commissioner for his initial appearance within the earlier of 24 hours after arrest *or* the first session of court following arrest, *irrespective of the reason for the delay.* Where, however, the delay in presentment falls within the outer limits established by M.D.R. 723 a, *it is incumbent upon the trial court to determine whether the State has met its burden of showing that the delay was necessary under the circumstances* of the particular case.

Johnson v. State, 282 Md. 314, 328, 384 A.2d 709, 717 (1978) (emphasis added).

92. *Id.* at 327, 384 A.2d at 716 (citing Commonwealth v. Futch, 447 Pa. 389, 393, 290 A.2d 417, 419 (1972)).

maximum limit of permissible delay. In rendering its opinion, the court was not very clear as to the exact basis for excluding the statements made by Johnson. The language of the opinion indicates that violations of both provisions formed the basis of the decision. The court declared that the statement was inadmissible "since it was given during the period of delay in presentment which extended beyond 24 hours and long after the first session of court following the arrest."[93] Accordingly, either basis provided sufficient grounds for excluding the statement.

The facts of the case also indicate that there should be an exclusion of any statement obtained prior to the 24 hour limit, if the police hold the defendant beyond 24 hours after arrest. In *Johnson,* the police had obtained incriminating oral statements before the 24 hour time period had expired, but waited until slightly over 24 hours before reducing the statements to writing and obtaining the defendant's signature. By excluding Johnson's confession, the court also rejected the oral statements made before 24 hours after arrest had expired. The prompt presentment rule thus incorporates a conclusive presumption of illegality, once its limits are exceeded, that relates back to statements obtained anytime during the delay.[94]

The court of special appeals, however, recently rejected this analysis in a case involving rather unusual facts. In *Davis v. State*[95] the defendant was taken into custody in Nevada by Maryland police at 1:30 p.m. on September 3, 1977. He was brought back into Maryland at 5:30 p.m. on September 4, 1977 on the charges of rape and robbery. At 8:30 p.m. on September 4th, he confessed to an unrelated murder. Davis was arraigned at 7:00 p.m. on September 5, 1977, more than 24 hours after he had been placed in the custody of Maryland police.

The *Davis* court, in a multi-faceted ruling concerning the possibility of a violation of M.D.R. 723, began by stating that the rule has "no extraterritorial effect as a matter of law."[96] Where a defendant has been extradicted from a state into Maryland, therefore, he is not "detained pursuant to arrest" until returned to

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93. *Id.* at 330, 384 A.2d at 718. Chief Judge Murphy, in his dissent, stated that it was doubtful that the earlier session of court provision was violated, since the record did not disclose whether the court was in session. *Id.* at 347, 384 A.2d at 727 (Murphy, C.J. dissenting).

94. *Id.* Although not addressed by the court, it seems certain that a delay in violation of M.D.R. 723(a) will be of no consequence absent a statement obtained during the delay. In Thereault v. United States, 401 F.2d 79 (8th Cir.), *cert. denied,* 396 U.S. 933 (1968), the Eighth Circuit rejected the appellant's contention that a violation of Rule 5(a) of the Federal Rules of Criminal Procedure necessitated reversal of the conviction even where no evidence was obtained during the delay. *See also* Morse v. United States, 256 F.2d 280 (5th Cir. 1958).

95. 42 Md. App. 546, 402 A.2d 77 (1979).

96. *Id.* at 559, 402 A.2d at 84.

the territorial limits of Maryland.[97] The *Davis* court asserted, however, that the defendant had been arrested for robbery and rape, concluding that Davis was not arrested for the crime of murder until he completed his confession of that crime at 10:25 p.m. on September 4th.[98] Because Davis was arraigned at 7:00 p.m. on September 5th, he had not been detained for more than 24 hours after his "arrest" for murder, and consequently no violation of M.D.R. 723(a) had occurred.[99] Alternatively, the court reasoned that even if Davis was deemed to have been arrested when he arrived in Maryland at 5:30 p.m. on September 4th, the exclusionary rule did not apply because the confession was given before the 24 hour period after "arrest" had expired.[100] Relying upon language from the *Johnson* opinion,[101] the *Davis* court concluded that a statement is subject to the *per se* rule of exclusion only if rendered after the maximum limits of M.D.R. 723(a) have been exceeded.[102]

The *Davis* opinion represents the lengths to which a court will travel to avoid the strictures of the *Johnson* exclusionary rule. Moreover, its alternative holding that a confession will be excluded only if given after 24 hours following arrest seems contrary to the application of M.D.R. 723(a) to the facts of *Johnson.* In *Johnson,* the oral confessions obtained before the expiration of 24 hours following arrest, were excluded as well as the written confession completed just after the expiration of the 24 hour period. Finally, the language of

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97. *Id.* at 560, 402 A.2d at 85.
98. *Id.*
99. *Id.*
100. *Id.*
101 The *Davis* court observed that:

> It is true that Davis was not presented to a judicial officer for more than 24 hours after his arrival in Maryland. To that extent M.D.R. 723 a was violated. But as we read the *Johnson* exclusionary rule it operates to automatically exclude a defendant's statement only if, "*at the time it was obtained from the defendant*" (Johnson, supra, at 329), the period of delay in presentment had extended beyond 24 hours after arrest or beyond the first session of court after arrest, whichever was earlier.

Davis v. State, 42 Md. App. 546, 560, 402 A.2d 77, 85 (1979) (emphasis in original).

It should be noted that elsewhere in the *Johnson* opinion the court of appeals stated that the statements there were excluded "since it was given during the period of delay in presentment which extended beyond 24 hours . . . following arrest." Johnson v. State, 282 Md. 314, 330, 384 A.2d 709, 718 (1978). Thus, it was not clear from *Johnson* whether the statements would have been excluded only if obtained after the limits of the rule had been exceeded.

102. The *Davis* court also considered whether the confession was obtained pursuant to an unnecessary delay in presentment, a delay not exceeding the maximum limits of M.D.R. 723(a) that was for purpose of obtaining an confession. See notes 108-111 and accompanying text *infra.* The court in *Davis* asserted that it was not required to make an independent appraisal of this issue and held that the trial court's conclusion, that no unnecessary delay existed, was not clearly erroneous. Davis v. State, 42 Md. App. 546, 560-61, 402 A.2d 77, 85 (1979).

M.D.R. 723(a) states that the accused shall be brought before a magistrate no later than the aforementioned times following arrest. Sanctions for clear violations of the rule should not depend upon the timing of the police in obtaining a confession.

The *Johnson* court did note an exception to the stringent earlier of twenty-four hours or first session of court after arrest provisions. The court of appeals stated that a spontaneous confession or statement "uttered at the time of arrest or shortly thereafter" would not be excluded even if the police subsequently violated M.D.R. 723(a).[103] In such cases, the rule created by *United States v. Mitchell*[104] will apply.

Chief Judge Murphy, interpreting *Mitchell* to mean that a confession was admissible if not induced by the delay, argued in his dissent that application of the rule of that case should have resulted in admission of the statements.[105] The majority interpretation, however, comports with the Supreme Court's interpretation of *Mitchell* in *Mallory*.[106] Under the majority approach, Johnson's confession could not have been considered admissible. It was not spontaneous since the police admitted that Johnson was held for interrogation notwithstanding his illness.[107] Nor was the confession rendered immediately after arrest, but an entire day after his detention began.

Although the decision of the court of appeals clearly proscribes the admission into evidence of statements or confessions obtained during a delay in violation of either the twenty-four hour limit or the provision regarding the first session of court, it did not define what would constitute unnecessary delay within the outer perimeter of the rule. The *Johnson* court merely stated, "where . . . the delay . . . falls within the outer limits established by M.D.R. 723 a it is incumbent upon the trial court to determine whether the State has met its burden of showing that delay was necessary under the circumstances of the particular case."[108]

The court of appeals listed five examples of permissible delay:

> 1) to carry out reasonable routine administrative procedures such as recording, fingerprinting, and photographing; 2) to determine whether a charging document should be issued accusing the arrestee of a crime; 3) to verify the commission of the crimes specified in the charging document; 4) to obtain information likely to be a significant aid in averting harm to persons or loss to property of substan-

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103. Johnson v. State, 282 Md. 314, 329, 384 A.2d 709, 718 (1978).
104. 322 U.S. 65 (1944).
105. 282 Md. 314, 349-50, 384 A.2d 709, 728 (1978) (Murphy, C.J., dissenting).
106. See text accompanying notes 49-51 *supra*.
107. See note 10 *supra*.
108. 282 Md. 314, 329, 384 A.2d 709, 717 (1978).

> tial value; and 5) to obtain relevant nontestimonial information likely to be significant in discovering the identity . . . of other persons who may have been associated with the arrestee in the commission of the offense . . . .[109]

None of these situations relate to obtaining incriminating testimonial evidence from the accused. It can be inferred, therefore, that the court of appeals did not intend to allow pre-arraignment delay for the purpose of interrogation, however brief. This construction of unnecessary delay is consistent with the Supreme Court's interpretation of unnecessary delay under Rule 5(a). In *Mallory,* the Supreme Court stated that brief delays were permitted but that "the delay must not be of a nature to give opportunity for the extraction of a confession."[110] Carried to its logical conclusion, a delay of even five minutes, if for the purpose of obtaining incriminating statements, will be impermissible. At least one federal court of appeals so interpreted the *McNabb-Mallory* rule.[111]

The difficulty in applying this facet of the rule is apparent. Unlike the maximum limits imposed by Rule 723(a), determining whether a delay was necessary primarily entails scrutinizing the facts surrounding the delay to determine whether it afforded an opportunity, seized upon by the police, to interrogate the accused. This determination necessarily involves an inquiry into police motives, a speculative endeavor at best. The net result, absent blatant interrogation, is that courts probably will be reluctant to suppress any statements but those obtained when the outer limits of the rule are violated.

Notwithstanding any differences among opinions as to what constitutes unnecessary delay, the state, when challenged, still has the burden of proving that the delay was necessary.[112] In his dissent, Chief Judge Murphy intimated that this was an undue burden on the prosecution.[113] When challenged, the prosecution not only will have to show that a confession was voluntary and that all *Miranda* requirements were met, but also it will have to establish that there was no unnecessary delay in prompt arraignment.

Although it was not stressed as an issue in either of the dissenting opinions, tainted evidence may also be a problem for the prosecution in future prompt arraignment challenges. In *Johnson* the court not only excluded the statements made before Johnson's presentment to a judicial officer, but also those made after his

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109. *Id.*
110. Mallory v. United States, 354 U.S. 449, 455 (1957).
111. United States v. Alston, 348 F.2d 72 (D.C. Cir. 1965).
112. 282 Md. 314, 329, 384 A.2d 709, 717 (1978).
113. 282 Md. at 350, 384 A.2d at 729 (Murphy, C.J., dissenting).

arraignment as well. The court of appeals reasoned that the post-arraignment statement was not an "independent act" but, rather, was tainted by the previous illegal detention.[114] The principle implicit in this ruling is clear. If there has been an illegal detention, subsequent presentment to a magistrate will not automatically dissipate the taint.

The court, in dicta, also appeared to have adopted a derivative evidence rule. In rejecting the state's second proposed theory for not employing the exclusionary rule the court stated that "a defendant suffers prejudice whenever a statement procured during an illegal delay is used against him at trial or leads directly to other evidence ultimately employed to convict him."[115] The full import of this statement will not be known until there is further litigation in this area. It seems, however, that the court of appeals will exclude not only confessions and inculpatory statements, but also any evidence that is derived from the unlawful detention. Thus, a derivative evidence rule such as that applied in *Wong Sun v. United States*[116] may be applicable when there is a violation of the prompt presentment rule. Other state courts adopting an exclusionary rule for statements obtained during an impermissible pre-arraignment delay have applied the fruit of the poisonous tree principle. The Pennsylvania Supreme Court, for example, has held inadmissible identifications resulting from line-ups conducted during an impermissible delay.[117] The court of appeals probably will not exclude all types of evidence,[118] but it would appear that Maryland courts will decide on a case by case basis what types of evidence, other than

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114. *Id.* at 330, 384 A.2d at 717.
115. *Id.* at 327, 384 A.2d at 716 (citing Commonwealth v. Futch, 447 Pa. 389, 393, 290 A.2d 417, 419 (1972)).
116. 371 U.S. 471 (1963). In *Wong Sun* the Supreme Court held that a confession is inadmissible if it was obtained immediately after an unlawful entry and subsequent unauthorized arrest of the defendant. The Court also stated that if such a confession led to other evidence, it would be inadmissible because it was the result of an illegal act. The Court did state, however, that if the relationship between the illegal search and evidence discovered is "so attentuated as to dissipate the taint," the evidence will not be considered as "fruit of the illegal search." *Id.* at 491.

    Maryland courts refused to apply the doctrine of *Wong Sun*, which was a federal prosecution, for over ten years. The court of appeals finally adopted it in Everhart v. State, 274 Md. 459, 337 A.2d 100 (1975), *rev'g* 20 Md. App. 71, 315 A.2d 80 (1974). For a discussion of *Wong Sun* in Maryland, see Ryon v. State, 29 Md. App. 62, 73-74 n.13, 349 A.2d 393, 401-02 n.13 (1975).
117. Commonwealth v. Futch, 447 Pa. 389, 395, 290 A.2d 417, 420 (1972). *Accord*, People v. Williams, 68 Cal. App. 3d 36, 45, 137 Cal. Rptr. 70, 75 (1977).
118. *See* Cupp v. Murphy, 412 U.S. 291 (1973) (scrapings from defendant's fingernails taken after the defendant started to destroy such evidence upon realizing he was under arrest for strangling his wife, ruled admissible).

statements or confessions, will be excluded because of a violation of M.D.R. 723(a).[119]

In summary, the *Johnson* decision adopted an exclusionary rule for statements and evidence obtained in violation of M.D.R. 723(a). Although similar to the *McNabb-Mallory* rule, Maryland's rule not only demands exclusion of statements obtained during an unnecessary delay, but also it places a maximum limit on the time an accused can be detained without being presented before a magistrate, regardless of the necessity of the delay. Maryland's rule therefore commands stricter compliance than Rule 5(a) of the Federal Rules of Criminal Procedure, as construed under *Upshaw* and *Mallory*.

### *D. The* Miranda *Waiver*

The state's final contention was that by thrice waiving his *Miranda* rights, Johnson also waived his right to prompt presentment.[120] This proposition was based upon the belief that *Miranda* and prompt presentment share a common purpose.[121] The court of appeals rejected the state's argument and correctly pointed out that this was not the case.[122] The court stated that while prompt presentment does overlap with *Miranda,* inasmuch as both are intended to assure that an arrestee is advised of his rights to counsel and to remain silent, prompt presentment serves additional functions.[123] For instance, prompt presentment provides a follow-up warning to a defendant of his constitutional rights by a neutral judicial officer.[124] Thus, a waiver of *Miranda* rights does not effect the state's duty to arraign a defendant in compliance with M.D.R. 723(a). The court of appeals did state, however, that like the fifth amendment privilege, a defendant can waive his right to prompt presentment.[125]

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119. There was no indication by the court of appeals that statements or confessions obtained in violation of prompt presentment could not be used for impeachment purposes. The use of tainted evidence for impeachment purposes was sanctioned in Walder v. United States, 347 U.S. 62 (1954) and reaffirmed in Harris v. New York, 401 U.S. 222 (1971) and Oregon v. Haas, 420 U.S 714 (1975). *See generally* Dershowitz & Ely, *Harris v. New York: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 YALE L. J. 1198 (1971); Note, *Impeachment by Unconstitutionally Obtained Evidence: The Rule of Harris v. New York,* WASH. U.L.Q. 441 (1971).

120. 282 Md. 314, 330-31, 384 A.2d 709, 718 (1978).

121. The prosecution has successfully employed this argument in the past. *See, e.g.*, Pettyjohn v. United States, 419 F.2d 651, 656 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1058 (1970).

122. Moreover, the Supreme Court indicated in its *Miranda* decision that a *Miranda* warning by the police does not supplant prompt presentment. Miranda v. Arizona, 384 U.S. 436, 463 n.32 (1966).

123. 282 Md. 314, 331-32, 384 A.2d 709, 719 (1978). *Accord,* United States v. Erving, 388 F. Supp. 1011, 1020-21 (W.D. Wis. 1975).

124. See notes 18-30 and accompanying text *supra.*

125. 282 Md. 314, 332, 384 A.2d 709, 719 (1978).

The court did not state exactly how long a defendant may be held if he waives his right to prompt presentment. It would seem that when one is arrested without a warrant, the police would still be bound by the ruling in *Gerstein v. Pugh*,[126] which requires a judicial determination of probable cause "as a condition for any significant pretrial restraint of Liberty."[127]

## VI. THE REMEDY

The exclusionary rule is usually applied to suppress evidence garnered in violation of a defendant's constitutional rights. It has been used in cases of search and seizure that violate the fourth amendment,[128] for confessions obtained in violation of the fifth amendment,[129] for confessions and incriminating evidence obtained in violation of the sixth amendment[130] and in cases in which evidence was obtained by shocking methods.[131] It also has been applied by legislative mandate for violations of the wiretapping law.[132]

Two theories have been propounded in support of the exclusionary rule — deterrence of future police misconduct[133] and preservation of judicial integrity.[134] The deterrence theory is based upon the notion that the only effective way to compel respect for constitutional rights is to remove the incentive to disregard them.[135] Thus, according to the theory, if the police know that illegally seized evidence will not be used, they will respect the law.

The second theory, concerned with maintenance of judicial integrity, seeks to avert a partnership between the police and the courts in official lawlessness.[136] In essence, this theory seeks to

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126. 420 U.S. 103 (1975).
127. *Id.* at 125.
128. Mapp v. Ohio, 367 U.S. 643 (1961).
129. Miranda v. Arizona, 384 U.S. 436 (1966); Brown v. Mississippi, 297 U.S. 278 (1936).
130. United States v. Wade, 388 U.S. 218 (1967) (line-ups); Gilbert v. California, 388 U.S. 263 (1967) (identifications); Miranda v. Arizona, 384 U.S. 436 (1966) (confessions).
131. Rochin v. California, 342 U.S. 165 (1952). In *Rochin*, the defendant had his stomach pumped by the police without his consent.
132. 47 U.S.C. § 605 (1976); 18 U.S.C. § 2515 (1976). *See* Lee v. Florida, 392 U.S. 378 (1968) (excluding evidence obtained in violation of the wiretap law). In Maryland, the use of evidence obtained in violation of the Maryland wiretap law is prohibited by MD. CTS. & JUD. PROC. CODE ANN. § 10-405 (Supp. 1978).
133. United States v. Janis, 428 U.S. 433, 446 (1976); Michigan v. Tucker, 417 U.S. 433, 446-47 (1974). In *Tucker*, however, the Court noted that where official action is pursued in good faith, the deterrence rationale loses force. *Id.* at 447.
134. Terry v. Ohio, 392 U.S. 1, 13 (1968); Olmstead v. United States, 277 U.S. 438, 484-85 (1928) ( Brandeis, J., dissenting).
135. Elkins v. United States, 364 U.S. 206, 217 (1960).
136. United States v. Calandra, 414 U.S. 338, 357 (1974) (Brennan, J., dissenting).

prevent the courts from becoming part of an illegal process.[137] Its proponents assert that the taint of illegality on the judicial process will be eliminated if courts exclude illegally obtained evidence. It has also been stated that courts' acceptance of such evidence could result in undesirable consequences. "If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy."[138]

The Supreme Court has accepted the deterrence theory as the basis for the exclusionary rule.[139] Although the Supreme Court's rationale for the exclusionary rule was not binding on the *Johnson* court, the court of appeals seems to have adopted it. Because deterrence was the primary purpose for the court's ruling it probably will not be retroactive,[140] as Chief Judge Murphy feared in his dissent.[141] There is no deterrent effect in a retroactive application of a rule.

## VII. CONCLUSION

In summary, the *Johnson* decision will have considerable impact on the administration of criminal justice in Maryland. Pre-arraignment statements will be admissible only if given spontane-

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137. In Terry v. Ohio, 392 U.S. 1 (1968), Chief Justice Warren observed that "[c]ourts which sit under our Constituation cannot and will not be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions." *Id.* at 13.

138. Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting). In *Olmstead,* Justice Holmes in his dissent added:

> [W]e must consider the two objects of desire, both of which we cannot have, and make up our minds which to choose. It is desirable that criminals should be detected, and to that end that all available evidence should be used. It also is desirable that the Government should not itself foster and pay for other crimes, when they are the means by which the evidence is to be obtained. . . . We have to choose, and for my part I think it a less evil that some criminals should escape than that the Government should play an ignoble part."

*Id.* at 470 (Holmes, J., dissenting).

139. *See* United States v. Calandra, 414 U.S. 338 (1974). *See generally* Oaks, *Studying the Exclusionary Rule in Search and Seizure,* 37 U. CHI. L. REV. 665 (1970).

140. For a discussion on applying a ruling retroactively, see Robinson v. Neil, 409 U.S. 505, 507-11 (1973); Stovall v. Denno, 388 U.S. 293, 297 (1967); Linkletter v. Walker, 381 U.S. 618, 627-29, 640 (1965) (discussing whether Mapp v. Ohio, 367 U.S. 643 (1961), should be applied retroactively).

141. 282 Md. 314, 350, 384 A.2d 709, 729 (1978) (Murphy, C.J., dissenting). The court of special appeals was recently confronted with a *Johnson* retroactivity problem in Shope v. State, 41 Md. App. 161, 396 A.2d 282 (1979). The court of special appeals, however, stated that the case had not been finally decided and thus did not rule on the issue of retroactivity. Finally decided, according to the court of special appeals, meant that all appeals had been exhausted and "the time for petition of certiorari had elapsed." *Id.* at 168, 396 A.2d at 287 (citing Linkletter v. Walker, 318 U.S. 618, 622 n.5 (1965)). Since *Johnson* was decided on the same day that Shope was sentenced, the court of special appeals felt compelled to apply the *Johnson per se* sanction to the violation of M.D.R. 723(a) in *Shope. Id.* at 169, 396 A.2d at 287.

ously after arrest,[142] pursuant to a waiver of one's prompt arraignment right, and finally, during a necessary delay of no longer than the earlier of 24 hours or the first session of court after arrest. The decision shall require greater police efforts in order to avoid the exclusion of evidence obtained before a defendant is presented to a magistrate.

*Johnson* resulted in the court of appeals applying a drastic remedy, the exclusionary rule, to the violation of a non-constitutional right. When a statutory right is so closely akin to a constitutional right, as is prompt presentment, the two become inextricably interwoven. Accordingly, the rule deserves the same remedy for its violation as violations of the constitutional rights it protects: total exclusion from the trier of fact.

Finally, just as the federal courts never really embraced the *McNabb-Mallory* rule,[143] the court of appeals probably will be faced with numerous cases in which the Maryland trial courts will have tried to circumvent or modify the *Johnson* decision. Moreover, *Johnson* was a 4-3 decision and its author, Judge Levine, is now deceased. It therefore remains to be seen how the court of appeals' newest member, Judge Rita Davidson, will decide cases brought under the *Johnson* ruling.

In addition, the Maryland General Assembly may modify or abrogate the *Johnson* court's ruling. During the 1979 legislative session' an emergency bill that would have reinstated the voluntariness test for statements obtained in violation of Rule 723(a) passed the House of Delegates, but was tabled by the Senate Judicial Proceedings Committee.[144] Future legislative proposals to modify the rule would therefore seem eminent. Thus, the ultimate viability of *Johnson* is as yet undetermined.

*John E. Betts*

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142. There must be detention after an arrest or M.D.R. 723(a) will not be applicable. Relying on United States v. Carignan, 342 U.S. 36 (1951), the court of special appeals recently ruled that if a defendant is already serving a sentence for an unrelated crime, the provisions of M.D.R. 723(a) do not apply. Chaney v. State, 42 Md. App. 563, 568-71, 402 A.2d 86, 90-91 (1979).

143. The federal courts applied the sanctions of *McNabb-Mallory* infrequently. The courts ultimately reduced the admissibility determination to a voluntariness standard. *See, e.g.*, United States v. Braverman, 376 F.2d 249 (2d Cir.), *cert. denied*, 389 U.S. 885 (1967); United States v. Vita, 294 F.2d 524 (2d Cir. 1961).

144. H.B. 309 (January 22, 1979). The bill, which would have amended MD. CTS. & JUD. PROC. CODE ANN. § 10-912 (Supp. 1978) stated:

> A confession will not be excluded from evidence solely because the defendant was not taken before a judicial officer within any specified time. Failure to strictly comply with the provisions of the Maryland District Rules pertaining to taking a defendant before a judicial officer after arrest is only one factor, among others, to be considered by the court in deciding the voluntariness and admissibility of a confession.