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# CASE COMMENT

## CUSTODIAL "SEIZURES" AND THE POISON TREE DOCTRINE: *DUNAWAY V. NEW YORK** AND ITS AFTERMATH

The fourth amendment to the United States Constitution[1] guarantees to the people freedom from "unreasonable searches and seizures"[2] and specifically outlines the requisites for issuance of arrest and search warrants. This provision was first afforded real meaning when the United States Supreme Court adopted the federal exclusionary rule.[3] This rule, as originally

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* 442 U.S. 200 (1979).

1. U.S. CONST. amend. IV provides:

> 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.

2. This protection against "unreasonable searches and seizures" was undoubtedly included in the Bill of Rights in response to the repulsion against "writs of assistance" in the colonies, and the use of "general warrants" in England. The "writs of assistance," which allowed British customs officials, at their discretion, to search private homes for smuggled goods, were characterized by James Otis, in 1761, as the "worst instrument of arbitrary power, the most destructive of English liberty and fundamental principle of law, that ever was found in an English law book." Boyd v. United States, 116 U.S. 616 (1886).

Execution of "general warrants," which left blank the persons or place to be searched, or things to be seized, was declared illegal by Lord Camden in Entick v. Carrington, 19 How. St. Tr. 1029, 2 Wils (Eng. C.P.) 275 (1765) (commonly known as the *Wilkes* case). *See generally* E.C. FISHER, SEARCH AND SEIZURE (1st ed. 1970).

The fourth amendment's requirement of specificity of search warrants is directly traceable to the condemnation of general warrants. It is aimed to prevent arbitrary intrusion by police into the private affairs of the people. *See* Andresen v. Maryland, 427 U.S. 463 (1976); Stanford v. Texas, 379 U.S. 476 (1965). For an examination of the history of the fourth amendment and the English experience with general warrants, see Boyd v. United States, 116 U.S. 616 (1886).

3. Weeks v. United States, 232 U.S. 383 (1914). In *Weeks*, the defendant was convicted of using the mails to transport lottery tickets. Admitted evidence included that seized by a United States Marshall when he searched the defendant's home without a warrant. The Supreme Court announced that if documents which were illegally seized could be used in evidence against a citizen accused of a crime, "the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned might well be stricken from the Constitution." *Id.* at 393. Accordingly, the Court held that the warrantless search violated the fourth amendment and that the trial

applied, required the exclusion of evidence in a federal criminal trial if obtained illegally by federal authorities.[4] Forty-eight years later, in *Mapp v. Ohio*,[5] the Supreme Court elevated the rule to constitutional status in applying it to the states through the due process clause of the fourteenth amendment.[6] The

court erred in refusing to return this material to the defendant on his pre-trial motion for return of all items unlawfully seized. *Id.*

The Supreme Court had first suggested, in dictum in 1886, that evidence obtained in violation of the fourth amendment should not be admissible against a defendant. Boyd v. United States, 116 U.S. 616 (1886). In *Boyd*, a quasi-criminal proceeding was instituted against the defendants, seeking a forfeiture of their property for alleged fraud contravening the revenue laws. Pursuant to statute, the defendants were ordered to produce books, invoices, and papers, and their failure to do so constituted an admission of the allegations. Justice Bradley, in his discussion of constitutional matters stated: "[B]reaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony, or of his private papers to be used as evidence to convict him of a crime, or to forfeit his goods, is within the condemnation of that judgment. In this regard the fourth and fifth amendments run almost into each other." *Id.* at 624. Yet before *Weeks*, in Adams v. New York, 192 U.S. 585 (1904), the Supreme Court had declined to follow the dictum expressed by Justice Bradley in *Boyd* and reiterated the rule that where evidence was competent, the collateral question on how it was obtained would not be pursued.

4. This rule did not go without its critics. *See, e.g.*, People v. De Fore, 243 N.Y. 13, 150 N.E. 585 (1926), in which Justice (then Judge) Cardozo made his often-quoted statement that "the criminal is to go free because the Constable has blundered." *Id.* at 21, 150 N.E. at 590. *See* Burger, *Who Will Watch the Watchman*, 14 AM. U.L. REV. 1 (1964); Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970); Plumb, *Illegal Enforcement of the Law*, 24 CORNELL L.Q. 337 (1939).

5. 367 U.S. 643 (1963).

6. In *Mapp*, the defendant was convicted of having obscene materials in her possession in violation of an Ohio statute. The police seized the materials when they forcibly gained admittance to her home, purportedly because they had information that a person wanted for questioning in connection with a bombing was hiding therein. The State contended that even if the search had been made without authority, it was not prevented from using the unconstitutionally seized evidence. The Supreme Court rejected this contention, and in doing so, overruled that portion of Wolf v. Colorado, 338 U.S. 25 (1949), which had refused to extend the exclusionary rule to the states. The *Wolf* Court recognized that the "security of one's privacy against arbitrary intrusion—which is at the core of the fourth amendment—is basic to a free society, . . . and is therefore implicit in the concept of ordered liberty and as such is enforceable against the States through the Due Process Clause." The Court, however, declined to go further and hold the exclusion of tainted evidence an integral part of the fourth amendment.

As it had in *Weeks*, the *Mapp* ruling provoked sharp debate. Burns, *Mapp v. Ohio: An All American Mistake*, 19 DE PAUL L. REV. 80 (1969); McKay, *Mapp v. Ohio, The Exclusionary Rule and the Right of Privacy*, 15 ARIZ. L. REV. 327 (1973) [hereinafter cited as McKay]; Traynor, *Mapp v. Ohio At Large in the Fifty States*, 1962 DUKE L.J. 319; Note, *The Privacy Interest of the Fourth Amendment—Does Mapp v. Ohio Protect it or Pillage it*, 74 W. VA. L. REV. 154 (1971). It continues to elicit heated criticism today. *See, e.g.*, Gottlieb, *Feedback From the Fourth Amendment: Is the Exclusionary Rule an Albatross around the Judicial Neck?*, 67 KY. L.J. 1007 (1979).

Court announced that "[a]ll evidence obtained in violation of the Constitution is, by that same authority, inadmissible in a State court."[7]

In support of this pronouncement, three divergent theories have emerged.[8] The early rationale had reflected an emphasis on individual rights,[9] indicating that the Constitution itself granted the accused the right to have the evidence excluded. Secondly, the rule was said to preserve judicial integrity.[10] The admission of tainted evidence would have the necessary effect of legitimizing unconstitutional police conduct.[11] Finally, in recent years, the Supreme Court has increasingly relied on a deterrence theory which regards the exclusionary rule as a means of effectively discouraging lawless police conduct.[12]

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7. 367 U.S. at 655. Before *Mapp*, the Court had expressed dissatisfaction with the *Wolf* decision and accordingly would reverse a state conviction when it found that the evidence which was used to convict the defendant was the product of police practices that "shocked the conscience." A most vivid example resulted in a reversal of defendant's conviction in Rochin v. California, 342 U.S. 165 (1952) (warrantless search during which officers transported defendant to hospital and had his stomach pumped).

Another landmark decision which preceded *Mapp* was Elkins v. United States, 364 U.S. 206 (1960), which partially emasculated the holding in *Wolf*. The Court banned the so-called "silver platter doctrine" practice which had allowed evidence obtained as a result of an illegal search and seizure by state officials, without federal participation, to be introduced against a defendant in a federal criminal trial.

8. For a thorough analysis of the rationales for the exclusionary rule, and their validity, see Note, *The Fourth Amendment Exclusionary Rule: Past, Present, No Future*, 61 A.B.A.J. 507 (1975).

9. *Id.* at 508.

10. Justice Holmes emphasized this concept when he wrote, "I think it a less evil that some criminals should escape than that the government should play an ignoble part." Olmstead v. United States, 277 U.S. 438, 470 (1928) (Holmes, J., dissenting).

11. Terry v. Ohio, 392 U.S. 1, 13 (1968); Weeks v. United States, 232 U.S. 383, 392 (1914). *See also* Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting); Comment, *Judicial Integrity and Judicial Review: An Argument for Expanding the Scope of the Exclusionary Rule*, 20 U.C.L.A. L. REV. 1129 (1973):

> [T]he principle of judicial review has been recognized as a legitimate means by which the Court performs its duty to uphold the Constitution. Likewise, in the fourth amendment arena, the means by which the Court performs its duty appears to be through satisfying its responsibilities under the judicial review/integrity rationale comprehensively to protect a defendant's fourth amendment rights.

*Id.* at 1155-56.

12. In Elkins v. United States, 364 U.S. 206 (1960), the Court stated: "[T]he rule is calculated to prevent, not repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *Id.* at 217; *accord*, Linkletter v. Walker, 381 U.S. 618 (1965) (Court refused to apply *Mapp* retroactively, announcing the purpose of the rule to be deterrence and the fact that the deterrent purpose would not be enhanced by applying the rule ret-

In order to understand the exclusionary rule, it is necessary to examine the situations in which its application is warranted. The fourth amendment exclusionary rule is triggered when an intrusion amounts to an "unreasonable search or seizure."[13] Therefore, one appropriate question is whether a given "search" or "seizure" is "reasonable" within the meaning of the Constitution.[14] If it is not, the principles underlying the exclusionary rule must still be examined to determine whether the evidence was obtained via the fourth amendment violation and must be excluded as the "fruit of the poisonous tree,"[15] there being no break in the connection between the illegality and the derivation of evidence. Yet, often before courts can reach the "reasonableness" issue, they must determine whether the particular intrusion even amounts to a "search" or "seizure" in the fourth amendment sense.

Obviously, not all confrontations between police and citizens involve "seizures of persons."[16] If an individual voluntarily accompanies police officers to the station house, there is no "seizure," and the judicial inquiry into the constitutionality of the exchange ends.[17] A "seizure" occurs "whenever a police officer accosts an individual and restrains his freedom to walk away."[18] However, the officer must by means of physical force or show of authority restrain the liberty of the individual before it can be concluded that a "seizure" has occurred.[19]

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rospectively); *cf.* United States v. Calandra, 414 U.S. 338 (1974) (witness summoned to appear before a grand jury may not refuse to answer questions on the ground that they are based on evidence obtained from an unlawful search and seizure).

13. "The exclusionary rule traditionally barred from trial physical, tangible materials obtained during or as a direct result of an unlawful invasion." Wong Sun v. United States, 371 U.S. 471, 485 (1963). It is now clear that the rule extends to any and all evidence indirectly obtained as a result of the unlawful activity. Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920). "The essense of forbidding the aquisition of evidence in a certain way is not merely that evidence so acquired shall not be used before the court but that it shall not be used at all." *Id.* at 392.

14. This comment will focus on (1) whether the intrusion upon an individual amounts to a "seizure" within the meaning of the fourth amendment; (2) whether the seizure was reasonable; and (3) whether evidence connected with an unlawful "seizure" is still admissible in court.

15. *See generally* Comment, *Fruit of the Poisonous Tree: Recent Developments as Viewed Through its Exceptions*, 31 U. MIAMI L. REV. 615 (1977).

16. Terry v. Ohio, 392 U.S. at 19 n.16.

17. *See* Dunaway v. New York, 442 U.S. 200 (1979). "Voluntary questioning not involving any 'seizure' for Fourth Amendment purposes may take place under any number of varying circumstances. And the occasions will not be few when a particular individual agrees voluntarily to answer questions . . . and later regrets his willingness to answer those questions." *Id.* at 222 (Rehnquist, J., dissenting).

18. Terry v. Ohio, 392 U.S. at 16.

19. *Id.* at 19 n.16.

The most obvious example of a fourth amendment seizure by police is the official arrest. Indeed, traditionally "[t]he term 'arrest' was synonomous with those seizures governed by the Fourth Amendment."[20] A long line of precedents has established that an arrest is reasonable only if supported by "probable cause."[21] This requirement applied to arrests perfected with or without a warrant[22] and appeared absolute until *Terry v. Ohio*.[23]

*Terry* involved an on-the-street confrontation between a citizen and a policeman investigating suspicious circumstances and introduced the doctrine now commonly referred to as "stop and frisk." The Supreme Court recognized an exception to the general rule that probable cause was required before a seizure could be reasonable under the fourth amendment. The brief on-the-spot "stop and frisk" for weapons "did not fit comfortably within the traditional concept of an arrest" because it was substantially less intrusive. The intrusion was substantial enough to amount to a "seizure,"[24] but the requirement of probable cause applicable to arrests was replaced with a balancing test[25] to determine reasonableness. After balancing the limited viola-

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20. Dunaway v. New York, 442 U.S. 200, 208 (1979).

21. *E.g.*, United States v. Watson, 423 U.S. 411 (1976). Probable cause exists where "the facts and circumstances within their [the officer's] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." Brinegar v. United States, 338 U.S. 160, 175-76 (1949) (quoting Carrol v. United States, 267 U.S. 132, 162 (1925)).

22. *See* Henry v. United States, 361 U.S. 98, 101 (1959).

23. 392 U.S. 1 (1968).

24. The Court stated:

> There is some suggestion in the use of such terms as "stop and frisk" that such police conduct is outside the purview of the fourth amendment because neither action rises to a level of a "search" and "seizure" within the meaning of the constitution. We emphatically reject this notion. It is quite plain that the Fourth Amendment governs "seizures" of the person which do not eventuate in a trip to the station house and prosecution for crime-"arrest" in traditional terminology.

*Id.* at 16. However, the *Terry* Court determined that the point at which Terry was seized was when he was subjected to the "frisk," stating that "there can be no question that [the officer] 'seized' petitioner and subjected him to a 'search' when he took hold of him and patted down the outer surface of his clothing." *Id.* at 19. In a footnote, however, the Court indicated that the record was uncertain as to whether "any such 'seizure' took place prior to [the] officer['s] initiation of physical contact for purposes of searching Terry for weapons." *Id.* n. 16. Therefore, the Court concluded, "we . . . may assume that up to that point no intrusions upon constitutionally protected rights had occurred." *Id.*

25. In balancing the opposing interests involved, the Court stated:

> Our evaluation of the proper balance to be struck in this type of case leads us to conclude that there must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police

tion of individual privacy involved against the opposing interests in crime prevention and detection and the police officer's safety, the Court concluded that the "seizure" was justified without probable cause, but only for the purpose of a pat down search for weapons.[26]

After *Terry*, the constitutional propriety of "custodial detention" not amounting to an arrest remained unresolved. The *Terry* Court expressly refrained from deciding whether an investigative "seizure" upon less than probable cause, for purposes of "detention" and/or "interrogation," was permissible.[27] The following year, in *Morales v. New York*,[28] the Supreme Court again chose "not to grapple with the question of the legality of custodial questioning on less than probable cause for a full fledged arrest,"[29] this time because of the absence of a record that squarely presented the issue and fully illuminated the factual context in which it arose.[30]

In its 1975 *Brown v. Illinois*[31] decision, the Court indicated its disdain for custodial questioning on less than probable cause, but in that case the defendant had been officially arrested. The Court condemned the police conduct, which was purportedly for investigative purposes, because the officers acted without probable cause. But the thrust of the case dealt with the relationship between the fourth and fifth amendments. Specifically, the issue was whether the interposing of *Miranda*[32] warnings suffi-

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> officer, where he is dealing with an armed individual, regardless of whether he has probable cause to arrest for a crime.

*Id.* at 27.

26. *Id.* at 30. "The *Terry* case created an exception to the requirement of probable cause, an exception whose 'narrow scope' [the] Court has been careful to maintain." Ybarra v. Illinois, 100 S. Ct. 338, 343 (1979) (refused to extend "reasonable belief" balancing test to evidence gathering function).

27. 392 U.S. at 19 n.16.

28. 396 U.S. 102 (1969).

29. *Id.* at 104-05.

30. *Id.* The Court of Appeals of New York had held that police could detain an individual, upon "reasonable suspicion," for questioning for a brief period of time, under carefully controlled conditions. People v. Morales, 22 N.Y.2d 55, 238 N.E.2d 307, 290 N.Y.S.2d 898 (1968). The Supreme Court remanded because the original hearing was devoted to the voluntariness of the confession and not to the nature of the detention. On remand, the New York court determined that Morales had gone to the police voluntarily. People v. Morales, 42 N.Y.2d 129, 137-38, 366 N.E.2d 248, 252-53, 397 N.Y.S.2d 587, 592 (1977). This, however, was its alternative holding. It initially reiterated the views expressed in its earlier opinion that the detention was permissible even absent probable cause.

31. 422 U.S. 590 (1975). In *Brown*, the defendant was arrested at gunpoint without probable cause by police who had forcibly entered his home. After being advised of his *Miranda* rights, he made two incriminating statements in custody. The defendant successfully challenged these statements as inadmissible because they were the product of the unlawful arrest.

32. Miranda v. Arizona, 384 U.S. 436 (1966). In this landmark decision,

ciently purged the taint of the unlawful arrest, such that the statements made by the defendant, while in custody, would be admissible against him. The Supreme Court ruled that they were not admissible and identified three factors to be considered in determining whether a confession is obtained by exploitation of an illegal arrest: (1) the temporal proximity of the arrest; (2) the presence of intervening factors; and, particularly, (3) the purpose and flagrancy of the police conduct.[33]

Finally, in 1979, *Dunaway v. New York*[34] provided a forum for the Court to explore the reserved question. *Dunaway* squarely presented the issue of the legality of an involuntary custodial interrogation on less than probable cause, where the detention did not amount to an "official arrest." The Court was also provided with an opportunity to further explain the factors enunciated in *Brown*.

## THE FACTS AND PROCEDURAL HISTORY

On March 26, 1971, in Rochester, New York, the proprietor of a small pizza parlor was shot and killed during an attempted robbery. Four months later, Irving Dunaway, a small, black teenager, was "picked up" by the police and taken into custody. The police conceded that they did not have sufficient informa-

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the Supreme Court held that when an individual is taken into custody or otherwise deprived of his freedom in any significant way, law enforcement authorities must advise him of certain constitutional rights. Specifically,

> he must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning.

*Id.* at 448. Unless the State establishes that such warnings were given, or were knowingly and intelligently waived, no evidence obtained as a result of the interrogation can be used against the person. *Id. See also* Rhode Island v. Innis, 100 S.Ct. 1682 (1980), the Supreme Court's most recent decision on the *Miranda* procedural safeguards that are triggered whenever an individual is subjected to "custodial interrogation." Justice Stewart, writing for the Court, further explained "custodial interrogation" in the context of *Miranda*, stating:

> *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term "interrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.

*Id.* at 1689 (footnotes omitted).

33. 422 U.S. at 603-04 (burden of showing admissibility rests on prosecution).

34. 442 U.S. 200 (1979).

tion to obtain a warrant for his arrest.[35] Dunaway was not technically placed under arrest, although he would have been physically restrained had he attempted to leave.[36] After being moved to an interrogation room at police headquarters and given the *Miranda* warnings,[37] Dunaway waived counsel and eventually made incriminating statements and sketches.[38] Subsequently, he was indicted for armed robbery and felony murder. Following denial of his pretrial motion to suppress,[39] the inculpatory statements and sketches were admitted into evidence, and Dunaway was convicted. That judgment was affirmed by the appellate division, and by the New York Court of Appeals without opinion.[40]

The United States Supreme Court granted certiorari, vacated the judgment, and remanded[41] the case for further consideration in light of the Court's supervening decision of *Brown v. Illinois*.[42] The New York Court of Appeals then remanded to the trial court for a hearing to make further findings of fact.[43] After this supplementary hearing, the trial court granted the

35. People v. Dunaway, 61 A.D.2d 299, 302, 402 N.Y.S.2d 490, 493 (1978). A police lieutenant directed his plain clothes detectives to find Dunaway and bring him to the station for questioning. Their suspicion stemmed from stale rumors and triple hearsay. The facts were confusing. Several months after the murder, one policeman learned from a fellow officer that an informant had said that a man named Cole said he and Irving were involved. The informant did not know Irving's last name but identified a picture of Dunaway from a police file. Cole, a jail inmate awaiting trial for burglary, was questioned and denied any involvement. However, he implicated Dunaway, claiming that two months previously he [Cole] had learned from Hubert Adams that Hubert's brother "BaBa" Adams and Irving [Dunaway] had committed the murder. Hubert allegedly learned this information from his brother "BaBa."

36. People v. Dunaway, 61 A.D.2d 299, 402 N.Y.S.2d 490 (1978) (per stipulation of People at conclusion of hearing).

37. *See* note 32 *supra*.

38. People v. Dunaway, 61 A.D.2d 299, 300, 402 N.Y.S.2d 490, 491 (1978). The first statement was made within an hour after Dunaway reached the station. The sketches were drawn at the request of the police, and a second more complete statement was made the following day.

39. People v. Dunaway, 38 N.Y.2d 810, 345 N.E.2d 583, 382 N.Y.S.2d 40 (1975) (memorandum opinion). Dunaway made the motion to suppress on the ground that the evidence was obtained during a period of illegal detention subsequent to an illegal seizure, without a showing of probable cause. The trial court, at this first hearing, denied the motion, ruling only on the voluntariness aspect of the statements and sketches, and not on the nature of the detention.

40. People v. Dunaway, 42 A.D.2d 689, 346 N.Y.S.2d 779 (1973), *aff'd*, 35 N.Y.2d 741, 320 N.E.2d 646, 361 N.Y.S.2d 912 (1974).

41. 422 U.S. 1053 (1975).

42. 422 U.S. 590 (1975).

43. People v. Dunaway, 38 N.Y.2d 810, 345 N.E.2d 583, 382, N.Y.S.2d 40 (1975). In compliance with the remand from the United States Supreme Court, the court remitted for a factual hearing to decide the issue concerning the nature of the detention; whether there was probable cause; or in the

motion to suppress, rejecting the precedential value of *People v. Morales*,[44] in which the Court of Appeals of New York had upheld a similar detention on less than probable cause.[45] Rather, the trial court believed that the controlling authority was *Brown v. Illinois*,[46] which indicated a "disdain for custodial questioning without probable cause to arrest."[47] The trial court further held that the recital of *Miranda* warnings alone did not purge the taint of the illegal seizure. Therefore, the evidence was held inadmissible.

The appellate division reversed.[48] Relying directly on the court of appeals' *Morales* decision, the court upheld the detention on "reasonable suspicion" because it was brief, the defendant was fully advised of his constitutional rights, there was no formal accusation filed against him, and great public interest existed in solving a brutal crime.[49] Alternatively, the court determined that the police conduct was not flagrant, and therefore, even if the detention was illegal, the confessions were the product of defendant's free will and thus admissible.[50]

The court of appeals dismissed Dunaway's application for leave to appeal, and his motion for reargument on the judgment was denied.[51] The United States Supreme Court granted certiorari to "clarify the Fourth Amendment's requirements as to the permissible grounds for custodial interrogation and to review the New York court's application of *Brown v. Illinois*."[52]

## Opinion of the United States Supreme Court

The Supreme Court reversed the state appellate court decision,[53] holding that the police violated the fourth and fourteenth

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event that there was a detention without probable cause, whether the "making of the confession was rendered infirm by the illegal arrest." *Id.*

44. *See* note 30 *supra*.

45. *Id.*

46. 422 U.S. 590 (1975).

47. It should be noted that the hearing court found that there was an "arrest," but that the factual predicate in this case did not amount to probable cause to support the arrest. That decision, rendered by the Honorable Donald J. Mark, Monroe County Court Judge, is not reported. *See* Brief for Petitioner at 14, Dunaway v. New York, 442 U.S. 200 (1979).

48. People v. Dunaway, 61 A.D.2d 299, 402 N.Y.S.2d 490 (1978).

49. *Id.* at 304, 402 N.Y.S.2d at 493.

50. *Id.*

51. *See* Brief for Petitioner, Dunaway v. New York, 442 U.S. 200 (1979).

52. Dunaway v. New York, 442 U.S. 200, 206 (1979).

53. On appeal to the Supreme Court, Dunaway argued that the appellate division erroneously reversed the trial court's suppression of the inclupatory statements and sketches. To support this argument, the defendant submitted that he was "arrested" without probable cause, in violation of the fourth amendment, and the subsequent statements and draw-

amendments when, without probable cause, they "seized" Dunaway and transported him to the police station for questioning. The Court rejected the State's contention that this type of "seizure" could be justified on "reasonable suspicion." The intrusion was found to be indistinguishable from a traditional arrest[54] and substantially different from the narrow intrusions in *Terry* and its progeny[55] which were judged by a balancing test rather than the probable cause standard. Regardless of its label, the custodial interrogation was such a serious intrusion on Dunaway's privacy that it necessarily triggered application of the traditional safeguards against an illegal arrest.

The Court further found that the "causal connection" between Dunaway's unlawful detention and his subsequent statements and sketches was not sufficiently attenuated to permit the use of this evidence at trial. The *Dunaway* Court reiterated the three factors enunciated in *Brown* and concluded that the overall situations in both cases were virtually identical.

## ANALYSIS

### *"The Seizure": A Preliminary Finding*

At the outset of the majority opinion, Justice Brennan announced that the Court would decide the issue left open in *Morales*, namely, the constitutionality of "custodial questioning on less than probable cause for a full fledged arrest."[56] While this issue was ultimately resolved by the Court, this phraseology assumed that the custodial questioning was "involuntary" and hence amounted to a "seizure." The Court disposed of this

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ings were a product of this illegal arrest and therefore inadmissible. Furthermore, despite full compliance by the police with the fifth amendment safeguards, the "causal connection" between the initial illegality and the resultant evidence was not sufficiently broken, under the standards articulated in *Brown*, to render the evidence admissible.

Alternatively, the defendant argued that if his confrontation with the police was not a "technical arrest," it was nonetheless a "seizure" under the fourth amendment, made for the purpose of detention and/or interrogation, without probable cause, and as such, violated his fourth amendment rights. *See* Brief for Petitioner at 25, Dunaway v. New York, 442 U.S. 200 (1979).

54. 442 U.S. at 206.

55. After *Terry*, the Supreme Court twice departed from the rule that probable cause was required to justify all police seizures, but both decisions involved limited weapons frisks, not arising in a custodial interrogation context. Pennsylvania v. Mimms, 434 U.S. 106 (1977) (order to get out of car after car is lawfully detained for a traffic violation; frisk for weapons justified after bulge observed in jacket); Adams v. Williams, 407 U.S. 143 (1972) (frisk for weapons upheld on reasonable suspicion). *See also* United States v. Brignoni-Ponce, 422 U.S. 873 (1975) (brief interrogation stops of suspicious automobiles near U.S. borders).

56. 442 U.S. at 202.

threshold issue by stating in one sentence that "there can be little doubt that petitioner was 'seized' in the Fourth Amendment sense when he was taken involuntarily to the police station."[57] Apparently influenced by the police officers' concession that Dunaway would have been physically restrained had he attempted to leave, the Court accepted the trial court's finding that the detention was involuntary.[58]

Justice Rehnquist dissented and strongly disagreed with the majority's resolution of this issue, believing that the county court did not apply *Terry* in determining whether Dunaway accompanied the police voluntarily. He stated: "[T]he question turns on whether the officer's conduct is objectively coercive or physically threatening not on the mere fact that a person might in some measure feel cowed by the fact that a request is made by the police officer."[59]

Viewing the totality of the circumstances surrounding the encounter, it would appear that Dunaway's detention was involuntary,[60] and that Justice Rehnquist's approach is unrealistically narrow. Moreover, such a factual determination is properly left with the trial court since it is best equipped to

57. *Id.* It should be noted that the State argued that the defendant accompanied the police voluntarily, and therefore was not "seized" within the meaning of the fourth amendment.

In a footnote, the Court cited the *A.L.I. Model Code of Pre-Arraignment Procedure* § 201 930 and commentary at 91 (tentative draft No. 1, 1966), to the effect that a "request to come to the police station may easily carry an implication of obligation while the appearance itself, unless clearly stated to be voluntary, may be an awesome experience for the ordinary citizen." 442 U.S. at 207 n.6. *See generally* Bivens v. Six Unknown Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 419 (1971) (Burger, C.J., dissenting), in which the Chief Justice recommended that the Court adopt the A.L.I.'s proposal in dealing with the exclusion of evidence. Evidence would be suppressed only if the Court found that the violation was substantial. *See also McKay*, *supra* note 6, for a discussion of Art. 290 of the proposed Model Code dealing with evidentiary exclusion.

58. 442 U.S. at 202. *But cf.* State v. Morgan, 299 N.C. 191, 261 S.E.2d 827 (1980) (no fourth amendment "seizure" where, although defendant did not initiate encounter with police, he accompanied officers to station and remained despite being advised he was free to leave).

59. 442 U.S. at 224 (Rehnquist, J., dissenting). Justice Rehnquist, with whom the Chief Justice dissented, stated that he would have had little difficulty in joining the Court's opinion on the issue of whether custodial questioning without probable cause was permissible. However, in his view of the case, Dunaway voluntarily went with the police to answer their questions and, therefore, was not "seized" within the meaning of the fourth amendment.

60. Dunaway was 18 years old, 5'7" tall, and weighed 130 pounds. He was confronted by two plain clothes detectives, both 6'3" or taller, and each weighing in excess of 200 pounds. Furthermore, the officers, in response to hypotheticals at trial, indicated that Dunaway would have been physically restrained had he attempted to leave. *See* People v. Dunaway, 61 A.D.2d 299, 304, 402 N.Y.S.2d 490, 494 (1978) (Cardamone, J., dissenting).

make it. Nevertheless, it does appear that the majority begged the question by holding that there was a "seizure" because there was an "involuntary detention." Since a threshold requirement for fourth amendment claims is that a "seizure" has occurred, perhaps a more detailed analysis by the Court on this issue could have alleviated ambiguities concerning the standard to be applied.[61] After deciding that Dunaway was "seized" in

61. The Supreme Court, in United States v. Mendenhall, 100 S.Ct. 1870 (May 27, 1980), had yet another opportunity to address the "seizure" issue. The Court, however, did little to clarify existing confusion concerning when an individual is "seized." Indeed, the decision appears inconsistent with *Dunaway*. In *Mendenhall*, the defendant was convicted of possession of heroin with intent to distribute following denial by the district court of her pretrial motion to suppress the introduction of the heroin. The defendant contended that the evidence against her had been acquired through an unconstitutional search and seizure by Drug Enforcement Administration (DEA) agents. The initial encounter between defendant and DEA agents began on the concourse at the Detroit Metropolitan Airport shortly after defendant disembarked from an airline flight which originated in Los Angeles. The defendant was the last passenger to alight from the plane, claimed no luggage, and proceeded to another airline counter, located in a different terminal, to receive her boarding pass for a flight from Detroit to Pittsburgh. The DEA agents had no advance information about the defendant. After observing her "unusual" behavior which they described as fitting the so-called "drug courier profile—an informally compiled abstract of characteristics thought typical of persons carrying illicit drugs," *id.* at 1873 n.1, the agents approached the defendant, identified themselves, and asked to see her identification and airline ticket. After producing an airline ticket and driver's license, bearing different names, and responding to brief questions, defendant was asked to accompany the agents to the airport DEA office for further questioning. The defendant accompanied the agents to the office, although the record did not indicate whether she gave a verbal response to the agents' request. At the office, defendant reportedly consented to a body search of her person by a female officer which revealed two plastic bags of heroin.

The district court, in denying defendant's pretrial motion to suppress, concluded that the agents' conduct in initially approaching defendant was "a permissive investigative stop under the standards of Terry v. Ohio, 392 U.S. 1 (1968)," in that it was based on "specific and articulable facts that justified a suspicion of criminal activity." United States v. Mendenhall, 100 S.Ct. at 1874. The district court further found that defendant accompanied the agents to the office "voluntarily" and the consent to the search was freely and voluntarily given. The court of appeals reversed in an unreported opinion, and on rehearing *en banc*, reaffirmed its original decision, stating that defendant had not voluntarily consented to the search. United States v. Mendenhall, 596 F.2d 706 (6th Cir. 1980).

The United States Supreme Court, in a widely divided decision, reversed. The Court concluded that the initial encounter between defendant and DEA agents on the concourse at the airport did not constitute a "seizure," and that the "District Court's determination that the [defendant] consented to the search of her person 'freely and voluntarily' was sustained by the evidence." United States v. Mendenhall, 100 S.Ct. 1870, 1880 (1980). Justice Stewart, writing for the Court, viewed the initial encounter as "an encounter that intruded upon no constitutionally protected rights." He stated that "a person is 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Id.* at

the fourth amendment sense, the Court focused on whether this "seizure," which did not amount to an arrest, was constitutionally permissible.

### *The Illegality of Involuntary Custodial Interrogations on Less Than Probable Cause*

The State claimed that at the time of his "seizure," the po-

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1877. Considering the facts before him, Justice Stewart concluded that the defendant "had no objective reason to believe that she was not free to end the conversation in the concourse and proceed on her way. . . ." *Id.* at 1878. Therefore, the initial encounter did not constitute a "seizure." Only Justice Rehnquist, however, concurred on this finding. A separate majority, while assuming that defendant was "seized," believed that the "stop" was permissible because there were reasonable grounds to justify it.

Justice Stewart, speaking for a majority of the Court, further held that the defendant's fourth amendment rights were not violated when she went from the concourse to the DEA office. Viewing the totality of the circumstances, he found that the district court's determination that she accompanied the agents to the office "voluntarily in a spirit of apparent cooperation," was sustained by the record. Similarly, he concluded that her consent to the search of her person was given freely and voluntarily.

The four dissenting Justices (White, Brennan, Marshall, and Stevens), all of whom were in the *Dunaway* majority, believed that the Court's decision could not be reconciled with *Dunaway*. The dissenters first criticised the majority's examination of whether the defendant was "seized." Justice White stated that the proper course would have been to remand for an evidentiary hearing on the question, since "throughout the lower court proceedings . . . , the Government never questioned that the initial stop of Ms. Mendenhall was a 'seizure.' " *Id.* at 1884. Rather, the government consistently maintained that the "stop" was justified because the agents were acting on reasonable suspicion that defendant was engaged in criminal activity. The dissenters therefore assumed, as did the concurring justices, that defendant was "seized" within the meaning of the fourth amendment when she was stopped by the agents. Unlike the concurring justices however, the dissenters concluded that the agents were not justified in "seizing" Ms. Mendenhall because their suspicion could only have been based on "inchoate and unparticularized suspicion or 'hunch,' rather than specific reasonable inferences." *Id.* at 1887. Furthermore, the dissenters argued that the finding that Ms. Mendenhall consented to go to the DEA office was unsupported by the record and inconsistent with *Dunaway*. "The evidence of consent here is even flimisier than that we rejected in *Dunaway* where it was claimed that the suspect made an affirmative response when asked if he would accompany the officers to the police station." *Id.* at 1888. In conclusion, Justice White stated that it was "unbelievable" that the sequence of events from the initial encounter to the strip search involved no invasion of a citizen's constitutionally protected interest in privacy. " *'Will you walk into my parlour?' said the spider to a fly; (you may find you have consented, without ever knowing why.)* " *Id.* at 1889 n.15 (emphasis added).

*But see* Reid v. Georgia, 48 U.S.L.W. 3847 (1980) (per curiam). In a case remarkably similar to *Mendenhall*, the Court determined that the petitioner was unlawfully "seized" when approached by DEA agents outside an airline terminal. The Court, in rejecting the lower court's conclusion that the "seizure" was permissible because the petitioner fit the so-called "drug courier profile," concluded that "the agent could not, as a matter of law, have reasonably suspected the petitioner of criminal activity on the basis of these observed circumstances." *Id.* at 3848.

lice had "reasonable suspicion" that Dunaway possessed "intimate knowledge about a serious and unsolved crime."[62] It urged the Supreme Court to adopt a *Terry*-like balancing test to uphold the seizure on "reasonable suspicion." Actually, the test proposed by the State and adopted by the New York courts in both *People v. Morales*[63] and *Dunaway* was a multifactor balancing test of reasonable police conduct[64] to cover all seizures not amounting to technical arrests.[65] The factors that the New York courts believed supported such an intrusion without probable cause were: (1) there was a "reasonable suspicion" that the suspect possessed knowledge of the crime; (2) the crime was brutal and heinous; (3) the crime had remained unsolved for a period of several months; (4) a great public interest existed in solving this brutal crime; (5) all investigative techniques except interrogation had been exhausted; and (6) the brief detention resulted in no formal arrest record.[66] The New York courts attempted to justify certain custodial seizures absent probable cause by creating a tightly drawn rule, which would be limited to exceptional circumstances, ample to protect fifth and sixth amendment rights.

In rejecting this proposed relaxed standard, the *Dunaway* Court examined *Terry* and its progeny and compared its own facts to the limited police intrusions in those cases. *Terry* allowed a limited frisk for weapons when an officer believed that criminal activity was afoot and that his safety was endangered. In contrast to this brief on-the-street encounter, Dunaway was picked up by police, transported to the police station, and, upon arrival, placed in an interrogation room. The severity of the intrusion was not even roughly analogous to the frisk in *Terry*. Rather, the detention of Dunaway was in important respects indistinguishable from a traditional arrest, and therefore the probable cause requirement applied.[67]

In further support of its holding, the *Dunaway* Court relied

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62. Dunaway v. New York, 442 U.S. at 207. The State conceded that the police lacked probable cause to arrest Dunaway but it argued that even if there had been a seizure, it was permissible under the fourth amendment.

63. *See* note 30 *supra*.

64. *See* text accompanying note 49 *supra*.

65. Dunaway v. New York, 442 U.S. at 213.

66. People v. Dunaway, 61 A.D.2d 299, 302, 402 N.Y.S.2d 490, 492 (1978); People v. Morales, 42 N.Y.2d 129, 366 N.E.2d 248, 397 N.Y.S.2d 587 (1977) (court reiterated the views expressed in its earlier opinion 22 N.Y.2d 55, 238 N.E.2d 307, 290 N.Y.S.2d 898 (1968)).

67. Dunaway v. New York, 442 U.S. at 212. "The requirement of probable cause has roots that are deep in our history. Hostility to seizures based on mere suspicion, or even strong reason to suspect was not adequate to support a warrant for arrest." Henry v. United States, 361 U.S. 98, 100 (1959).

on its decisions in *Brown v. Illinois*[68] and *Davis v. Mississippi*.[69] In *Brown*, the Court had indicated its disdain for custodial questioning on less than probable cause and condemned the police conduct, which in that case amounted to a technical arrest. "Although Brown's arrest had more of the trappings of a technical formal arrest than [Dunaway's], such differences in form must not be exalted over substance. . . . The application of the Fourth Amendment's requirement of probable cause does not depend on whether an intrusion of this magnitude is termed an 'arrest' under state law."[70]

In *Davis*, in connection with a rape investigation, police had brought in numerous black youths to the police station for questioning and fingerprinting. Ultimately, the defendant Davis' fingerprints matched those found in the victim's home. The evidence was admitted against him, and he was convicted. The Court rejected the State's argument that the detention without probable cause was lawful because it occurred during an investigatory rather than accusatory stage for the sole purpose of obtaining fingerprints.[71] The Court stated: "Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions be termed 'arrests' or 'investigatory detentions.' "[72] In dictum, it was suggested that there may be narrowly defined circumstances which would allow fingerprinting absent probable cause, but the Court declined to create such an exception because it found that Davis was not merely fingerprinted during his detention, *but was also subject to interrogation*.[73]

A close examination of *Davis* suggests that *Dunaway* is not only a reaffirmation of the Court's "disdain for custodial interrogations" without probable cause, but also an extension. In *Davis*, the police conduct was not even based on "reasonable suspicion." The officers "rounded up" numerous young blacks for fingerprinting because the victim had identified her attacker

68. 422 U.S. 590 (1975).

69. 394 U.S. 721 (1969).

70. Dunaway v. New York, 442 U.S. at 212.

71. 394 U.S. at 726. In reversing, the Court rejected the State's argument that fingerprint evidence, because of its trustworthiness, is not subject to the fourth and fourteenth amendment proscriptions. The Court reiterated its position that *all* evidence which is the result of an illegal search or seizure is inadmissible in court. *See* Mapp v. Ohio, 367 U.S. 643 (1963). *See* notes 5-6 and accompanying text *supra*. *See generally* Comment, *Admissibility of Fingerprints Seized as a Result of an Illegal Detention*, 47 J. URB. LAW 733 (1970).

72. 394 U.S. at 726-27.

73. *Id.* at 729 (emphasis supplied).

as a black youth. The defendant merely fit that very general description, but certainly this information did not amount to a "reasonable suspicion" that he was responsible. In *Dunaway*, the police believed, and the lower courts found, that the officers had "reasonable suspicion" that Dunaway was involved in the murder.[74] The Supreme Court thus expanded its prior holding by rejecting *any* standard short of probable cause for an involuntary custodial interrogation, no matter how exceptional the circumstances.

### *The Propriety of the New York Standard*

The significance of the *Dunaway* holding becomes apparent by envisioning the various problems which would result from application of the rule proposed by the New York courts. In determining whether police action was justified in particular situations, the courts would have to consider all of the factors enunciated by the New York courts in *Morales* and *Dunaway* and define such terms as "reasonable suspicion," "brief detention," "carefully controlled circumstances," and "crimes which are brutal and heinous."[75] Furthermore, the proposed balancing test itself is not readily definable. The appellate division in *Dunaway* seemed to apply three different tests in upholding the police seizure on less than probable cause.

First, the appellate division, quoting from the court of appeals' *Morales* opinion, emphasized the fact that the detention was brief and carefully controlled to protect Dunaway's fifth and sixth amendment rights.[76] Second, the court proposed that the conduct of law enforcement officials should be judged by considering the "manner and intensity of the interference, the gravity of the crime involved and the circumstances attending the encounter."[77] Finally, the court upheld the seizure and subsequent interrogation because it was a brief detention, based on reasonable suspicion, to investigate a brutal and unsolved crime, where no formal accusation was filed against the defendant.[78]

Perhaps the Supreme Court was disinclined to accept such a rule when the confusion surrounding its application was al-

74. Since the Supreme Court did not accept the lower court's standard, it did not address the issue of whether triple hearsay, several months old, would constitute "reasonable suspicion."

75. *See* Brief for American Civil Liberties Union and New York Civil Liberties Union, Amici Curiae, Dunaway v. New York, 442 U.S. 200 (1979).

76. People v. Dunaway, 61 A.D.2d at 301, 402 N.Y.S.2d at 492.

77. *Id.* (quoting People v. DeBour, 40 N.Y.2d 210, 219; 352 N.E.2d 562, 569, 386 N.Y.S.2d 375, 382 (1976).

78. People v. Dunaway, 61 A.D.2d at 302, 402 N.Y.S.2d at 493.

ready apparent. More importantly, any attempt to fashion an exception to the probable cause requirement in a situation so closely resembling an arrest would threaten to destroy important fourth amendment safeguards. It would have amounted to a clear departure from the probable cause requirement which has been interpreted and applied by the courts for over two hundred years.[79] Indeed, "adopting the New York doctrine would [have] require[d] re-writing fourth amendment law in a way which would significantly impair the administration of justice as well as individual liberty."[80]

### *The Admissibility of Statements Made Following an Illegal Arrest or Detention: The "Attenuation Doctrine"*

Having found that Dunaway's detention was illegal, a further issue remained: whether the statements and sketches were nevertheless admissible because they were not tainted by the unlawful seizure. Not all evidence is subject to the exclusionary rule "simply because it would not have come to light but for the illegal actions of the police."[81] Evidence linked to a fourth amendment violation is admissible if the causal connection between the initial illegality and the derived evidence is sufficiently "attenuated"[82] to dissipate the primary taint.[83]

In *Wong Sun v. United States*,[84] the Supreme Court announced the standard to be applied in determining whether a statement or other evidence obtained subsequent to an illegal arrest should be suppressed: "[W]hether granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by means sufficiently

79. In Henry v. United States, 361 U.S. 98 (1959), the Court stated: "[T]he standard of probable cause [represents] the accumulated wisdom of precedent and experience as to the minimum justification necessary to make the kind of intrusion involved in an arrest 'reasonable' under the Fourth Amendment." *Id.* at 100.

80. Brief for American Civil Liberties Union and New York Civil Liberties Union, Amici Curiae at 10, Dunaway v. New York, 442 U.S. 200 (1979).

81. Wong Sun v. United States, 371 U.S. 471, 480 (1963). This was the first case in which the Supreme Court applied the exclusionary rule to oral evidence in the form of confessions. The Court concluded that "no logical distinction existed between physical and verbal evidence in light of the policies underlying the rule." *Id.*

82. "Attenuate" is defined as: to make thin or slender, to lessen the amount, force or value of: WEAKEN; to reduce the severity, virulence or vitality of. WEBSTER'S NEW COLLEGIATE DICTIONARY 72-73 (5th ed. 1977).

83. *See* Nardone v. United States, 308 U.S. 338 (1939), wherein the Court, in dictum, noted that "sophisticated argument may prove a causal connection between the information obtained through illicit [activity] and the Government's proof. As a matter of good sense, however, such connection may have become so attenuated as to dissipate the taint." *Id.* at 341.

84. 371 U.S. 471 (1963).

distinguishable to be purged of the primary taint."[85] *Wong Sun* involved two defendants, and application of the above quoted test resulted in different dispositions. Defendant Toy made incriminating statements to federal authorities shortly after police forcibly entered his home and arrested him without a warrant or probable cause.[86] Toy's statements were held inadmissible because they derived so immediately from the unlawful entry and arrest. Under the circumstances, it was "unreasonable to infer that Toy's response was sufficiently an act of free will."[87] Defendant Wong Sun's confession, however, was admissible because "he was assumed to have acted on his own volition."[88] His confession did not arise by exploitation of the illegal arrest. Rather, he was lawfully arraigned, released on his own recognizance, and voluntarily returned to the police station several days later to confess. *Wong Sun*, however, left unstated the factors to be considered in "poison tree" contexts.

The Supreme Court explained the "attenuation doctrine" in further detail in the 1975 case of *Brown v. Illinois*.[89] After condemning the police misconduct in arresting Brown without probable cause, the Court focused on the admissibility of the defendant's confession which was made after he had been properly advised of his *Miranda* rights.[90] Reversing the Illinois Supreme Court's affirmance of Brown's conviction, the Court held that *Miranda* warnings do not, "per se," render admissible a confession following an illegal arrest.[91] To be admissible, not only must a confession be voluntary under the fifth amendment, but the taint of any fourth amendment violation must be sufficiently removed.[92] Compliance with the fifth amendment will not remedy a fourth amendment violation because the fourth

85. *Id.* at 488 (quoting J. MAGUIRE, EVIDENCE OF GUILT 221 (1959)).

86. The police entry was effecuated, at night, in Toy's bedroom where his wife and child lay sleeping.

87. 371 U.S. at 486.

88. *See* Note, *Admissibility of Confessions Made Subsequent to an Illegal Arrest: Wong Sun v. United States Revisited*, 61 J. CRIM. L., CRIMINOLOGY & P. SCI. 207, 209 (1970).

89. 422 U.S. 590 (1975).

90. *See* note 32 *supra*.

91. 422 U.S. at 603.

> If *Miranda* warnings, by themselves, were held to attenuate the taint of an unconstitutional arrest, regardless of how wanton and purposeful the Fourth Amendment violation, the effect of the exclusionary rule would be substantially dilluted. . . . Arrests made without a warrant or without probable cause, for questioning or "investigation" would be encouraged by the knowledge that evidence derived therefrom could well be made admissible at trial by the simple expedient of giving *Miranda* warnings.

*Id.* at 602.

92. *See* Comment, *Fourth Amendment Exclusionary Rule—Miranda*

amendment serves interests and policies distinct from those safeguarded by the fifth.[93] Nor would fourth amendment violations be sufficiently deterred.[94] Thus, although important,[95] *Miranda* warnings alone cannot assure that the fourth amendment has not been unduly exploited.

Looking beyond *Miranda*, the Court articulated a "causal connection" test, specifically outlining three factors for determining whether a confession is obtained by exploitation of an illegal arrest: "[T]he temporal proximity of the arrest and the confession; the presence of intervening circumstances; and, particularly, the purpose and flagrancy of the official misconduct."[96] After examining the record, the *Brown* Court held the defendant's confession inadmissible because: (1) less than two hours had elapsed between the arrest and confession; (2) there was no significant intervening event; and (3) the arrest had a "quality of purposefulness in that it was an expedition for evidence admittedly undertaken in the hope that something might turn up."[97]

The appellate division in *Dunaway* distinguished *Brown*, primarily relying on the dissimilar police conduct in the two cases. The appellate division noted that the police conduct in *Dunaway* did not resemble the flagrancy and purposefulness apparent in *Brown*.[98] Rather, it was highly protective of Dunaway's fifth and sixth amendment rights.[99]

The Supreme Court, in rejecting the appellate division's rationale, stated:

> This betrays a lingering confusion between "voluntariness" for purposes of the Fifth Amendment and the "causal connection" test established in *Brown*. Satisfying the Fifth Amendment is only the "threshold" condition of the Fourth Amendment analysis required by Brown . . . . To admit petitioner's confession in such a case would allow "law enforcement officers to violate the Fourth Amendment with impunity, safe in the knowledge that they could wash

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*Warnings Do Not Per Se Render Admissible A Confession Following An Arrest Which Violates Fourth Amendment Rights*, 25 EMORY L.J. 227 (1976).

93. *Miranda* warnings in no way inform a person of his fourth amendment rights, including his right to be released from unlawful custody following an arrest made without a warrant or without probable cause. Brown v. Illinois, 422 U.S. at 601 n.6.

94. *Id.* at 601.

95. A finding that *Miranda* warnings have been given is essential to fourth amendment analysis. If the police have violated the defendant's fifth amendment rights, the evidence would be inadmissible, and there would be no need to examine the connection between the fourth amendment violation and the confession.

96. 422 U.S. at 603.

97. *Id.* at 605.

98. Dunaway v. New York, 61 A.D.2d 299, 303-04, 402 N.Y.S.2d 490, 493 (1978).

99. *Id.* at 302, 402 N.Y.S.2d at 492.

their hands in the 'procedural safeguards' of the Fifth."[100]

The Court believed that *Dunaway* was a virtual replica of the situation in *Brown*, although different labels were used to define the detentions that occurred.

### *An Analysis of the "Causal Connection" Test*

*Brown*'s "causal connection" test was designed to serve two purposes: (1) to insure the voluntariness of confessions obtained in illegal custodial surroundings, and (2) to protect fourth amendment interests, namely, to insure that fourth amendment violations are not encouraged by *Miranda* warnings providing a cure-all. Such a result would reduce the fourth amendment to a form of words[101] and certainly would not enhance the deterrence of fourth amendment violations.

The first two *Brown* factors, the temporal proximity of the arrest and confession, and the presence or absence of intervening circumstances, relate to whether the confession is "sufficiently an act of free will to purge the primary taint of the unlawful invasion."[102] An "illegal detention in the coercive atmosphere of a police station [should] not be lightly overlooked."[103] The "free will" of the defendant, in this context, however, means something more than the absence of coercion or compliance with fifth amendment safeguards. Instead, the focus is on "attenuating" the causal connection between the fourth amendment violation and the subsequent incriminating statements.

The Supreme Court in both *Brown* and *Dunaway* found significant the fact that very little time had elapsed between the defendants' arrests and confessions. However, this factor alone is too ambiguous to be determinative. The Court implied that the longer the time lapse, the more likely the confession would be purged. This approach is unacceptable if a prolonged detention in the face of police influences is to be viewed as a continuing violation of the fourth amendment.[104] A continual detention

100. 442 U.S. at 219 (quoting in part 25 EMORY L.J. 227, 238 (1976)).

101. *See* note 91 *supra*.

102. United States v. Perez-Esparza, 609 F.2d 1284, 1289 (9th Cir. 1979) (quoting Wong Sun v. United States, 371 U.S. at 486). *See* notes 139-156 and accompanying text *infra*.

103. United States v. O'Looney, 544 F.2d 385, 393 (9th Cir. 1976) (Hufstedler, J., dissenting), *cert. denied*, 429 U.S. 1023 (1976).

104. *See* Comment, *Fourth Amendment Exclusionary Rule—Miranda Warnings Do Not Per Se Render Admissible A Confession Following An Arrest Which Violates Fourth Amendment Rights*, 25 EMORY L.J. 227, 241 (1976) ("If the accused is held in continuous unconstitutional custody, for a long period of time, would not that fact indicate oppressive circumstances tending to cause him to 'give up?' ").

for several hours, without any intervening events would be no less of an exploitation of the illegal detention than a statement made within minutes after arrival at the station.[105] Thus, the "temporal proximity" factor should be important only when viewed in connection with the presence or absence of intervening circumstances.

The Supreme Court noted in *Brown* and *Dunaway* that "there were no intervening circumstances whatsoever."[106] Hence, the Court did not articulate the type of intervening circumstances which would serve to break the causal connection. An example of an attenuating event which would probably be deemed sufficient is the *Wong Sun* situation where the defendant was released from custody and voluntarily returned to the police station several days later to confess. Whether a purging event could occur while the defendant is still in custody, for example a consultation with an attorney, remains unanswered.[107] However, if incriminating statements by a detained suspect are to be deemed causally unrelated to his unlawful seizure, the intervening "happening" should be no less than some event away from police influences.

The *Brown* Court indicated that the most important consideration was the purpose and flagrancy of the police conduct.[108] The reason for this emphasis is clear, given one major purpose of the exclusionary rule being deterrence of official misconduct. This approach was also consistent with previous decisions in which the Supreme Court did not invoke the exclusionary rule where doing so would not have enhanced its deterrence value.[109]

The facts in *Brown* were particularly illustrative of this last factor. The police conduct could appropriately be labeled both "purposeful" and "flagrant." After laying in wait on the defendant's stairway, the police surprised Brown with their guns drawn and proceeded to conduct a warrantless search of his apartment. He was subsequently arrested, handcuffed, and

105. *See* Dunaway v. New York, 442 U.S. at 220 (Stevens, J., concurring) ("If there are no relevant intervening circumstances, a prolonged detention may well be a more serious exploitation of an illegal arrest than a short one.").

106. Brown v. Illinois, 422 U.S. at 603-04; Dunaway v. New York, 442 U.S. at 218.

107. In Brown v. Illinois, 422 U.S. 590 (1975), it was suggested at oral argument that release of the defendant from unconstitutional detention or the presence of defendant's attorney would constitute an intervening factor. *See* 16 CRIM. L. REP. (BNA) 4226, 4227-28 (Mar. 26, 1975). *See also* Dunaway v. New York, 442 U.S. at 220 (Stevens, J., concurring) ("[E]ven an immediate confession may have been motivated by a prearrest event such as a visit with a minister.").

108. 422 U.S. at 603-04.

109. See note 12 *supra*.

transported to the police station for custodial interrogation. The police were fully aware that they did not have probable cause to "arrest" Brown.[110]

In contrast to *Brown*, the confrontation between the police and Dunaway was not "calculated to cause surprise, fright and confusion." The police did detain Dunaway without probable cause, but he was not placed under arrest, and their initial contact with him did not resemble the abusive manner in which Brown was "seized." Furthermore, although the conduct of the police was "purposeful," in the sense that it was "investigatory" in nature, the highest state court in New York had previously ruled that such a "custodial detention" was lawful on a lesser standard than probable cause,[111] and the Supreme Court had yet to rule on the constitutionality of the New York standard. Based on these facts, it is entirely possible that the police were acting under the good faith belief that the detention was constitutionally permissible under the fourth amendment.[112] Therefore, excluding the evidence obtained while Dunaway was detained cannot be justified solely by looking to the *Brown* decision. The *Brown* analysis assumes that the police knowingly violate the fourth amendment, and is based, in large part, on deterring fourth amendment violations.[113] The police conduct to be deterred is that in which police *knowingly* flout fourth amendment standards.

The *Dunaway* Court reaffirmed that the "causal connection" test established in *Brown* is to be utilized to determine whether a confession made following an illegal seizure is admissible. However, reconciling *Dunaway*'s facts with the Court's holding that the evidence was inadmissible, indicates that *Duna-*

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110. Brown v. Illinois, 422 U.S. at 605. ("The impropriety of the arrest was obvious; awareness of the fact was virtually conceded by the two detectives . . . in their testimony. . . .").

111. People v. Morales, 22 N.Y.2d 55, 238 N.E.2d 357, 290 N.Y.S.2d 898 (1968). *See* note 30 *supra*.

112. Of course inquiring into the subjective state of mind of the police officer might be unsatisfactory as a determining factor since this approach is peculiarly subject to manipulation. But an objective analysis of the facts in *Dunaway* clearly point to "good faith" on the part of police officers. Three members of the United States Supreme Court, however, advocate limiting the focus to this factor alone. *See* Dunaway v. New York, 442 U.S. at 226 (Rehnquist, J., dissenting, joined by Chief Justice Burger); Brown v. Illinois, 422 U.S. at 602 (Powell, J., concurring in part).

113. The *Brown* Court's discussion of the test reflects this deterrent purpose. When the Court explained that voluntariness is only the threshold requirement of fourth amendment analysis, and that the fourth amendment serves interests and policies that are distinct from those it serves under the fifth, it stated that if *Miranda* warnings alone would allow the admission of the evidence following an illegal arrest, this would not "sufficiently deter a Fourth Amendment violation." 422 U.S. at 601. *See* note 91 *supra*.

*way*, to some extent, departed from the *Brown* analysis. Specifically, *Dunaway* at least impliedly discounted the importance of the last factor—"the purpose and flagrancy of the official misconduct." This case seems to be a departure from the rationale that deterrence is the only real basis for the exclusionary rule.

If the exclusionary rule is to serve as a deterrent, the exclusion of evidence is inappropriate where officers act under a good faith belief that their conduct is constitutionally permissible.[114] Similarly, the courts would not be sanctioning official misconduct, and thereby compromising their integrity, by allowing the admission of a confession found voluntary under the fifth amendment, where it was not obtained through an intentional or knowing violation of the fourth amendment. Given that the purpose of the fourth amendment guarantee is the protection of individual rights, the most logical explanation for the exclusionary rule, in this context, is that the individual has the right to have tainted evidence excluded.

*Dunaway* presented the Supreme Court an excellent opportunity to examine the *Brown* "causal connection" test. Rejecting the New York courts' application of *Brown*, the Court stated that it "betrayed a lingering confusion between voluntariness for purposes of the fifth amendment and the causal connection test established in *Brown*."[115] However, by failing to give any in depth treatment to the "causal connection" issue, and by only impliedly departing from the underlying rationale of *Brown*, the *Dunaway* Court did little to remedy the existing confusion which is certain to surround future application of the "attenuation doctrine" in lower courts.

## RECENT INTERPRETATIONS OF *DUNAWAY*

The Illinois Supreme Court and United States Court of Appeals for the Ninth Circuit have recently considered the admissibility of statements made following illegal arrests.[116] These decisions reveal the inconsistent results likely to continue surfacing as a consequence of *Dunaway*.

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114. Justice Stevens, in his concurring opinion in *Dunaway*, indicated that the deterrent purpose of the rule is sometimes interpreted quite differently, and in his view, the justification for excluding evidence obtained unlawfully was to motivate the law enforcement profession as a whole "to adopt and enforce regular procedures that will avoid the future invasion of the citizen's constitutional rights." 442 U.S. at 221.

115. 442 U.S. at 219.

116. United States v. Perez-Esparza, 609 F.2d 1284 (9th Cir. 1979); People v. Gabbard, 78 Ill. 2d 88, 398 N.E.2d 574 (1979).

### *People v. Gabbard—Illinois Supreme Court*

*Facts*

In *People v. Gabbard*,[117] the defendant was convicted of burglary and armed robbery and was sentenced to 20 to 40 years imprisonment. An appellate court reversed and remanded for a new trial,[118] and the Supreme Court of Illinois granted the State's petition for leave to appeal. Scrutiny of the circumstances of defendant's arrest and subsequent conviction is needed to place the Illinois court's opinion in context. At 7:00 a.m. on April 29, 1979, the defendant was seen walking along the shoulder of Highway 66, on the outskirts of Lincoln, Illinois. A state police officer stopped him pursuant to police department policy requiring checks of every person found walking on the road.[119] The defendant proceeded to enter the police vehicle,[120] and after offering the anomalous answer that he was both going to and coming from Springfield, he was asked for identification. After producing only personalized checks and failing to possess an Illinois driver's license (which the police officer thought he saw tucked in the checkbook), defendant was ordered to place his head on the dashboard, with his hands behind him.[121] The officer then drew his weapon and handcuffed Gabbard. A search of the checkbook revealed two drivers' licenses, one of which was eventually found to belong to the victim of a robbery. While proceeding to the police station, and after transmitting the defendant's name over the police radio, the officer learned that Gabbard was an escapee from a mental institution. Some eleven hours later, after being shown a sketch of the prime suspect, which resembled him, and after being confronted with evidence that he had been identified at an earlier lineup, the defendant gave a very circumstantial account of the robbery.[122]

117. 78 Ill. 2d 88, 398 N.E.2d 574 (1979).

118. 67 Ill. App. 3d 945, 385 N.E.2d 366 (1979). The appellate court held that defendant's arrest had been invalid, and consequently the trial court should have granted his pretrial motion to suppress the items seized at the time of his arrest. The court went on to hold, however, that the inculpatory statements made by the defendant while in police custody were admissible despite the illegality of the arrest.

119. At the hearing on the motion to suppress, the police officer testified that one of the reasons for this policy was to ascertain whether someone was in need of assistance. People v. Gabbard, 78 Ill. 2d at 92, 398 N.E.2d at 576.

120. The testimony of the police officer and the defendant conflicted on this point. The officer testified that the defendant voluntarily got into the car, while the defendant claimed that he was summoned to get into the car. *Id.* at 91, 398 N.E.2d at 575.

121. This was the substance of the police officer's testimony.

122. People v. Gabbard, 78 Ill. 2d at 98, 398 N.E.2d at 578. Defendant was originally questioned about the robbery at approximately 9:00 a.m. by a

*Analysis of the Illinois Supreme Court Opinion*

The issues before the supreme court were: the legality of the arrest; the admissibility of the items seized at the time of arrest; and the admissibility of the defendant's inculpatory statements made thereafter while in police custody. The supreme court, agreeing with the appellate court, ruled that the arrest had been illegal.[123] Consequently, it held that the items seized at this time should have been suppressed.[124] Because the case had to be retried, the court considered whether the inculpatory statements regarding the robbery should also have been suppressed. After reviewing the causal connection test, the court stated that "[t]he circumstances of the arrest and the incriminating statements here are markedly different than those in" both *Brown* and *Dunaway*.[125] The statements were held to be admissible at any new trial.

After twice noting that the defendant had been informed of his *Miranda* rights, and waived them, the court distinguished *Brown* and *Dunaway* on the ground that the "purpose" of the unlawful arrest was not to interrogate the defendant about the crime to which his subsequent statements related. The court also emphasized that the interrogating officer was not even

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detective who had been informed that the driver's license of one of the victims was found in defendant's possession. At this time, defendant made no response to the questions concerning the robbery. Defendant was then driven to the sheriff's office in Springfield and in the afternoon was interrogated by a deputy sheriff who showed him a composite sketch of the suspect. When asked whether he thought the sketch resembled him, defendant responded that there were many similar characteristics. After being advised that he would appear in a lineup at which he would be viewed by victims of the robbery, defendant reportedly offered to cooperate if consideration would be given to his testimony. The detective informed defendant that he had no authority to enter into an agreement, but relayed the information to his superiors. After the lineup that evening, defendant was informed that he had been identified by two of the victims. A further conversation took place between the deputy sheriff and the defendant, at which time, eleven hours after he was arrested and after being asked to supply information about the robbery, defendant gave a circumstantial account of the robbery, the specific nature of which was not reported.

123. Citing *Dunaway*, the court believed that the defendant's handcuffing constituted an arrest. The only basis upon which the court could have found the arrest valid was that the officer had, six days earlier, received a report of persons wanted by the police. Among the reports distributed was one which contained a description of the escapee from the mental institution. On direct examination, however, the police officer testified that the only reason he had stopped the defendant was to "check out what he was doing." On cross-examination by the State, the officer offered the report as a further reason. Because the description contained in the report was so "general and lacking in distinctness," the supreme court ruled that there were not reasonable grounds, at the time of the arrest, to believe that the defendant was the escapee. *Id.* at 94, 398 N.E.2d at 576.

124. *Id.*

125. *Id.* at 96, 398 N.E.2d at 577.

aware of the circumstances of the arrest. Therefore, the court, citing *Dunaway*, held: "[T]he purpose of the exclusionary rule, i.e. to deter improper police conduct would be served minimally, if at all, by exclusion of defendant's statements."[126]

In further support of its holding, the court indicated that the defendant's statements were also prompted by intervening events. According to the court, these events included: (1) the sketch being shown to the defendant, and his acknowledgement that it resembled him; (2) defendant's implied admission of involvement by offering cooperation in exchange for leniency; and (3) the lineup identification after which the defendant was informed that he had been identified by the victim.[127] The court, however, acknowledged the inherent difficulty in considering the lineup identification an intervening event, particularly since the State conceded that the lineup evidence should have been suppressed.[128]

Finally, the court cited two Pennsylvania Supreme Court decisions as supporting its ruling that the inculpatory statements were admissible because not causally related to the unconstitutional invasion of the defendant's rights.[129] Reliance on these precedents appears strained. The first Pennsylvania case cited, *Commonwealth v. Wright*,[130] was decided before *Brown v. Illinois*[131] introduced the three-prong "causal connection" test. The other Pennsylvania decision, *Commonwealth v. Bogan*,[132] though decided after *Brown*, is easily distinguishable. In *Bogan*, the intervening events occurring between the defendant's arrest and confession were his appearance before a judge and

126. *Id.* at 98-99, 398 N.E.2d at 579.

127. *Id.* at 99, 398 N.E.2d at 579. In addition, the court stated "when the defendant, immediately preceding his inculpatory account of the robbery, was told that he had been identified by each of the viewers at the lineup, he responded to that information by stating that he was not surprised." *Id.*

128. The supreme court did not directly decide the issue of whether the lineup evidence should have been suppressed, because it determined that the state had waived any objection. The defendant had sought to suppress the lineup identification contending that the lineup was a consequence of the unlawful arrest. Since the state conceded that this evidence should have been suppressed, the supreme court, rather than deciding the question of whether lineup testimony should be treated by the same standards as confessions, held only that the state had waived any objection to suppressing this evidence. *Id.*

129. Commonwealth v. Bogan, 482 Pa. 151, 393 A.2d 424 (1978) (defendant's confession found voluntarily made, free of any element of coercion, and not resulting from an exploitation of his illegal arrest); Commonwealth v. Wright, 460 Pa. 247, 332 A.2d 809 (1975) (defendant's confrontation with his accomplice prompted his confession, not any exploitation of the circumstances of his arrest).

130. 460 Pa. 247, 332 A.2d 809 (1975).

131. 422 U.S. 590 (1975).

132. 482 Pa. 151, 393 A.2d 424 (1978).

an arraignment on an unrelated charge.[133]

The Illinois Supreme Court's reasoning in holding admissible the defendant's inculpatory statements[134] indicates its failure to grasp the distinction between "voluntariness for purposes of the fifth amendment and the 'causal connection' test established in *Brown*."[135] The distinction between the "purpose" of the police conduct in *Gabbard*, as compared to *Brown* and *Dunaway*, would justifiably been deemed controlling but for the fact that *Dunaway* appeared to have dispelled the overriding importance of this factor. However, since *Dunaway* at least recognized the purpose and flagrancy of the official misconduct as a relevant point of inquiry, an analysis of the police conduct in *Gabbard* is appropriate.

Indeed, the arresting officer's purpose in apprehending Gabbard was not to interrogate him on the crime to which he later made incriminating statements; there was no basis whatsoever upon which to arrest the defendant.[136] If the "flagrancy" factor is to be accorded any weight, the facts surrounding the officer's initial contact with the defendant should not have been overlooked.[137] Moreover, if the purpose of the exclusionary rule is, as the court believed, only deterrence of official misconduct, *Gabbard*'s facts present a particularly compelling case for an application of the exclusionary rule. Why should it matter whether the interrogating officer knew of the circumstances surrounding the suspect's arrest, or, whether the arresting officer's

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133. *Id.* at 152 n.4, 393 A.2d at 427-28 n.4 (defendant returned from his arraignment on an unrelated charge, and completed his statement providing numerous additional details).

134. Justice Clark, concurring in part and dissenting in part, disagreed with the *Gabbard* majority on whether the defendant's arrest was illegal. He conceded, however, that the majority, in determining that the arrest was invalid, "utilized somewhat tortuous reasoning to uphold the admissibility of the defendant's inculpatory statements." 78 Ill. 2d at 105, 398 N.E.2d at 582.

135. *See* text accompanying note 100 *supra*.

136. Justice Underwood, concurring in part and dissenting in part, joined by Justice Ryan, believed that "[o]nce the defendant had denied the possession of any identification other than the checks, it seems to me the officer, who had seen a driver's license, acted quite reasonably in arresting defendant in the belief that an offense had been committed by him." 78 Ill. 2d at 103, 398 N.E.2d at 581. It should be noted, however, that the defendant was not operating a motor vehicle at the time of his encounter with the police officer. Justice Underwood did not make clear exactly what offense he believed the officer had probable cause to arrest the defendant for, although he suggested that the report that described the escapee was on the officer's mind at the time of the stop.

Justice Clark, also concurring in part and dissenting in part, believed that the totality of the facts and circumstances, known to the arresting officer justified the arrest, and that the majority had "become bogged down in a morass of details." *Id.* at 105, 398 N.E.2d at 582.

137. *See* notes 117-21 and accompanying text *supra*.

purpose in apprehending the suspect was to question him about the crime to which he later made incriminating statements? This approach seems particularly susceptible to police manipulation.

An even more alarming result of the *Gabbard* decision is the court's interpretation of what constitutes "intervening circumstances." It is indeed questionable that an intervening event which is to serve as a break in the "causal connection" between the initial illegality and the subsequent evidence is any event perpetuated by police influences.[138]

### *United States v. Perez-Esparza: Ninth Circuit Court of Appeals*

In *United States v. Perez-Esparza*,[139] the Ninth Circuit recently had occasion to consider the "attenuation doctrine" in the aftermath of *Dunaway*. By holding inadmissible for "insufficient attenuation," certain contraband and inculpatory statements obtained subsequent to the defendant's unlawful arrest, *Perez-Esparza* offers a striking contrast to *Gabbard*.

#### *Facts*

Based upon stipulated facts, the defendant was convicted of possession with intent to distribute cocaine.[140] He appealed from the district court's denial of his pretrial motion to suppress the contraband and statements elicited during his detention. Drug Enforcement Administrative (DEA) agents, acting on an informant's tip,[141] alerted California law enforcement agencies

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138. *See* note 127 and accompanying text *supra* for a summary of the "intervening events" listed by the court. The court did not expressly deal with the factor identified as the "temporal proximity" between the arrest and confession, but it appears that it also considered the application of this factor to be in favor of allowing admissibility. Significantly, the appellate court, 67 Ill. App. 3d 945, 385 N.E.2d 366 (1979), whose opinion was affirmed, noted that more than eight hours had elapsed between the initial illegal arrest of defendant and his inculpatory statements. The court did not note, however, that the defendant was held in "continuous" police custody during this time. A mechanical application of the "temporal proximity" factor in this fashion is not at all persuasive. The fact that there was such a great time lapse, with no intervening factors not subject to police influences, should be deemed as "aggravating" the situation rather than "attenuating" it, especially in light of the events occurring during this time. *See* note 122 *supra*.

139. 609 F.2d 1284 (9th Cir. 1979).

140. The defendant was originally charged with (1) importing and attempting to import cocaine, and (2) possession and intent to distribute cocaine. The first count was dismissed, and he was convicted on the second count for violating 21 U.S.C. § 841 (A) (1). *Id.* at 1285.

141. The informant, who had supplied reliable information on some

to a certain automobile suspected in narcotics smuggling.[142] Pursuant to tightened security, the defendant's automobile was stopped at the border patrol checkpoint at San Clemente and ordered to an inspection area. The defendant was then taken to a border patrol office to await questioning by DEA agents. After nearly a three-hour delay, the agents arrived and informed the defendant that he was being detained because of suspected smuggling activity. At this time, he was also advised of *Miranda* warnings. Subsequently, the defendant signed a written consent authorizing the agents to search his car, which resulted in the discovery of cocaine concealed in a headlight. Following seizure of the contraband, the defendant made incriminating statements.[143]

*Analysis of the Ninth Circuit Opinion*

The Ninth Circuit reversed, holding that the contraband seized and the subsequent statements made by the defendant were "fruits of an illegal seizure" and should have been suppressed.[144] Adjudicating the propriety of the initial stop, the court noted that the informant's tip provided "reasonable suspicion" but that this did not necessarily render the subsequent detention lawful. The detention was for the purpose of "custodial interrogation" and, thus, controlled by *Dunaway*. Therefore, consistent with *Dunaway*, the "detention for custodial interrogation" was found sufficiently similar to an "arrest" so as to re-

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twenty occasions, advised DEA agents that a beige 1971 Ford, with California license plates was being used to smuggle narcotics. *Id.*

142. Originally the information was entered into the border computer but because of an error in the system, the defendant's car was not stopped the previous evening when the car entered the United States at a border crossing. *Id.*

143. The statements made by Perez-Esparza were that he had been paid to drive the car and was aware of the fact that it contained cocaine. *Id.*

144. *Id.* at 1291. The district judge, in denying the defendant's motion to suppress stated:

> As the Courts have repeatedly stated, each case must stand on its own feet, and taking all the evidence in this case, together with the reasonable inferences to be drawn from the evidence, I think there was probable cause to stop the car. They had the information; as you say, they could have searched it at the border without any search warrant; they had been looking for the car for some time, and the Border Patrol had been notified of the license number and the type of car; and when it approached the inspection point, I think there was grounds to stop the car. Then the defendant gave written consent to search it when he was advised that they could get a search warrant. I think taking all this evidence into consideration that there was probable cause to stop it. There was a written consent to search it. The Motion to Suppress the evidence is overruled, and the Motion to Suppress statements is overruled.

*Id.* at 1286 n.1.

quire probable cause. Since the basis for the detention was the informant's tip, which was not sufficient to meet the standard of probable cause,[145] the court held the defendant's detention illegal.

In view of this initial determination, the court considered the effect of the illegality on the admissibility of the seized evidence and inculpatory statements. The court identified the proper inquiry as being "whether the unconsitutional police conduct was sufficiently attentuated from the voluntary consent to search and the inculpatory statements to avoid exclusion from evidence."[146] After reviewing the *Brown* "causal connection" test, the court concluded that there was insufficient "attenuation." It noted that *Miranda* warnings are not dispositive, since satisfying fifth amendment safeguards "is merely a threshhold requirement for fourth amendment analysis."[147]

While recognizing that fourth amendment interests deserve protection irrespective of fifth amendment rights, the court acknowledged that the United States Supreme Court has given conflicting signals as to the real purpose of the exclusionary rule when utilized to implement the fourth amendment.[148] However,

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145. The *Perez-Esparza* court found that the tip did not give the police probable cause to arrest the defendant because it did not satisfy the *Aguilar-Spinelli* two-pronged test that must be met before an informer's tip can provide the basis for probable cause. *See* Spinelli v. United States, 394 U.S. 410 (1969); Aguilar v. Texas, 378 U.S. 108 (1964) (testing the sufficiency of an affidavit filed in support of a search warrant which was based on an informant's tip). The *Aguilar-Spinelli* test requires that the tip detail (1) facts which show the informer is credible or the information is reliable (the "veracity" prong), and (2) underlying circumstances which verify the validity of the informer's conclusions (the basis of "knowledge" prong). *See* United States v. Perez-Esparza, 609 F.2d at 1287. The second part of the test can be satisfied if the informer's tip is sufficiently detailed so as to allow an inference that the information was gained in a reliable fashion. *See* Draper v. United States, 358 U.S. 307 (1959) (example of the detail required to satisfy the second part of the test). Using *Draper* as a standard, the *Perez-Esparza* court stated, "[I]dentifying a specific vehicle in general use for smuggling lacks the extensive corroborative detail-particulars for a smuggling trip—found sufficient in *Draper*." Therefore, the court held, "the information given by the informant does not verify the validity of his conclusions and the second part of the *Aguilar-Spinelli* test is not met." 609 F.2d. at 1288.

146. *Id.*

147. *Id.* (quoting Brown v. Illinois, 422 U.S. at 604).

148. 609 F.2d at 1288-89. As the court noted, the Supreme Court has not been consistent on whether the sole purpose of the exclusionary rule is to deter official misconduct, or whether judicial integrity concerns are equally important. *Compare* United States v. Calandra, 414 U.S. 338 (1974) (deterrence is the "prime purpose" of the exclusionary rule) *and* Stone v. Powell, 428 U.S. 465 (1976) (primary justification for the exclusionary rule is deterrence) *with* Brown v. Illinois, 422 U.S. 590 (1975) *and* Dunaway v. New York, 442 U.S. 200 (1979) (both cases noting that the exclusionary rule protects fourth amendment guarantees in two respects: deterrence and judicial integrity).

the court chose to adopt the *Dunaway* "formulation" because it believed that its facts were not substantially different than those presented to the Supreme Court in *Dunaway*. *Dunaway* indicated that the purpose of the exclusionary rule was to deter improper police conduct and to avoid compromising judicial integrity.[149] The *Perez-Esparza* court believed that the factors enunciated in *Brown*, and reaffirmed in *Dunaway*, were to be examined in light of these twin policies. Accordingly, the first two factors: the temporal proximity of the arrest and confession, and the presence of intervening events had to be scrutinized to determine the "free will" of the defendant.[150] Thus, "the defendant's free will must be sufficient to render inapplicable the deterrence and judicial integrity purposes that justify excluding [the evidence]."[151] Similarly, the "purpose and flagrancy of the official misconduct" must be examined in light of these dual exclusionary rule policies. If the evidence has been obtained by exploitation of the initial illegality, the application of the exclusionary rule is particularly appropriate.[152]

After applying the "causal connection" test to the facts before it, the *Perez-Esparza* court concluded that the evidence should have been excluded. First, despite a three-hour delay between the initial illegality and the consent and inculpatory statements, the government failed to set forth any intervening circumstances *not themselves influenced by police*.[153] Although the defendant's decision to consent and confess appeared voluntary under the fifth amendment, the court stated: "[W]e [cannot] find that [his] decision was so independent of police pressures as to absolve the judicial system from charges of savoring the forbidden fruits of unconstitutional conduct."[154] Finally, the *Perez-Esparza* court considered the purpose and flagrancy of official misconduct factor. The court conceded that

149. Dunaway v. New York, 442 U.S. 200, 218 (1979).

150. 609 F.2d at 1289.

151. *Id.* The court stated:

> In some cases, the intervening completely self-motivated decision of a putative defendant to inculpate himself is so unforseeable an event, from the arresting officer's vantage point, that excluding the defendant's statement would serve no deterrent purpose. . . . Moreover, where a defendant makes an unconstrained, independent decision to confess or consent, judicial integrity is not compromised by respecting the defendant's decision to consent to a search or admit his guilt.

152. *Id.*

153. *Id.* at 1290 (emphasis supplied). The court stated, "[H]is decision to consent and confess while still in custody, and only three hours after his initial detention, was not an unforseeable result of his illegal detention. Thus, the deterrence rationale was not vitiated, as in *Wong Sun*, by a lengthy period away from police influence."

154. *Id.*

the official misconduct was not as flagrant as in *Brown*, but that "*Dunaway* was decided on very similar facts and the Supreme Court specifically rejected the possibility that such facts distinguished *Dunaway* from *Brown*."[155]

Thus, the *Perez-Esparza* court, in finding "insufficient attenuation" to justify admission of the "presumptively tainted" evidence, specifically rejected the contention that the somewhat warranted police conduct could overcome the finding of no attenuation on the first two factors. The court believed that *Dunaway* required such a result.[156]

In contrast, the Illinois Supreme Court in *Gabbard*[157] specifically distinguished its case from *Dunaway* on the ground that the "purpose" of the police conduct and the circumstances surrounding the arrest were markedly different.[158] By a very narrow construction, it might be argued that if the purpose of the unlawful arrest is not to interrogate the suspect about the crime to which his later statements relate, then they are not obtained by exploitation of the initial illegality. Thus, had the totality of the circumstances warranted a finding of "attenuation" in *Gabbard*, the "innocent" purpose might properly have been weighted in favor of admissibility. However, in *Gabbard*, the initial illegal arrest amounted to a flagrant violation of the defendant's fourth amendment rights.[159] The items seized at the time of arrest led to the subsequent interrogation and lineup. Furthermore, these items were suppressed on the ground that the arrest was unlawful. The lineup itself was admittedly improper, requiring exclusion of this evidence at any new trial.

It is a very curious result to hold that these "fruits" of the illegal arrest are inadmissible, but that the inculpatory statements are not "tainted" by the same illegality because of the arresting officer's "purpose," and the interrogating officer's ignorance of the circumstances surrounding the arrest. Moreover, it is quite frankly inconceivable that the state supreme

155. *Id.*

156. The court did not believe that the facts of the case before it were substantially different than those in *Dunaway* to allow it to deviate from *Dunaway*'s finding of insufficient attenuation. As the *Perez-Esparza* court stated:

> The Court in *Dunaway* gave short shrift to the purpose and flagrancy factor emphasized in *Brown*. Although we do not, *Dunaway*'s sweeping language, and the lack of police justification in this case, compel us to conclude that the last factor is insufficient to overcome the lack of attenuation dictated by the first two factors.

*Id.* at 1291.

157. 78 Ill. 2d 88, 398 N.E.2d 574 (1979).

158. *Id.* at 96, 398 N.E.2d at 377. *See* text accompanying notes 124-25 *supra*.

159. *See* notes 117-21 and accompanying text *supra*.

court could even consider an "illegal lineup" as an intervening event in support of "attenuation."

The ultimate result is that the most flagrant police misconduct, an arrest without any justification whatever, while providing the court with the easiest case for terming the "seizure" unconstitutional, legitimatizes the law enforcement activity by employing this same outright flagrancy against the accused in attenuation analysis. Consequently, the individual's fourth amendment guarantee to be free from "unreasonable searches and seizures" is significantly impaired, and the effect of the exclusionary rule is substantially diluted.

## CONCLUSION

The United States Supreme Court, in *Dunaway*, announced that it would decide the issue it had reserved in *Morales*,[160] namely, the constitutionality of custodial interrogation when predicated upon less than probable cause for a full-fledged arrest.[161] The Court rejected the view that a balancing test could be utilized in determining the "reasonableness" of such a "seizure," holding that an involuntary custodial interrogation so severely intrudes upon the privacy of an individual, that it can only be justified by a showing of probable cause—the same standard that applies to arrests.[162] The significance of the Court's

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160. Morales v. New York, 396 U.S. 102 (1969). *See* notes 28-30 and accompanying text *supra.*

161. It is interesting to note that at least one federal court that has interpreted *Dunaway* decided that the Supreme Court announced no new principal of law, and therefore its holding must be applied retroactively. United States v. Tucker, 610 F.2d 1007 (2d Cir. 1979). Faced with a factual situation similar to that in *Dunaway*, the Second Circuit concluded that a detention in a police station "holding pen" for several hours for investigative purposes must be supported by probable cause. Acknowledging that the New York Court of Appeals in People v. Morales, 42 N.Y.2d 129, 366 N.E.2d 248, 397 N.Y.S.2d 587 (1977), *cert. denied*, 434 U.S. 1018 (1978), had held that under exceptional circumstances an investigative seizure was lawful without probable cause, the majority nevertheless concluded that *Dunaway* did not "decide an issue of first impression whose resolution was not clearly forshadowed." 610 F.2d at 1012. Thus, the court stated, "we are . . . compelled to find that on the present record, the Government has failed to show that the police and FBI agents could reasonably have believed that their conduct was lawful." *Id.* at 1012.

The dissent believed that on the basis of *Morales*, the officers had ample reason to think that their conduct was lawful, and *Dunaway* indeed clarified and expanded fourth amendment requirements. 610 F.2d at 1014-15 (Van Graafeiland, Circuit Judge, dissenting). Moreover, the dissent argued that neither the deterrence nor judicial integrity purposes of the exclusionary rule would "be furthered by retroactive application of *Dunaway*'s clarifying holding." *Id.* at 1018.

162. Dunaway v. New York, 442 U.S. 200, 216 (1979). *Cf.* United States v. Sanchez-Jaramillo, No. 78-2649 (7th Cir. Apr. 22, 1980) wherein the court determined that government agents, acting without probable cause to arrest

holding is perhaps in its refusal to extend *Terry* to encompass a setting so closely resembling a traditional arrest, and one involving an invasion so substantially different from the narrow intrusions in *Terry* and its progeny[163] which were judged by a balancing test rather than by the standard of probable cause. Had the Court drawn a distinction between the custodial interrogation at the station house, and the traditional arrest, it would have seriously undercut fourth amendment safeguards and significantly departed from the general rule that "seizures" are reasonable only if supported by probable cause. Moreover, the possibility of abuse would have been devastating if the permissible grounds of police conduct would have been judged by the label that the police attached to the intrusion.

The troublesome aspect of *Dunaway* is, therefore, not in its primary holding, but rather in its inextensive and rather confusing "fruit of the poisonous tree" analysis.[164] The Court had the opportunity to examine the *Brown* "causal connection" test for

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defendant, violated his fourth amendment rights when they seized and detained him in his own apartment, notwithstanding the fact that his roommate was under lawful arrest, and had consented to a search of the apartment.

163. *See* note 55 *supra.*

164. In the recent case of People v. Dowdell, 81 Ill. App.3d 266, 401 N.E.2d 295 (1980), the Illinois Appellate Court, Third District, answered one question impliedly reserved in *Dunaway* and constructed a poison-tree analysis that appears much more expansive than that contemplated by the Supreme Court and the Illinois Supreme Court in *Gabbard.* In *Dowdell*, the defendant was convicted of burglary. He had been transported to the police station for purposes of questioning on a different burglary. After waiving his *Miranda* rights, defendant made inculpatory statements regarding the burglary he was ultimately found guilty of, following denial of his motion to suppress.

The appellate court reversed and remanded, concluding that the case was so similar to *Dunaway* that defendant's motion should have been granted. *Id.* at 270, 401 N.E.2d at 298. The prosecution sought to distinguish *Dunaway* by placing significance on the fact that the officers expressly testified that Dunaway would have been arrested had he been unwilling to accompany them to the station. Police testified that Dowdell would not have been arrested had he refused to be transported to the custodial interrogation room. The court responded, stating that it failed "to see how the results should depend on the uncommunicated ideas or intentions of the police officers. To suggest that defendant was not seized merely because after the fact the police officers disclaimed any intention of arresting the defendant would permit the evasion of Fourth Amendment protections." *Id. Cf.* United States v. Mendenhall, 100 S.Ct. 1870, 1877 n.6 (1980) ("We agree with the District Court that the subjective intention of the DEA agent in this case to detain the respondent, had she attempted to leave, is irrelevant except insofar as that may have been conveyed to the respondent."). *See* note 61 *supra.*

Considering whether the statements were admissible despite the illegal detention, the *Dowdell* court adopted "the standards set forth in *Dunaway*" and concluded that even if they were voluntary under fifth amendment standards "there must be intervening circumstances sufficient to remove the taint of the illegal detention." 81 Ill. App. 3d at 270, 401 N.E. 2d at 298.

"attenuation" and to focus on the rationale behind the three-factor test it had previously set forth. Instead, the Court overstated the similarities between its case and *Brown*, and simply reaffirmed that the *Brown* test was to continue as the standard by which lower courts determine whether evidence connected to a fourth amendment violation is to be excluded as the "fruit of the poisonous tree." However, by its own rather mechanical application of the three-factor test, the Court departed from reliance on the factor it had identified in *Brown* as most important—"the purpose and flagrancy" of the official misconduct, by failing to give any weight to the rather drastic differences between the flagrancy of the police conduct in *Brown* as compared to that in *Dunaway*. Consequently, the Court left in doubt the importance which should be attached to each factor. It also left unanswered whether "attenuation" on one or two factors could overcome the lack of it on another,[165] although the Court perhaps *impliedly* determined that "attenuation" on the last factor was insufficient to overcome a contrary finding on the first two factors.

Perhaps the only truly relevant factor which a court should concern itself with is the presence or absence of intervening events which would serve either to remove the taint of the initial illegality or to aggravate it. The Court would be well advised to reexamine the "attenuation doctrine" and clarify existing rules

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The court determined that there were no such circumstances from which it could find that the effect of the illegal detention was attenuating.

It is interesting to note that the court in *Dowdell* did not cite or adopt any part of the reasoning of *Gabbard*. *Gabbard*, in finding sufficient "attenuation" to allow admission into evidence of defendant's inculpatory statements, placed primary emphasis on the fact that the police conduct was not "flagrant," and the arresting officer's "purpose" in apprehending Gabbard was not to interrogate him about the crime to which his later statements related. In *Dowdell*, the officers initial contact with the defendant was not as flagrant as in *Brown v. Illinois*, but instead remarkably similar to that in *Dunaway*. It was also less intrusive than in *Gabbard*. Moreover, as in *Gabbard*, the "purpose" of apprehending Dowdell was not to question him about the crime of which he was later convicted. *Dowdell* appears consistent with *Dunaway* but inharmonious with the recent decision of the state supreme court. The conclusion seems inescapable that *Gabbard* cannot be squared with *Dunaway*.

165. The fact that this question remains unanswered is best reflected by the conflicting decisions of United States v. Perez-Esparza, 609 F.2d 1284 (9th Cir. 1979), holding that the somewhat justified police conduct could not overcome the lack of "attenuation" on the first two factors, and People v. Gabbard, 78 Ill. 2d 88, 398 N.E.2d 574 (1979) in which the Illinois Supreme Court distinguished its case from *Dunaway* and *Brown* on the basis of its belief that the police conduct was neither "flagrant" nor "purposeful." *See* notes 155-56 and accompanying text *supra*. *See* text accompanying notes 125-26 *supra*.

regarding its application in order to curb the confusion that *Dunaway* has already triggered.

*Rosanne J. Faraci*