

Winter 1979

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Recommended Citation

Fourth Amendment--Admissibility of Statements Obtained during Illegal Detention, 70 J. Crim. L. & Criminology 446 (1979)

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FOURTH AMENDMENT—ADMISSIBILITY OF STATEMENTS OBTAINED DURING ILLEGAL DETENTION

Dunaway v. New York, 99 S. Ct. 2248 (1979).

INTRODUCTION

In *Dunaway v. New York*,¹ the Supreme Court decided two related fourth amendment issues. First, the Court held that an involuntary detention of an individual by police merely for investigatory purposes and without probable cause violated the fourth amendment.² The Court implied that a detention is involuntary when police officers do not inform the individual of his freedom to leave and when they intend to restrain the individual should he attempt to leave. Second, the Court held that a confession obtained during an illegal seizure is not admissible where the causal connection between the illegality of the seizure and the confession is unbroken. The Court stated that *Miranda* warnings in themselves do not remove the taint of an illegal detention. Applying a multifactor causal-connection test, the Court held that incriminating statements given during custody were inadmissible when the confession was obtained only hours after the detention, when no intervening events occurred, and when the police intended the detention to be an expedition for evidence.

In framing each of these holdings, the Court relied upon familiar doctrines and precedent. However, the Court also drew new distinctions. In defining custody, the Court placed new emphasis on the intentions of police. The Court also distinguished the situations in which it will define the reasonableness requirement of the fourth amendment in terms of probable cause rather than a balancing of opposing interests. In deciding the admissibility of Dunaway's statements, the Court clarified the use of the exclusionary rule to effectuate fourth amendment guarantees.

¹ 99 S. Ct. 2248 (1979). Justice Brennan wrote for the majority. Justices White and Stevens filed concurring opinions. Justice Rehnquist wrote a dissenting opinion in which Chief Justice Burger joined.

² The pertinent part of the fourth amendment states: "The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . ." U.S. CONST. amend. IV.

FACTS AND CASE HISTORY

During their investigation of a robbery and murder, Rochester police learned from an informant that a jail inmate awaiting trial could supply a lead implicating Dunaway. Police questioned the inmate but did not obtain "enough information to get a warrant" for . . . [Dunaway's] arrest."³ Nonetheless, the officer in charge of the case ordered detectives to "pick up" Dunaway. The detectives found Dunaway at a neighbor's house. Police did not tell Dunaway that he was under arrest and that they would have physically restrained him had he attempted to leave.⁴ At their headquarters, police placed Dunaway in an interrogation room and questioned him after reciting the *Miranda* warnings. Dunaway waived his right to counsel. Within an hour after arriving at the police station, Dunaway made statements and drew sketches which implicated him in the crime.⁵ The following day, Dunaway made a more complete second statement.⁶

At trial in the Monroe County Court, Dunaway moved to suppress the statements and sketches. The court denied the motion, and the jury returned a guilty verdict. This conviction was affirmed without opinion by the Appellate Division of the Fourth Department and the New York Court of Appeals.⁷ The United States Supreme Court then granted certiorari.⁸ The Court remanded the case to the lower courts for further consideration in accordance with its decision in *Brown v. Illinois*.⁹ On

³ 99 S. Ct. at 2251.

⁴ *Id.* (citing *People v. Dunaway*, slip op. at 116, 117 app. (Monroe Cty. Ct., N.Y. March 11, 1977)).

⁵ 99 S. Ct. at 2251.

⁶ *Id.* at 2251 n.2.

⁷ *People v. Dunaway*, 42 App. Div. 2d 689, 346 N.Y.S.2d 779 (1973), *aff'd*, 35 N.Y.2d 741, 390 N.E.2d 646, 361 N.Y.S.2d 912 (1974).

⁸ *Dunaway v. New York*, 422 U.S. 1053 (1975).

⁹ 422 U.S. 590 (1975). *Brown* involved a situation very similar to that presented in *Dunaway*. During their investigation of a murder, Chicago police arrested Brown at gunpoint without probable cause and without a warrant. Police later testified that they made the arrest for investigatory purposes. At the station, police advised Brown

remand, the New York Court of Appeals sent the case back to the Monroe County Court to obtain factual findings regarding the circumstances of Dunaway's detention.

After a supplemental suppression hearing, the trial court granted Dunaway's motion to suppress the statements and sketches. The trial court found that Dunaway had not voluntarily appeared at police headquarters in response to a police request.¹⁰ The court noted that *Brown* indicated "disdain for custodial questioning without probable cause to arrest," and found the factual requisites of probable cause lacking.¹¹ Finally, the trial court held that the *Miranda* warnings did not purge the taint of Dunaway's illegal seizure and that the prosecution had not demonstrated that the confession was attenuated from the illegal detention.¹²

The New York Appellate Division reversed the county court on two separate grounds. First, in accordance with the New York Court of Appeals decision in *People v. Morales*,¹³ the appellate division

of his *Miranda* rights. After police informed Brown of their knowledge of his participation in a previous shooting incident, Brown confessed to his participation in the murder. The trial court denied Brown's motion to suppress the confession as being the fruit of an illegal seizure, and the jury returned a guilty verdict. The Illinois Supreme Court affirmed, holding that the *Miranda* warnings rendered Brown's statements admissible despite the illegality of his arrest. The United States Supreme Court reversed, stating that if *Miranda* warnings by themselves rendered a confession given during an illegal arrest admissible, police would have no incentive to avoid fourth amendment violations. In order to determine whether Brown's statements were a product of his free will so as to dissipate the taint of his illegal arrest, the Court employed a multifactor test. Since Brown confessed within two hours after his detention with no intervening event of significance, and since the arrest was merely for investigatory purposes, the Court found Brown's confession inadmissible as an exploitation of the illegal arrest.

¹⁰ 99 S. Ct. at 2252 (citing *People v. Dunaway*, slip op. at 117 app. (Monroe Cty. Ct., N.Y. March 11, 1977)).

¹¹ *Id.* at 2252-53 (citing *People v. Dunaway*, slip op. at 118 app. (Monroe Cty. Ct., N.Y. March 11, 1977)).

¹² *Id.* at 2251-52 (citing *People v. Dunaway*, slip op. at 117 app. (Monroe Cty. Ct., N.Y. March 11, 1977)).

¹³ 22 N.Y.2d 55, 238 N.E.2d 307, 290 N.Y.S.2d 898 (1968). In *Morales*, the New York Court of Appeals confronted the issue of whether a detention without probable cause for purposes of investigatory questioning was unreasonable under the fourth amendment. New York police had detained Morales on mere suspicion of his involvement in a murder and questioned him at the police station. In order to determine the reasonableness of this seizure, the court of appeals balanced the factors of Morales' privacy interest, the seriousness of the crime, and the degree of suspicion possessed by police. The court

found that police could legally detain and question a person on reasonable suspicion if conditions were controlled to protect the person's fifth and sixth amendment rights. Thus, the court held Dunaway's detention legal. Second, relying on the fact that police had not threatened or abused Dunaway while he was in custody, the appellate division found that even if Dunaway's detention was illegal, the taint was attenuated sufficiently to permit the admission of Dunaway's statements into evidence.¹⁴ The New York Court of Appeals did not grant Dunaway an appeal.

The United States Supreme Court reversed the New York Appellate Division on both issues presented in the case. The Court found first that Dunaway's detention without probable cause violated his fourth amendment rights. The Court found "little doubt that petitioner was 'seized' in the Fourth Amendment sense"¹⁵ In reaching this result, the Court relied on the trial court's supplemental suppression hearing finding that "this case does not involve a situation where the defendant voluntarily appeared at police headquarters in response to a request of police."¹⁶

Since Dunaway's detention was involuntary, the Court next considered whether the seizure was reasonable within the meaning of the fourth amendment. The state argued, on the basis of *Terry v. Ohio*,¹⁷ that since Dunaway's seizure was not a formal arrest, the fourth amendment requirement of reasonableness was satisfied by the reasonable suspicion of police that Dunaway possessed knowledge of a crime.¹⁸ The state thus urged the Court to employ the *Terry* balance test of reasonableness¹⁹

held Morales' seizure reasonable because the public interest in prosecuting the murder outweighed the invasion of Morales' privacy incurred by the custodial interrogation. However, the court also emphasized that police had conducted the questioning under carefully controlled conditions protecting the individual's fifth and sixth amendment rights.

¹⁴ 99 S. Ct. at 2253 (citing 61 App. Div. 2d 299, 302, 402 N.Y.S.2d 490, 492 (1978)).

¹⁵ 99 S. Ct. at 2253.

¹⁶ *Id.* at 2252 (citing *People v. Dunaway*, slip op. at 117 app. (Monroe Cty. Ct., N.Y. March 11, 1977)).

¹⁷ In *Terry v. Ohio*, 392 U.S. 1 (1968), the Court held that limited stop-and-frisk searches conducted by police on the basis of reasonable suspicion did not violate the fourth amendment.

¹⁸ 99 S. Ct. at 2254.

¹⁹ In *Terry*, the Court determined reasonableness by balancing the violation of individual privacy involved in the search and the opposing interests in crime prevention and in the police officer's safety. 392 U.S. at 22-27.

to custodial interrogations, rather than the standard of probable cause applicable to arrests.

Distinguishing *Dunaway's* detention from the types of seizures warranting the *Terry* balance test, the Court rejected the state's arguments. The Court stated that *Terry* had departed from the general rule that seizures must be based on probable cause. The Court noted that *Terry* had defined a special category of seizures so substantially less intrusive than arrests that the general rule of probable cause could be replaced by a balancing test.²⁰ The Court pointed out that it had refused to expand this special category beyond limited weapons frisks²¹ and limited, brief questioning.²² Since *Dunaway* was taken from a neighbor's home to a police car, transported to a police station, never informed that he was free to go, and would have been restrained by police had he attempted to leave, the Court found that *Dunaway's* seizure was not "even roughly analogous to the narrowly defined intrusions involved in *Terry* and its progeny."²³ The Court concluded that if *Dunaway's* seizure was added to the limited instances warranting the use of the *Terry* balancing test, the general rule that fourth amendment seizures are reasonable only if based upon probable cause would be rendered nugatory.²⁴

The Court noted that since *Terry*, it had held detentions of the same magnitude as *Dunaway's* seizure to be unconstitutional unless supported by probable cause. The Court first stated that in *Davis v. Mississippi*,²⁵ it had held that "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.'"²⁶ Thus, since *Davis's* detention was without probable cause, the *Davis* Court found that it violated the fourth amendment. The Court in *Dunaway* next pointed out that in *Brown v. Illinois*,²⁷ it had similarly condemned an arrest made solely for investigatory purposes and without probable cause. Thus,

the *Dunaway* Court concluded that "detention for custodial interrogation—regardless of its label—intrudes so severely on interests protected by the Fourth Amendment as necessarily to trigger the traditional safeguards against illegal arrest."²⁸

Having determined that *Dunaway's* detention was illegal, the Court next considered whether the circumstances surrounding *Dunaway's* statements and sketches sufficiently dissipated the taint of his illegal detention so as to render the incriminating evidence admissible. In deciding this issue, the Court followed its reasoning in *Brown*. The Court first reiterated that *Miranda* warnings in themselves do not render statements given during an illegal detention admissible. The Court again noted that use of the exclusionary rule "to effectuate the Fourth Amendment . . . serves interests and policies that are distinct from those it serves under the Fifth . . ."²⁹ One policy goal of the exclusionary rule is to deter fourth amendment violations. Quoting from *Brown*, the Court stated that such deterrence could not be achieved "[i]f *Miranda* warnings, by themselves, were held to attenuate the taint of an unconstitutional arrest, regardless of how wanton and purposeful the Fourth Amendment violation . . ."³⁰ Since involuntary statements would be excluded from evidence under the fifth amendment, the Court stated that "voluntariness" is merely a threshold requirement for fourth amendment analysis.³¹

Again following *Brown*, the Court in *Dunaway* indicated that the relevant inquiry in the fourth amendment analysis is whether the contested statements were obtained by exploiting the illegality of the detention.³² The *Brown* Court had established a multifactor test focusing on the causal connection between the illegality of the seizure and the confession. The factors of this test include "[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 . . ."³³

Applying *Brown's* multifactor test, the *Dunaway* Court found that since *Dunaway* confessed without any intervening event of significance and since the police had made the seizure in the hope that something might turn up, *Dunaway's* statements

²⁰ 99 S. Ct. at 2255.

²¹ See *Pennsylvania v. Mimms*, 434 U.S. 106 (1977); *Adams v. Williams*, 407 U.S. 143 (1972).

²² See *Delaware v. Prouse*, 99 S. Ct. 1391 (1979); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975).

²³ 99 S. Ct. at 2256.

²⁴ *Id.*

²⁵ 394 U.S. 721 (1969). In *Davis*, the admissibility of fingerprints taken from a suspect detained during the investigatory process without probable cause was at issue.

²⁶ 99 S. Ct. at 2257 (citing 394 U.S. at 726-27).

²⁷ 422 U.S. 590 (1975).

²⁸ 99 S. Ct. at 2258.

²⁹ *Id.* (quoting 422 U.S. at 602).

³⁰ *Id.* at 2258-59.

³¹ *Id.* at 2259.

³² *Id.*

³³ *Id.* (quoting 422 U.S. at 602-03). The burden of showing admissibility rests on the prosecution.

were inadmissible. The Court stated that the appellate division had erred in relying on the facts that the police did not physically abuse Dunaway and that their conduct was highly protective of Dunaway's fifth amendment rights. The Court stated that such reliance confused the voluntariness requirement of the fifth amendment with the causal-connection test established in *Brown*.³⁴ Thus, the Court concluded that Dunaway's confession was obtained by the exploitation of his illegal detention. Hence, in order to deter similar future fourth amendment violations, the Court found Dunaway's statements inadmissible.³⁵

Two Justices filed concurring opinions in *Dunaway*. Justice White pointed out that the key principle of compliance with the fourth amendment is reasonableness, which is determined by a balancing of competing interests. He stated further that while the balancing of interests must be done on a categorical basis in order to give courts and law enforcement officials a workable rule, the general rule of probable cause should not preclude recognition of extraordinary private or public interests nor certain generic exceptions where more flexibility is essential. Thus, Justice White implied that the test of reasonableness need not always be satisfied by probable cause. However, in the circumstances of *Dunaway*, he found the police conduct similar enough to an arrest to warrant the standard of probable cause.³⁶

While Justice White's concurrence concerned the question of when the fourth amendment is violated, Justice Stevens' concurrence discussed the admissibility of evidence once a fourth amendment violation has already been determined. First, Justice Stevens pointed out the ambiguity in two of the factors employed in the *Brown* causal-connection test. He noted that the temporal proximity between the illegal seizure and the confession is unreliable in determining whether the statements are a product of free will because a long detention may be a more serious exploitation than a short one, and a quick confession may have little to do with the fact of detention itself. He also argued that the flagrancy of the official misconduct factor in the *Brown* test was relevant "only insofar as it has a tendency to motivate the defendant."³⁷ He stated that an individual would be affected by the outer manifestations of police conduct, whether these manifestations are violent or polite, regardless of

whether the acting police officer "thinks he has probable cause or knows that he does not."³⁸ Thus, Stevens concluded that "the admissibility question will turn on the causal relationship between that violation and the defendant's subsequent confession."³⁹ Second, Justice Stevens argued that the exclusion of evidence illegally obtained must be determined through the use of objective criteria. He reasoned that since the exclusionary rule is designed to motivate all law enforcement officers and not to punish the errant policeman, the policeman's subjective good faith should not be relevant to the application of the exclusionary rule.⁴⁰

Justice Rehnquist's dissenting opinion disagreed with the majority's disposition of both the detention and admissibility issues. First, Justice Rehnquist argued that Dunaway's detention was not involuntary. He noted that when the police asked Dunaway if he would accompany them to the station for questioning, Dunaway had said that he would.⁴¹ Rehnquist contended that the test for seizure was actual physical restraint.⁴² He emphasized that police had not given any indication to Dunaway that he was under arrest nor had they used any physical force. Rehnquist differed with the majority's reliance on the fact that the police would have restrained Dunaway had he attempted to leave. Rehnquist argued that the "unexpressed intentions of police officers as to hypothetical situations have little bearing on the question whether the police conduct, objectively viewed, restrained petitioner's liberty by show of force or authority."⁴³ Thus, Rehnquist concluded that since police did not compel Dunaway to accompany them to the station, he was not involuntarily detained.

Justice Rehnquist next argued that even if Dunaway's detention was illegal, the fourth amendment did not require the suppression of Dunaway's statements and sketches. Noting that the Court had not assigned equal weight to the three factors in the *Brown* causal-connection test, Rehnquist placed the greatest importance on the "purpose and flagrancy of police misconduct" factors of the test. He contended that where police have acted in good faith and not in a flagrant manner, a confession made during an illegal detention should be

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 2260-61.

⁴¹ *Id.* at 2262 (citing *People v. Dunaway*, slip op. at 89-90 app. (Monroe Cty. Ct., N.Y. March 11, 1977) (Rehnquist, J., dissenting)).

⁴² *Id.* (citing *Terry v. Ohio*, 392 U.S. at 19 n.16).

⁴³ *Id.* at 2262.

³⁴ 99 S. Ct. at 2259-60.

³⁵ *Id.* at 2260.

³⁶ *Id.* (White, J., concurring).

³⁷ *Id.* at 2260 (Stevens, J., concurring).

admissible if the *Miranda* warnings are given and if the statement is voluntary within the meaning of the fifth amendment. Rehnquist implied that "good faith" meant reliance by police on the state court's current interpretation of search and seizure law and that "flagrant manner" referred to the police officer's treatment of the individual during the seizure.⁴⁴ Since the New York Court of Appeals in *People v. Morales*⁴⁵ had held custodial questioning on less than probable cause permissible, Rehnquist argued that Rochester police had acted in good-faith reliance on state law. Since police did not physically abuse Dunaway during the seizure, Rehnquist contended that their conduct was not flagrant. Thus, he concluded that Dunaway's *Miranda* statements "were of sufficient free will to purge the primary taint of his alleged illegal detention."⁴⁶

THE FOURTH AMENDMENT ISSUE

In deciding whether the actions of police violated Dunaway's fourth amendment rights, the Court found first that Dunaway had been seized, and second, that this seizure without probable cause did not attain the standards of reasonableness prescribed by the fourth amendment.

The facts of *Dunaway* presented the Court with a custody issue which represents a common occurrence in law enforcement practice. The police requested an individual to come to the station for questioning; they did not intend to arrest him, but would not have permitted him to leave until questions were answered. The majority and the dissenters in *Dunaway* differed as to the standard of custody that should be applied in order to determine whether an individual who comes to the station for questioning under these circumstances is seized within the meaning of the fourth amendment.

While the majority's determination of the custody issue largely relied on the trial court's finding that Dunaway did not voluntarily appear at police headquarters, two dimensions of a test for custody can be discerned from the Court's opinion. First, the Court noted an objective dimension which tests actual restraint of the individual's freedom.⁴⁷ The

Court had established this dimension of custody in *Miranda* where it equated custody with any instance where an individual is "deprived of his freedom of action in any significant way."⁴⁸ Second, the Court implied that the test for custody also contains a subjective dimension. Noting that a request to come to the police station may carry with it an implication of obligation and may be an awesome experience,⁴⁹ the Court indicated that this dimension might include the subjective belief of the individual. The Court also implied that the subjective dimension may include the intentions of police. In finding Dunaway's detention involuntary, the Court relied on the facts that police did not inform Dunaway that he was free to go and that the police would have restrained Dunaway had he attempted to leave. Apparently, the Court inferred from these facts that the police intended Dunaway's confinement in the station to constitute custody.

In his dissent, Justice Rehnquist argued that only the actual, objective circumstances of the detention should be considered in the determination of custody. Citing *Terry v. Ohio*,⁵⁰ he stated that the test of seizure was whether a police officer "by means of physical force or show of authority, has in some way restrained the liberty of a citizen."⁵¹ Thus, Justice Rehnquist argued that whatever the detectives might have done if Dunaway had tried to leave was irrelevant.⁵²

In previous decisions, the Court has utilized both the subjective and the objective dimensions in order to determine the existence of custody. In *Orozco v. Texas*,⁵³ the Court seemed to emphasize the subjective dimension. In *Orozco*, police went to the defendant's home a few hours after a shooting and asked Orozco about his ownership of a gun and his presence at the scene of the crime. Although police did not physically restrain Orozco nor tell him that he was under arrest, they testified that during the questioning, Orozco "was not free to go where he pleased but was 'under arrest.'"⁵⁴ Since police thus intended to restrain Orozco, the Court found that his detention constituted custody, requiring the *Miranda* warnings.

In *Cupp v. Murphy*,⁵⁵ the Court seemed to favor

⁴⁸ *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

⁴⁹ 99 S. Ct. at 2253 n.6 (quoting ALI MODEL CODE OF PREARRAIGNMENT PROCEDURE § 2.01(3) (Tentative Draft no. 1 1966)).

⁵⁰ 392 U.S. 1 (1968).

⁵¹ 99 S. Ct. at 2261 (Rehnquist, J., dissenting) (citing *Terry v. Ohio*, 392 U.S. at 19 n.16).

⁵² *Id.* at 2262.

⁵³ 394 U.S. 324 (1969).

⁵⁴ *Id.* at 325.

⁵⁵ 412 U.S. 291 (1973).

⁴⁴ *Id.* at 2263.

⁴⁵ 22 N.Y.2d 55, 238 N.E.2d 307, 290 N.Y.S.2d 898 (1968).

⁴⁶ 99 S. Ct. at 2264 (Rehnquist, J., dissenting).

⁴⁷ 99 S. Ct. at 2253 n.6. Quoting from *Terry*, the Court stated that "whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." *Id.* (quoting *Terry v. Ohio*, 392 U.S. 1 (1968)).

the objective dimension of the custody test. In *Cupp*, Murphy had voluntarily come to the police station and police had probable cause to suspect him of committing a murder. Over the objection of Murphy, police took fingernail scrapings, presumably restraining Murphy in the process. Police then released Murphy and did not arrest him until one month later. Despite the fact that Murphy had voluntarily come to the station, the Court held that Murphy's restraint and detention for the purpose of taking the samples "against his will constituted a seizure of his person."⁵⁶

Since no physical restraint was involved in *Dunaway*, the Court's decision seems to place greater emphasis on the subjective dimension of police intentions, rather than on the objective dimension of actual restraint. This implication of *Dunaway* threatens to erode a doctrine of custody established by the circuit courts. These courts have refused to consider the intentions of police unless they are manifested to the suspect. In *United States v. Hall*,⁵⁷ the Second Circuit stated that in the "absence of actual arrest something must be said or done by the authorities . . . which indicates that they would not have heeded a request to depart or allow the suspect to do so."⁵⁸ Similarly, in *Lowe v. United States*,⁵⁹ the Ninth Circuit held that custody is determined not by what the officer or person thinks but rather by the "officer's statement and acts, the surrounding circumstances, gauged by a 'reasonable man' test."⁶⁰ Justice Rehnquist's position in *Dunaway* is closely aligned with this doctrine since he too deems only objective criteria relevant in the determination of custody.

By emphasizing the unmanifested intention of police in the test for custody, it would appear that the Court has shifted the locus of the presumption of detention from what the individual and an objective observer readily perceive to what the police officers intend. Since police often intend to restrain an individual without actually having to do so, such a shift places a greater burden on police to ascertain whether the purpose of their investigation warrants obtaining probable cause before detaining the individual. If the police have determined that the answers they seek are important

enough to warrant the restraint of an individual should he attempt to leave, then the police must have probable cause before transporting an individual to the station for questioning.

At the same time, the Court's decision frees the individual from having to guess whether he is free to leave at any time or whether he is the target of investigation. The individual can assume that when he is detained by police and not advised of his right to depart, that he is seized and protected under the fourth amendment.

Such a result is consistent with the Court's prior decisions in *United States v. Martinez-Fuerte*⁶¹ and *United States v. Brignoni-Ponce*.⁶² In those cases, the Court found that stopping an individual's automobile, either at a checkpoint or at random, for the purpose of brief questioning, constituted a seizure.⁶³ The Court treated these stops as seizures presumably because the individuals were not free to depart until they answered questions, although they were not under formal arrest. Thus, the Court held that these stops were governed by the fourth amendment's requirement of reasonableness.

The determination of custody is not a problem if the individual clearly and voluntarily consents to be questioned. The Court's decision in *Dunaway* helps to refine the parameters of voluntariness. In *Oregon v. Mathiason*,⁶⁴ the Court established that voluntariness was indicated when the police gave the individual a choice of where the questioning would be conducted, and the individual chose the station. In *Dunaway*, the Court indicated that giving an individual only a yes-or-no choice as to whether he wanted to go to the station does not give the individual a voluntary choice.

The net result of the Court's treatment of the custody issue in *Dunaway* is that police must do one of three things before legally transporting an individual to the police station for questioning: they must (1) obtain the individual's unequivocal consent to go to the station for questioning; (2) inform the individual of his right to depart at any time before or during the interview; or (3) have probable cause sufficient for an arrest.

It appears that of these three factors, the Court prefers that police have probable cause before taking an individual to the station. The majority in *Dunaway* devoted a large part of its opinion to explaining that probable cause, rather than the

⁵⁶ *Id.* at 294.

⁵⁷ 421 F.2d 540 (2d. Cir. 1969), *cert. denied*, 397 U.S. 990 (1970).

⁵⁸ 421 F.2d at 545; *accord*, *United States v. Tobin*, 429 F.2d 1261 (8th Cir. 1970).

⁵⁹ 407 F.2d 1391 (9th Cir. 1969).

⁶⁰ *Id.* at 1397. *See also* *United States v. Kennedy*, 573 F.2d 657 (9th Cir. 1978); *Hicks v. United States*, 382 F.2d 158 (D.C. Cir. 1967).

⁶¹ 428 U.S. 543 (1976).

⁶² 422 U.S. 873 (1975).

⁶³ *United States v. Martinez-Fuerte*, 428 U.S. 543, 556 (1976).

⁶⁴ 429 U.S. 492 (1977).

Terry balance test, constitutes the proper standard of reasonableness under the fourth amendment where the circumstances of detention closely approximate arrest. In order to determine why the Court found probable cause to be the test of reasonableness in *Dunaway*, the situations in which the Court has used the balance test should first be considered.

In several decisions, the Court has balanced the individual's interest in privacy with the opposing interest of society in crime prevention. In *Terry*, the Court found that the exigencies and dangers surrounding a policeman's questioning of an individual on the street outweighed the limited intrusion of a frisk search. In *United States v. Martinez-Fuerte*,⁶⁵ the Court held that the burden on public resources created by an unchecked rate of Mexican immigration created a public interest which outweighed the minor intrusion to individuals involved in the stopping of their cars to inquire about citizenship. In *Camara v. Municipal Court*,⁶⁶ the Court balanced public and private interests in order to determine probable cause. The *Camara* Court found that a warrant to search dwellings located in a particular geographical area for building code violations was sustained by probable cause if the search was justified by a reasonable governmental interest.⁶⁷

By refusing to balance in *Dunaway*, the Court has distinguished the kinds of crime prevention situations which warrant the balance test from those requiring probable cause. First, the Court has delineated the types of detention which must be supported by probable cause. In *Terry* and *Martinez-Fuerte* the seizure involved was limited to a roadway or sidewalk stop and was of brief duration. The Court admitted that while the fourth amendment applied in these situations, it found that since the degree of intrusion upon the individual's privacy was minimal, the fourth amendment's reasonableness requirement could be satisfied by mere suspicion. In contrast, the seizure in *Dunaway* involved a nonarrest detention in a police station. By holding that such a detention requires more than mere suspicion, the Court has indicated that station-house detentions for purposes of investigation involve the same serious degree of invasion upon privacy as does an arrest itself. Thus, since arrests require probable cause, investigatory detentions similarly are not reasonable unless supported by probable cause.

Second, the *Dunaway* Court has implicitly distinguished the kinds of police investigations which require probable cause. The investigations involved in *Terry*, *Martinez-Fuerte*, and *Camara* were broad in scope. In *Martinez-Fuerte* and *Camara*, the investigations were designed to cast a wide net in order to catch many violators of specific immigration laws or building codes. *Terry* involved the converse situation in which police observed a particular individual whom they thought might be involved in criminal activity, yet no specific crime motivated the police detention. In each case, the Court found that a particular public interest warranted such a broadly based, extraordinary police investigation.

In contrast, *Dunaway* involved a routine criminal investigation which was narrow in scope. Police sought a particular individual in order to solve a particular crime. The Court's decision in *Dunaway* thus indicates that the public interest in routine investigation and crime prevention does not warrant use of the balance test. In his dissent in *Martinez-Fuerte*, Justice Brennan warned that the individual could never win in a balance with the broad governmental interest in preventing crime.⁶⁸ A majority of the Court in *Dunaway* adopted the same view, warning that the balance test would swallow the individual's fourth amendment protections.⁶⁹ Since the New York Appellate Division had found that *Dunaway's* detention on mere suspicion was reasonable because "great public interest existed in solving a brutal crime which had remained unsolved for a period of almost five months,"⁷⁰ the *Dunaway* Court has implied that even heinous crimes do not mandate seizures on less than probable cause. Thus, the *Dunaway* decision reinforces the Court's longstanding position that the fourth amendment was designed to protect the individual against the zealous use of police power.⁷¹

In sum, *Dunaway* represents a refinement of the Court's treatment in *Davis* and *Brown* of situations

⁶⁵ 428 U.S. at 570 (Brennan, J., dissenting).

⁶⁶ 399 S. Ct. at 2256.

⁶⁷ 61 App. Div. 2d at 303, 402 N.Y.S.2d at 492.

⁷¹ See *Johnson v. United States*, 333 U.S. 10, 14 (1948). In *Johnson*, police had entered a hotel room without a warrant when they smelled opium. The Court found that while the police might have had probable cause to believe that a crime was being committed, they should not have conducted the search without first obtaining judicial approval. The Court held that the fourth amendment protections required that the judgment of the existence of probable cause be determined by a neutral magistrate rather than by the officer "engaged in the often competitive enterprise of ferreting out crime."

⁶⁵ 428 U.S. 543 (1976).

⁶⁶ 387 U.S. 523 (1967).

⁶⁷ *Id.* at 539.

where police detain individuals at the police station for investigatory purposes. The Court again has found that detentions which approximate arrest must be supported by probable cause and do not fall within the special category of police practices requiring only reasonable suspicion for detention as delineated in *Terry*. By holding in *Dunaway* that a detention without actual physical restraint by police approximates arrest, the Court expanded the situations which trigger the fourth amendment requirement of probable cause. While police need not have probable cause before initiating every encounter with an individual from whom they seek information, *Dunaway* indicates that police must have probable cause before transporting an individual to the police station for questioning.

APPLICATION OF THE EXCLUSIONARY RULE

After finding that police had illegally seized *Dunaway*, the Court next considered whether *Dunaway*'s statements and sketches should be excluded from evidence. Since *Dunaway* had received the *Miranda* warnings and had waived his right to counsel, the Court confronted a situation where, but for a violation of *Dunaway*'s fourth amendment rights, the evidence police obtained would have been admissible under the fifth amendment. In order to place the Court's application of the exclusionary rule in *Dunaway* in perspective, the Court's prior interpretations of the rule must be examined.

When utilizing the exclusionary rule, the Court has been guided by two policies. First, the rule is designed to deter unconstitutional police conduct. The Court has found that the only effective way to protect constitutional guarantees is to remove police incentive to disregard the guarantees.⁷² This is accomplished by excluding from evidence information obtained by illegal means. Second, the rule is designed to maintain judicial integrity. Since the admission of illegally obtained evidence implies the judiciary's approval of conduct securing the evidence, the Court has invoked the exclusionary rule to close the "doors of the federal courts to any use of evidence unconstitutionally obtained."⁷³

In situations where evidence, otherwise admissible, is obtained as a result of an illegal seizure, the Court has previously applied these policies in two

ways. First, in order to effectuate the deterrence purpose of the rule, the Court has declined to find that *Miranda* warnings in themselves render confessions given during an illegal seizure admissible. The Court's rationale for excluding such evidence is premised on the notion that the fourth and fifth amendments serve different interests.⁷⁴ In *Brown*, the Court noted that the *Miranda* warnings in "no way inform a person of his Fourth Amendment rights, including his right to be released from unlawful custody"⁷⁵ The *Brown* Court also emphasized that if such voluntary confessions made after illegal arrests were admitted, the illegal conduct "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."⁷⁶

In addition to deterring illegal conduct, the Court's use of the exclusionary rule is also motivated by concern for the competing interest of society in law enforcement. This concern manifests itself through the judicial integrity policy of the exclusionary rule. The Court has recognized that although society benefits from the constitutional guarantees protected by the rule, society also pays the cost of crime which goes unprosecuted. Thus, the Court has stated that the exclusionary rule should not be used to "proscribe the use of illegally seized evidence in all proceedings or against all persons."⁷⁷ In order to further society's interest in law enforcement, the Court will not exclude evidence when it appears that, despite illegal police conduct, the individual has freely decided to make incriminating statements.

Such admission of free-will statements appears to be more closely related to the judicial integrity purpose of the exclusionary rule than to the deterrence purpose. If the Court's only objective is to deter illegal seizures, even statements given of free will during an illegal detention would be excluded. Since the Court also is concerned with law enforcement, free-will statements given during an illegal detention sometimes are admissible. However, such statements must be sufficiently removed from the illegal purpose of the seizure so that their admission into evidence will not imply that the Court condones the illegal conduct. Thus, in choosing between the competing interest of deterring illegal police conduct and promoting law enforcement,

⁷⁴ *Brown v. Illinois*, 422 U.S. at 601.

⁷⁵ *Id.* at 601 n.6.

⁷⁶ *Id.* at 602.

⁷⁷ *United States v. Calandra*, 414 U.S. 338, 348 (1974).

⁷² See *Elkins v. United States*, 364 U.S. 206, 217 (1960). See also *United States v. Calandra*, 414 U.S. 338, 347 (1974).

⁷³ *Wong Sun v. United States*, 371 U.S. 471, 486 (1963). See also *Elkins v. United States*, 364 U.S. 206 (1960).

the Court implicitly invokes the judicial integrity policy of the exclusionary rule. Even though the exclusion of statements obtained during an illegal seizure always would serve to deter illegal conduct, when law enforcement can be served without compromising judicial integrity, the Court will admit illegal detention statements.

In order to determine when illegal detention statements are sufficiently removed from the illegality of the seizure so as not to compromise judicial integrity, the Court has developed a causal-connection test. The Court will admit evidence when the connection between the illegality and the evidence has become "so attenuated as to dissipate the taint"⁷⁸ of the detention.⁷⁹ In *Brown*, the Court recognized the difficulty of determining whether a confession was the product of an exploitation of the detention or the product of free will. The Court noted that the complexities of the human mind and the diversity of police conduct made the application of a talismanic test unrealistic.⁸⁰ Thus, the Court announced a multifactor causal-connection test in *Brown*.⁸¹

The Court's application of the exclusionary rule in *Dunaway* indicates that the Court sought to effectuate both the deterrence and judicial integrity policies of the rule. The Court again emphasized that if *Miranda* warnings by themselves were deemed to render an illegal detention confession admissible, then police would have little incentive to avoid violating the fourth amendment.⁸² In order to determine whether *Dunaway's* statements were a product of free will rather than an exploitation of the illegal detention, the Court employed the *Brown* multifactor test. The Court found that since police seized *Dunaway* in the hope that evidence might turn up and since *Dunaway* confessed without any intervening events of significance, his statements should be excluded from evidence.⁸³

The *Dunaway* Court's use of the *Brown* multifactor test demonstrates its intention to weigh systematically the many factors which might determine whether an individual's confession is sufficiently attenuated from the taint of the illegal detention

so as to warrant the admission of the confession without compromising judicial integrity. By employing a specific test, it appears that the Court seeks to narrow the unenumerated test it used before *Brown*, which encompassed a totality of the circumstances. If the *Brown* test is to be effective and produce consistent results, its factors must be unambiguous. Did the Court's application of the test in *Dunaway* help to establish the clarity of its factors?

The first factor in the test is the temporal proximity between the arrest and the confession. In both *Brown* and *Dunaway*, the Court indicated that a confession made only hours after the individual is taken into custody signals exploitation of the illegal detention. Presumably, the longer the period of time an individual has to reflect while in custody, the more likely it is that his statements will be the product of free will.⁸⁴ In his concurring opinion in *Dunaway*, Justice Stevens pointed out that this temporal factor may be ambiguous. He noted that a prolonged detention may be more serious exploitation than a short confinement, and that an immediate confession may have little to do with the fact of detention itself.⁸⁵ Thus, the time by which a confession follows detention may not reliably indicate whether the individual freely decided to give statements or whether he felt compelled by the surrounding circumstances to make such statements.

The second factor of the test consists of the presence of intervening circumstances. In neither *Brown* nor *Dunaway* did the Court attempt to define this factor, even though it appears to be important in the Court's decision in *Dunaway*.⁸⁶ By common definition, an intervening event would break the causal chain between the illegal detention and the confession. Two such kinds of events can be inferred from the Court's previous decisions. First, the nature of some kinds of events occurring subsequent to an illegal detention may serve to vitiate the taint of illegality surrounding the detention itself. In *Johnson v. Louisiana*,⁸⁷ where *Johnson* was illegally arrested without a warrant and identified

⁷⁸ *Nardone v. United States*, 308 U.S. 338, 341 (1939).

⁷⁹ Thus, in *Wong Sun v. United States*, 371 U.S. 471 (1963), the Court established that evidence is not automatically excluded only because it would not have been obtained but for the illegal police actions.

⁸⁰ *Brown v. Illinois*, 422 U.S. at 603.

⁸¹ This test consists of the temporal proximity of the arrest and the confession, the presence of intervening factors and the purpose and flagrancy of official misconduct.

⁸² 99 S. Ct. at 2259.

⁸³ *Id.*

⁸⁴ The Eighth Circuit has interpreted the temporal factor to mean that confessions given after many hours of detention are the product of free will. In *United States v. Rose*, 541 F.2d 750 (8th Cir. 1976), where *Rose* had been arrested for a bank robbery by state officials who carried a defective warrant, the court held that statements made 40 hours after the arrest were admissible.

⁸⁵ 99 S. Ct. at 2260 (Stevens, J., concurring).

⁸⁶ The Court twice noted that *Dunaway* confessed without any intervening event. 99 S. Ct. at 2259, 2260.

⁸⁷ 406 U.S. 356 (1972). The main issue in the case was the constitutionality of a less than unanimous verdict.

by the robbery victim in a lineup, the Court held that the identification evidence was sufficiently purged of the taint of the illegal arrest because Johnson had been taken before a magistrate prior to the lineup.⁸⁸ Presumably the magistrate found probable cause for the arrest, thus making Johnson's detention valid at the time the identification evidence was obtained. A second kind of intervening event is one which serves to demonstrate that the individual's decision to give a statement subsequent to the original detention is free from the taint of illegality. Such an event might be the release from custody. In *Wong Sun v. United States*, Wong Sun had been illegally arrested and then released. Two days later, he returned to police headquarters and confessed. The Court held that this sequence of events made the connection between the arrest and confession so attenuated as to dissipate the taint.⁸⁹ Thus, the Court admitted the confession.

Since *Johnson* and *Wong Sun* demonstrate differing occurrences which break the causal chain,⁹⁰ further indication by the Court as to the meaning of intervening circumstances would aid practitioners and jurists in the application of this factor. In *United States v. Monti*,⁹¹ the First Circuit indicated several intervening factors which the Supreme Court might enumerate. Monti had made inculpatory statements first while under arrest and later during an informal meeting with police. The court found that Monti's second statements were sufficiently free from any taint associated with the arrest because 1) Monti had consulted with counsel before the meeting, 2) the setting of the questioning had changed to a noncustodial situation, and 3) Monti himself had urged the second meeting.

The third factor in the causal-connection test consists of the purpose and flagrancy of the official misconduct. The members of the Court in *Dunaway* debated whether the misconduct factor measured the degree to which police purposefully violated the fourth amendment or the degree of coercion and abuse with which the police actually conducted the seizure. The majority construed the misconduct factor as relating to the purpose behind the seizure. The Court noted that police seized Dunaway "admittedly . . . without probable cause in the hope that something might turn up."⁹² The

Court pointed out that the appellate division's emphasis on the fact that police did not abuse Dunaway was misplaced. Thus, the Court implied that physically unabusive conduct is not a major factor in the causal-connection test.⁹³

The *Dunaway* Court's treatment of the misconduct factor of the causal-connection test is consistent with the *Brown* decision. In *Brown*, the Court condemned police for arresting Brown merely for investigatory purposes.⁹⁴ When the Court delineated the multifactor test in *Brown*, it cited two cases in which circuit courts had construed official misconduct to mean a violation of rights. In *United States v. Edmons*,⁹⁵ in order to present certain individuals for identification purposes in an investigation, FBI agents arrested the individuals on the unknown charge of not having Selective Service cards in their possession. The court held that the illegal arrests were a pretext for securing evidence which would otherwise not have been obtained. As such, the court held that the evidence was obtained by exploiting an illegal arrest.⁹⁶ Similarly, in *United States ex. rel. Gockley v. Myers*,⁹⁷ where police had arrested Gockley on a forgery charge, only to question him extensively regarding the disappearance of two people, the court found that the illegal arrest was designed to facilitate effective and persistent interrogation concerning the disappearances. The court excluded evidence obtained during the interrogation in order to deter such uses of illegal arrests.⁹⁸ Hence, on the basis of these decisions and *Brown*, it appears that the Court in *Dunaway* intended the misconduct factor in the causal-connection test to measure the degree to which police purposefully violated the fourth amendment in order to secure evidence.

In his dissent in *Dunaway*, Justice Rehnquist argued that the factor of official misconduct should apply to the conduct of police toward the individual during the seizure. Rehnquist emphasized that police did not abuse Dunaway. He further contended that since police acted in good faith reliance on the New York Court of Appeals decision in *People v. Morales*,⁹⁹ their conduct was not flagrant. Rehnquist concluded that if police do not act in a physically coercive manner, a *Miranda* confession

⁸⁸ *Id.* at 365.

⁸⁹ *Wong Sun v. United States*, 371 U.S. at 491.

⁹⁰ In *Johnson*, removing the taint of illegality, and in *Wong Sun*, highlighting the circumstances of a free decision, broke the causal chain.

⁹¹ 557 F.2d 899 (1st Cir. 1977).

⁹² 99 S. Ct. at 2259.

⁹³ *Id.*

⁹⁴ *Brown v. Illinois*, 422 U.S. at 605.

⁹⁵ 432 F.2d 577 (2d Cir. 1970).

⁹⁶ *Id.* at 584.

⁹⁷ 450 F.2d 232 (3d Cir. 1971), *cert. denied*, 404 U.S. 1063 (1972).

⁹⁸ 450 F.2d at 237.

⁹⁹ 22 N.Y.2d 55, 238 N.E.2d 307, 290 N.Y.S.2d 898 (1968).

given during a detention later found illegal by a court should be admissible.

Some support for Rehnquist's position exists in *Brown*. Another of the circuit court cases relied on by the *Brown* Court utilized the misconduct factor in the same manner as Rehnquist. In *United States v. Kilgen*,¹⁰⁰ after police arrested Kilgen for vagrancy, they found stolen stamps in his car and obtained his confession. Since the United States Supreme Court later declared the vagrancy statute unconstitutional, Kilgen argued that the stamps and his confession should be suppressed as fruits of an illegal arrest. The court rejected this argument, holding that no legitimate interest would be served by excluding evidence obtained in good faith while the statute was still valid.¹⁰¹

The debate between the majority and the dissenters in *Dunaway* over the meaning of the police misconduct factor belies a difference in opinion as to how this factor determines whether the causal connection between the illegality of the seizure and the confession has been broken. This difference turns on the interpretation given to the meaning of voluntariness.

By holding that the misconduct factor measures the degree of the fourth amendment violation, the majority implied that the purpose of the seizure begins the causal chain. In order to be admissible, statements made during the seizure must be removed from this illegal purpose. The Court indicated that a statement which is voluntary in the sense of being given without threat or physical coercion may not be attenuated from the taint of illegality because the police have manipulated the circumstances under which the statement is given. An individual has no way of knowing whether the purpose of the seizure is to gain evidence which the police know is otherwise unobtainable. Thus, even if an individual freely decides to confess, this free decision has been manipulated by police who intended all along to acquire incriminating evidence.¹⁰² Since this illegal purpose is not manifested to the seized individual by the actual demeanor of police, the way in which police treat the individual is irrelevant in the Court's decision as to the admissibility of illegal detention statements.

¹⁰⁰ 445 F.2d 287 (5th Cir. 1971).

¹⁰¹ *Id.* at 289.

¹⁰² It is important to note, however, that the Court will not exclude a statement only because it would not have been obtained but for the illegal detention. Apparently, the Court intends for the temporal-proximity and intervening-circumstances factors of the causal-connection test to help determine the degree of police manipulation.

In contrast, Justice Rehnquist argued that the police misconduct factor can be used in reference to the extent of a fourth amendment violation only when police knowingly undertake such a violation. Rehnquist implied that when police think they are acting in conformity with search and seizure law as interpreted by the courts, and if the courts later change this interpretation, the actions of police cannot begin the causal chain. If police do not know they are acting illegally, presumably they cannot manipulate a confession. Thus, Rehnquist emphasized the actual treatment of the individual by police. If police do not threaten or abuse an individual, that individual's decision to confess is voluntary since it is free from both physical compulsion and purposeful manipulation. Rehnquist therefore argued that such confessions should be admissible.

When viewed in relation to a specific case, Rehnquist's position is both practical and logical. If police act in good faith reliance on the law, and if this law is later interpreted differently, how are police to know that their actions were illegal and manipulative? But when viewed in relation to a body of constitutional law which develops by accretion, Rehnquist's position is too narrow. The reasonableness of police practices changes over time through a process of judicial interpretation. Such interpretation applies an objective standard of judgment to a set of facts frozen in the past, rather than the subjective standard of the belief of the actors involved. These objective criteria are utilized to shape future conduct.¹⁰³ Thus, while an individual prosecution may suffer, as Rehnquist suggested was the case in *Dunaway*, the constitutional rights of individuals become further defined and protected by the use of objective criteria.

In sum, the Court in *Dunaway* stressed that statements obtained during an illegal seizure will only be admissible if the causal chain between the illegality of the seizure and the confession is broken. In applying the *Brown* test, the Court did not lessen the ambiguity inherent in the temporal-proximity and intervening-circumstances factors of the test. The Court's discussion of the official-misconduct factor indicates that this factor measures the degree to which police conduct violates the fourth amendment, not to the actual demeanor of police while they conduct the seizure. Since the conduct of police begins the causal chain between detention

¹⁰³ Justice Stevens made this point in his concurring opinion in *Dunaway*. See 99 S. Ct. at 2261 (Stevens, J., concurring).

and confession, the Court has clarified this important dimension of the *Brown* test.

CONCLUSION

In *Dunaway*, the Court largely relied on precedent to find that police had illegally seized Dunaway and that his *Miranda* confession, being insufficiently removed from the taint of the illegal detention, was inadmissible. In defining custody, the Court placed new emphasis on the intentions which police have in detaining an individual. The Court refused to extend the *Terry* balance test of reasonableness to situations which closely approximate

arrest and distinguished situations in which the balance test is applicable, holding that probable cause is the test for seizures made during routine criminal investigations.

In deciding the admissibility of Dunaway's statements, the Court indicated that it intends to utilize a multifactor test in determining whether a confession is attenuated from the taint of an illegal detention. Although two factors of the test remain ambiguous, the Court did clarify the official-misconduct factor. This factor is interpreted as referring to the flagrancy of the police violation of the fourth amendment, not to the manner in which the seizure itself is conducted.