In the

Supreme Court of the United States

IRVING JEROME DUNAWAY,

Petitioner,

v. No. 78-5066

STATE OF NEW YORK,

Respondent.

Washington, D. C.
March 21, 1979

Pages 1 thru 59

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Wednesday, March 21, 1979

The above-entitled matter came on for argument at 10:09 a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN P. STEVENS, Associate Justice

APPEARANCES:

EDWARD J. NOWAK, Esq., Monroe County Public Defender, 36 West Main Street, Rochester, New York 14614, for the Petitioner.

MELVIN BRESSLER, Esq., Assistant District Attorney of Monroe County, 201 Hall of Justice, Rochester, New York 14614, for the Respondent.

I N D E X

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in Dunaway against New York.

Mr. Nowak, you may proceed whenever you are ready.

ORAL ARGUMENT OF EDWARD JOHN NOWAK

ON BEHALF OF THE PETITIONER

MR. NOWAK: Mr. Chief Justice, and may it please this Court: This case directly puts an issue the rights of our citizens to be free from arrests or seizures for purposes of police investigation without probable cause under the Fourth and Fourteenth Amendments of our Constitution and as applied by this Court in 1975 to the case of Brown v. Illinois.

This case may also present a further issue, because if this case is not decided in accordance with Brown v. Illinois, then this Court will be faced with resolving the issue of the important right of our citizens to be free from unreasonable seizures for purposes of investigative detention, a question that was left open by this Court in Terry v. Ohio and again left open in Morales v. New York.

If I may briefly outline the facts:

There was a murder in the city of Rochester at a pizza parlor March 26 of 1971. The proprietor of that establishment was fatally wounded during the course of an

attempted robbery.

The next fact we have from the record -- we do not know what the police did from the record between March 26 and August 10. We know that on August 10 the police received information from an inmate who was incarcerated in the Monroe County Jail whom they had never used before, who was never established in this record as having been reliable. They received information from this Mr. Sparrow indicating that a Mr. Cole and a Mr. Irving Axelrod committed this particular murder at the pizza parlor.

At that point in time, the police officer who was in the jail called the lieutenant in charge of the criminal investigation of the Physical Crimes Squad. The lieutenant came down to police headquarters at about 8 o'clock at night, and he questioned Mr. Sparrow, and he asked Sparrow where he got his information, how did he come about knowing this. Sparrow indicated that Cole told him he did it.

The police then went and confronted Cole, who at that time was also incarcerated in the Monroe County Jail. After two hours of questioning, Cole persisted and denied any involvement whatsoever in this homicide. He said, "I had nothing to do with it, but I will tell you who did. I didn't do it, but Irving Axelrod did it with another guy called "BaBa" Adams.

The police at that point said, "Who told you this,

Mr. Cole?"

"Somebody else, Adams' brother, a guy named Hubert Adams."

"Well, where's Hubert Adams?"

"He's in the Elmira Correctional Facility," which is about 90 miles south of Rochester.

What did the police do?

Again, I would like to emphasize that Mr. Cole is a person charged with a crime, never having been used at all in any way, his reliability has never been established. And while his reliability had never been established, he is denying that he was involved in this crime, which is the original information that they got, that he was involved.

QUESTION: Where did the interrogation of Cole take place?

MR. NOWAK: At the Monroe County Jail.

QUESTION: Where he was incarcerated on another charge.

MR. NOWAK: He was incarcerated, your Honor. They took him from the jail to an interview room.

QUESTION: He was already in jail on some --

MR. NOWAK: He was in jail on other charges, that's correct.

QUESTION: He wasn't brought to the jail for interrogation.

MR. NOWAK: No, he wasn't.

Now, Cole gave this information. Now, what did the police do when they had this information? They didn't go question Hubert Adams who was the source of the information to try to verify an unreliable informant. Instead, the --

QUESTION: You have, I think for the third time, called him an unreliable informant. Is the first information that a citizen gives police inherently unreliable on your theory? Must he give several reliable reports before he establishes his reliability?

MR. NOWAK: It would be preferable if he did. If he didn't, it must be verified by some other source. OK?

QUESTION: It's inherently unreliable if it's the first time the police hear from him.

MR. NOWAK: If the police hear from him for the first time, they can then go to the scene and what they see. If a person on a tip says So and So is selling marijuana and also has a firearm; he is on the corner of -- let's pick two streets -- Main Street and State Street. The police go to the corner and there is a guy dressed as the informer said he would be. OK, then we have a different situation, because now they have acted on some information and they have been able to corroborate what his story was.

In this case the police took no action to corroborate this person who just gave them some information

while he is denying his own guilt.

QUESTION: From your point of view, the results obtained by the police invalidate the accuracy of the tip, as it were.

MR. NOWAK: No, because they didn't corroborate it before.

QUESTION: Hypothetically. You said if they did this in the hypothetical case.

MR. NOWAK: But they didn't in this case.

QUESTION: What is your authority for the requirement of corroboration, as you put it, in a situation such as this where there was no search warrant, or arrest warrant obtained?

MR. NOWAK: In a situation such as this, there is no authority. I think this is the first case that will talk about that particular point of law. In drug or firearm cases there are cases that indicate the tip must be substantiated to some point.

QUESTION: That's the Draper case. But am I quite mistaken in my apprehension that there is no issue of whether there was or was not probable cause?

MR. NOWAK: There is no issue --

QUESTION: Everybody agrees there was not?

MR. NOWAK: There is no issue whatsoever. Every court has held there is no probable cause in this case and the prosecution has conceded.

QUESTION: And the prosecution virtually concedes it.

MR. NOWAK: Right. But the argument will come down to reasonable suspicion on whether or not that existed.

QUESTION: Everyone agrees there was not mine-run probable cause, isn't that correct?

MR. NOWAK: That is correct.

QUESTION: That's what I thought.

MR. NOWAK: What subsequently followed was that the police then issued an order to go pick up and bring in Mr. Dunaway acting on this information. And that night two teams of police officers went out, were unable to locate Mr. Dunaway during the evening hours, and at 8 o'clock in the morning they went to his house. Upon arrival at his house they asked where he was. His mother said, "He's not home." The police officer said, "I am going to see for myself," and they walked in and looked through the house. Mr. Dunaway was not there.

Another officer who was with this team was standing watch of the house to make sure, as he said, no one jumped from windows or tried to run out the back door. He noticed a young lady leave the house and go to a house three doors down. So when the team of detectives who entered the house came back out, he said, "Let's follow her because she went a couple houses over and he might be there."

They went to the house. Mr. Dunaway was there. Mr. Dunaway was subsequently taken downtown by the police and questioned.

We have a fact that now becomes important, I think, to the entire issue in this case, and that is whether or not the petitioner was in fact arrested or seized in accordance with the Fourth Amendment.

QUESTION: Why not give us the facts. What did they do?

MR. NOWAK: The police testimony is, "We asked him if he would go downtown with us, and he said yes."

The defendant's testimony is that they came up and they said, "We are going downtown to question you." And one of the officers grabbed him by the belt of his pants and led him toward the police car.

QUESTION: How many police officers were there altogether?

MR. NOWAK: There were three police officers.

QUESTION: Three of them making --

MR. NOWAK: Three police officers who stand 6 feet three, over 210 pounds. This defendant is an 18-year-old black youth who weighs about 145 pounds.

Now, the findings of fact --

QUESTION: Ordinarily that would be enough force to look like an arrest, wouldn't it?

MR. NOWAK: It certainly would. The hearing court, in fact, found that there was an arrest in this case. The issue that comes forth is that the appellate division found that the defendant went voluntarily. The court of appeals of the State of New York denied us permission to appeal this, dismissed our application. We filed a petition for certiorari.

QUESTION: Is there anything inherently inconsistent between a person being arrested and going without resistance?

MR. NOWAK: No. That is the exact point that I am about to make, your Honor, that if a person is accosted by the police and goes along voluntarily, there are many Federal cases which hold that that still constitutes an arrest as long as the person being seized feels that he is so restricted. And the testimony in this case which is crucial is that Mr. Dunaway asked the police in the police car while going downtown, "Why do we have to go downtown?" And the police said, "You'll find out when we get there."

Now, I think that that type of a request indicates that the police had seized this individual and in fact had arrested him at this point in time. They didn't answer his direct request to find out why they had to go downtown. And the record, I think, is also clear that there was an objection to one of the questions about putting emphasis, counsel, on the word "had." The court said, "Objection overruled, the officer

knows what we are driving at," and the officer said, "If I remember correctly, that's what he said, 'Why do we have to go downtown?'"

So I think the state of mind of this defendant is clear that he felt he was arrested. It's also clear from the stipulation on the record that the people who stipulated, the officers when they went out intended to arrest, because the officers many times have said, "When we have a warrant of arrest, our directive is to pick them up and bring them in."

QUESTION: Didn't the State courts agree in their final judgment there was a detention?

MR. NOWAK: They agreed that there was a detention, that's correct.

QUESTION: Against his will.

MR. NOWAK: Well, they said he went along voluntarily, but a detention. I don't see where --

QUESTION: Where do you find this voluntary?

MR. NOWAK: The Appellate Division opinion in the record, I believe it's page --

QUESTION: There was no opinion.

MR. NOWAK: There was an opinion by the Appellate Division the second time, your Honor.

QUESTION: Page 124 of the --

MR. NOWAK: Of the Appendix.

In quoting some of the facts of this case, they say

he went along voluntarily. It is my statement that when you are arrested you need not resist arrest. There is a holding of the various --

QUESTION: It says this case involves a brief detention.

MR. NOWAK: That's correct. It says that as well.

QUESTION: And that therefore it is controlled by Morales.

MR. NOWAK: That's correct.

QUESTION: Which did involve a detention.

MR. NOWAK: And that's why I don't know why they throw in the word voluntary.

QUESTION: Admittedly on less than probable cause.

MR. NOWAK: That's correct.

QUESTION:: I am just reading the opinion now by Judge Moule. He says, according to the police testimony the defendant was asked to come downtown to talk and did so voluntarily.

MR. NOWAK: That's correct. He quotes the police testimony. But that is contrary to the findings of the fact made by the hearing court.

QUESTION: Did the court of appeals say --

MR. NOWAK: The court of appeals dismissed our application.

QUESTION: -- that he did come down voluntarily?

MR. NOWAK: The court of appeals dismissed our application for permission to appeal.

QUESTION: Nobody has found that he came voluntarily. No court found that he came voluntarily.

MR. NOWAK: As an affirmed finding of fact, I say that's true, they didn't, but they put the word --

QUESTION: The trial court found just to the contrary.

MR. NOWAK: That's correct. And the people are contending in point one of their brief that he did go along voluntarily.

QUESTION: The finding was otherwise.

MR. NOWAK: That's correct. That's what I am trying to point out to the Court at this time. I think the finding is otherwise, but the people say that he did go along voluntarily and they are relying on the use of the word "voluntary" in that Appellate Division opinion. But I don't see how they can use it when they say at the same time he was detained.

QUESTION: We don't sit to retry the facts here. I think you ought to get to the law of this case.

MR. NOWAK: OK. I will be happy to, your Honor.

It is my feeling that under the law of Brown v. Illinois this petitioner was arrested. He was also arrested concededly without probable cause. And the question becomes:

Do we apply the exclusionary rule? And was the confession attenuated from the initial illegality, that is, detention of this person at police headquarters without probable cause?

QUESTION: The Fourth Amendment doesn't say anything about arrest; it talks about seizure.

MR. NOWAK: It does talk about seizure, your Honor.

QUESTION: And that's the real question, isn't it?

MR. NOWAK: I believe if a person is arrested, he is seized.

QUESTION: It's pretty clear that you are not seized if you consent to go along with somebody. That's not a seizure.

MR. NOWAK: That's correct.

QUESTION: If you consent to go along with a man with a machine gun, I'm not too sure that's consent.

QUESTION: Well, then it isn't consent.

MR. NOWAK: If you are consenting to the police authority saying, "We are going to go downtown," and you ask him why you have to go, it's obvious that you don't have to resist, and you are going along voluntarily with the police is not consent. They are two different terms of art.

QUESTION: If the police wanted him, why didn't they just telephone and tell him to come on down?

MR. NOWAK: They didn't do that. That's a significant fact that they didn't ask by phone.

QUESTION: They didn't send one, they sent four, four officers.

MR. NOWAK: Three officers.

QUESTION: Three.

MR. NOWAK: That's correct.

QUESTION: To deliver a message, please come down.

MR. NOWAK: They said, "We want to talk to you downtown."

QUESTION: Mr. Nowak, I am sorry to go back to the facts, but there seems to be a general consensus that there was no change in the finding of the trial judge, but on page 126 the Appellate Division says, "This testimony shows that the police legally detained the defendant for questioning." And then at the top of page 127 they say, "In our opinion, the police conduct here is proper."

So isn't it rather clear that you are correct in saying that they did find that there was a voluntary submission to the police?

MR. NOWAK: No, I don't think that's what they meant by that. They felt that the detention was legal because of the application of the Morales case, which is a New York Court of Appeals case, which says you can detain people on reasonable suspicion, and that's probable cause.

QUESTION: All right.

MR. NOWAK: And that's why they classified the

detention as being legal. In my opinion it is clearly violative of the Fourth Amendment. And we have to look at whether or not there is now the attenuation that is needed in applying the criteria established by this Court in Brown. The first criteria is the proximity of the arrest to the confession. In Brown there were two hours between the initial arrest and the detention. In this case there was one hour.

Was there any intervening circumstance, the entering of counsel, the arraignment before a local magistrate? In Brown there was none; in this case there was none.

What was the purpose of the official misconduct in this case? It was clearly by the police's own admission for the purposes of interrogation. Exactly the same improper purpose in Brown.

QUESTION: Mr. Nowak, excuse me again, but you are arguing the attenuation point now, if I understand you correctly.

MR. NOWAK: That's correct.

QUESTION: Because there is an intermediate point. The legal proposition that is disputed is whether or not the police can ever bring a man in just on reasonable suspicion. Is it your view that it can never be done, say, to fingerprint him, put him in a lineup, ask him questions? Is there any time when a suspect against whom there is no probable cause

but there is reasonable suspicion can be detained? What is your view of the law?

MR. NOWAK: My view is that at this time under the law of Brown it cannot when he is brought in because in effect he is arrested at that point in time. When he is brought in in that type of a fashion, he cannot be -- what was done to this petitioner cannot be done to anyone for any purpose. They need probable cause.

QUESTION: For fingerprinting or for a lineup.

MR. NOWAK: For fingerprinting or for a lineup.

Now, there could be a situation that could be developed where they could go to his house and say to him, "Would you like to come," and he says, "No."

QUESTION: You always have a case where he says, "No," and they say --

MR. NOWAK: Right. They take him forcibly. If the police try to set up an appointment with him, if they go to his house and say, "We would like to question you. Let's sit here and have a talk," that might pose a different problem because he may not be seized for purposes of the Fourth Amendment. But once seized, I think you need probable cause.

QUESTION: And that's for a lineup as well as questioning?

MR. NOWAK: I would say yes, sir.

QUESTION: Or for fingerprinting.

MR. NOWAK: I think the Court held that in Davis v. Mississippi, and that's why I feel that is the law of the state.

The last issue under Brown to determine whether or not there is attentuation after the purpose of a misconduct is the flagrancy. And this is where there is some difference of opinion between myself and the district attorney's office. The flagrancy of misconduct -- what is flagrant official misconduct, I guess, is the real question. And I think in the concurring opinion of Mr. Justice Powell in Brown v. Illinois he said that there are three types, or three examples,he gave of official flagrant misconduct.

The first is when the police clearly act without probable cause.

The second is when they make a pretext arrest.

Thirdly, when they go in with arms, weapons drawn, without probable cause.

And he cites those three examples. Clearly Brown fell within example three. He was accosted at gunpoint in his own home.

Example three does not apply to this case, and therefore the people say there is no flagrancy. But if you look at Mr. Justice Powell's concurring opinion, he says that -- the first example he gives is when they make an arrest without

probable cause. In this case they conceded that they didn't have probable cause. They were directly asked by the defense attorney on cross-examination, "Did you have probable cause to get a warrant, or did you go get a warrant?"

He said, "I didn't get a warrant because I knew I didn't have probable cause to get one."

Yet, knowing this, they went to his house and seized him. And I submit to you, as did the dissent at the Appellate Division clearly stated this constitutes flagrant official misconduct, when the police know they do not have probable cause and they act without it. And I think that this is a flagrant misuse of official misconduct, and the exact purpose of the exclusionary rule as it was used in Brown would be served again by applying it in this case.

I would only point out that originally, in 1975 when Brown v. Illinois was decided, this case had been up to this Court and certiorari was granted and it was remanded for a rehearing.

QUESTION: But when these police acted, Morales was on the books in that circuit, wasn't it?

MR. NOWAK: Morales, in my opinion, your Honor, has never been the law because it has been dicta. I think if the Court would examine the opinion in Morales --

QUESTION: What would reasonable people think about Morales? This Court -- the New York courts thought this case

was governed by Morales, the Appellate Division did. They thought it was the law of New York.

MR. NOWAK: That's correct.

QUESTION: Well, what about police operating under judgments like this?

MR. NOWAK: If in fact the police are acting under a statute which is later declared invalid, there are court cases which indicate that the police are acting in good faith and that is a criteria to consider.

QUESTION: Morales is I suppose just a construction of the New York statute stating the powers of the police.

MR. NOWAK: I don't believe it is, but in any event --

QUESTION: What is it, then?

MR. NOWAK: I think it's their interpretation of what the Federal Constitution says. That's what the New York court did, they said, "We interpret the Federal Constitution as saying this, and we are going to hold that this is in fact the case."

If the police were aware of Morales, I submit to the Court that when they testified at the hearing in 1977 that was conducted, they would have said, "Counselor, we don't need probable cause to pick him up; we only need reasonable suspicion." But they didn't. If they were aware of Morales, that's what they would have said.

Now, given the fact that they did -- or even if they were acting in some sort of good faith to a law which I say still is not on the books in the State of New York because it was dicta, the court of appeals when Morales came back said that he consented to the police seizure and therefore we never get to the question we addressed.

QUESTION: Police aren't expected to distinguish between dicta and holdings.

MR. NOWAK: No, I am not suggesting that they should. I am just saying that there really was no reasonable way or reason for the police to believe this was the law in the State of New York. Even if it was good faith alone, I don't think should --

QUESTION: You say the police said to themselves, "We don't have probable cause and we don't need it, and whether we need it or not, we are taking the fellow down."

MR. NOWAK: That's correct. That's exactly what I feel. They wanted to solve this murder and they were going to go get this defendant instead of following leads that they had available to them. And I don't think that's proper.

QUESTION: Judge Denman's concurring opinion did rely precisely on the point implicitly suggested by my brother White's question, didn't he? Judge Denman.

MR. NOWAK: She was bound by the holding of the Court of Appeals.

QUESTION: She.

MR. NOWAK: That's correct. In Morales.

QUESTION: In Morales, yes.

MR. NOWAK: But the Morales opinion, I would only ask the Court to note that that opinion specifically makes all the findings that she relies on and then says we have a second basis for our holding. That is, that the defendant Morales consented to the police detention, and therefore, it obviated the real purpose of the rule they were seeking to develop. They said that he consented.

QUESTION: This Court and alternative holdings, they were both holdings.

MR. NOWAK: I guess it could be said both holdings. Maybe they made two separate ones and there was no need to make it because they were relying on a consent issue. When a petition for certiorari was made to this Court, it was denied, and I think properly so, because there was no question, because he consented. This Court specifically remanded Morales to find out if he was arrested, whether he consented, and whether there was probable cause. And they said he was not arrested because he consented.

I think that obviously answers the question this Court was seeking to address at that point in Morales. That is why I say it really never became the law. But even if it did and the Court wishes to look at good faith, there is only

one of the three or four criteria that should be attached to attenuation. And I think there is no way in this case that there was any attenuation.

I respectfully submit to the Court that in this particular case Mr. Dunaway was seized for purposes of interrogation. This Court in 1975 remanded this case for further consideration of Brown v. Illinois. The hearing court took in all the testimony and found as a fact this defendant was arrested, he was arrested without probable cause, and in the hearing court's opinion even without reasonable suspicion. And further, the people offered absolutely no evidence at the hearing to show attenuation.

QUESTION: Mr. Nowak, on your attenuation point, what is the ultimate conclusion one draws if one finds there was attenuation? Is it a conclusion that the confession was voluntary?

MR. NOWAK: If one finds attenuation?

QUESTION: Yes.

MR. NOWAK: Before one gets to that question, the threshold question is is there a voluntary confession under the Fifth and Sixth Amendments? If you answer that question yes, then you go to the Fourth Amendment question that was posited in Brown.

QUESTION: As I understand it there is no claim in this case --

MR. NOWAK: There is no claim that this confession was not --

QUESTION: -- that this confession was involuntary.

MR. NOWAK: No, there isn't. And the same -- this is the facts of the Brown case.

QUESTION: I have to confess -- what is it that one is trying to find out by asking whether there was attenuation?

MR. NOWAK: Should the confession be suppressed? Should the exclusionary rule apply?

QUESTION: Attenuation like an adjective. What -- if it is attenuated, then what -- I mean, does that mean if it's attenuated then it's admissible?

MR. NOWAK: Then it is admissible in evidence because the purge of the initial --

QUESTION: What are you looking for when you ask about attenuation? What kind of --

MR. NOWAK: You are looking to see if the defendant's statement was sufficiently an independent intervening act of free will.

QUESTION: But if you found it was voluntary, haven't you found that?

MR. NOWAK: Well, that's where I disagree, because the purpose of the --

QUESTION: There are two kinds of voluntariness

apparently.

MR. NOWAK: Voluntariness under the Fifth Amendment is one question. But an act of free will, an independent intervening act of free will, which is what this Court specifically drew upon in the Wong Sun case and again in Brown, because Brown's confession was voluntary. The Court looked and said, "Can we say that his act of confessing was not a result of the police illegality, that they went in and seized him trying to get some evidence."

QUESTION: It has nothing to do with his free will because --

MR. NOWAK: It has nothing to do with --

QUESTION: -- as you said, it's conceded that this was a voluntary statement.

MR. NOWAK: It was voluntary.

QUESTION: Attenuation, as I understand it, and perhaps I misunderstand it, is whether or not it is sufficiently disconnected with the Fourth Amendment violation by the police.

MR. NOWAK: That's correct. And if it's sufficiently

QUESTION: What makes it disconnected other than voluntariness?

QUESTION: An intervening act.

MR. NOWAK: There are certain facets enunciated in Brown. One was the arrest. Did they exploit the illegal

detention to get this confession, or was he detained -- was he arrested illegally, was he taken to the courtroom, was he arraigned, given a lawyer? And then he says, "Look, I've got a lawyer and I talked to him, but I still want to confess." The court can look at that for Fourth Amendment purposes and say, "That was an act of his own will after he knew what was going on. They didn't exploit the illegal arrest to get that confession from him."

But on the other hand if the defendant was illegally arrested and as a result of that arrest, directly within hours and minutes of being seized,gives a confession, he has never had a lawyer, entered a proceedings, he has never been arraigned, the purpose was not to legitimately arrest him to charge him with a crime, but was for investigation, the court looks at the balancing and says that the weight is on the wrong side here, this confession must be excluded because it was obtained in violation of the Fourth Amendment, despite the fact it was obtained properly under the Fifth and Sixth.

And what the New York Court of Appeals says is that if you comply with the Fifth and Sixth, we will forget the Fourth. That is what I submit that they have tried to do in this particular case. And because they have tried to do that, I respectfully submit that the judgment of the New York court be reversed, Judge Mark's original decision after hearing

all the evidence in this case should in fact be reinstated, the confession suppressed, and this judgment reversed.

QUESTION: Is there any authority for your theory other than the Brown case?

QUESTION: Wong Sun.

MR. NOWAK: Wong Sun. Also the doctrine --

QUESTION: Is it Wong Sun -- I should have reread it, I suppose. Does that hold there can be a violation of the Fourth without a violation of the Fifth?

MR. NOWAK: Yes.

QUESTION: It does.

MR. NOWAK: The Fourth Amendment --

QUESTION: Confession.

MR. NOWAK: That's correct. Totally separate and apart from the Fifth and Sixth Amendments.

QUESTION: A product of an illegality.

MR. NOWAK: It's a product --

QUESTION: A fruit.

MR. NOWAK: That's correct, it's the fruit of an illegal arrest or detention.

If there be no other questions and if the Court please, I would like to reserve some of my time for rebuttal.

MR. CHIEF JUSTICE BURGER: Mr. Bressler.

ORAL ARGUMENT OF MELVIN BRESSLER ON

BEHALF OF RESPONDENT

MR. BRESSLER: Mr. Chief Justice, and may it please the Court: The parties have framed the issues in some detail. But the real issue, as I think, the bottom line issue, is shall this concededly voluntary statement be suppressed? And I would suggest that there are two separate theories, separate theories but interrelated, why it should not and why the statement is perfectly good as it is.

Rather obviously those two theories are expressed in Brown v. Illinois and the New York theory, which I will refer to as the Morales theory for simplicity's sake, which I think the Court now is aware of.

There are one or two preliminary factual matters I would like to go into. I think one of the things the Court might be interested in is Officer Luciano's part in this whole episode.

From the appendix and the testimony, although we make nothing of it in our statement in the briefs, you will see that Officer Luciano was at headquarters or somewhere nearby when he was told to go pick up the other two officers, Mickelson and Ruvio, and he was ferrying them around. He really knew nothing about what they were doing. They told him, "We've got to go here," and they said, "By the way, let us stop off and see if this guy Dunaway is home. We tried before and he wasn't there." He was just supernumerary, so to speak, he had no part in it.

When they got out of the car to do whatever they were doing, he hung back. He didn't go to the first house, Dunaway's home. He stayed in the driveway and used his eyes.

QUESTION: What difference does this make? What is the point you are making?

MR. BRESSLER: Well, there was a question before, your Honor, about the fact that there were three officers.

QUESTION: Really, what difference does it make whether there are three, one, or 24?

MR. BRESSLER: It comes down to a question of the voluntariness. It happens that he was the officer who was right there. Then also later on it goes to the question of whether or not there was an illegal exploitation of the arrest if it was illegal.

Now, if I understand what this Court told us in Brown as an extension of Wong Sun, it has to be a balancing test. In order for the rule to apply, you assume the initial illegality, and for the purposes of argument we will do that here. We will assume that the initial detention -- we don't concede it, but we will assume it -- was improper. From that point on, there was no exploitation of any illegality. The two officers, or three officers, who transported him downtown never spoke to him. There were no drawn guns. There were no threats. There was no bodily movement. They did not manhandle him. They did not put him in handcuffs. When he

got downtown, he was not booked. He was not fingerprinted. He was brought immediately into the interview room. In the interview room he was questioned --

QUESTION: And you are suggesting the interview is not an exploitation?

MR. BRESSLER: I am suggesting that they did not seek to exploit the illegality, assuming that the initial detention was --

QUESTION: Well, we are assuming he is being illegally held in that room.

MR. BRESSLER: That's correct.

QUESTION: And you are suggesting that -- well, I guess you are -- questioning him while he is being illegally held is not an exploitation of the illegality.

MR. BRESSLER: Yes, your Honor, and I will tell you why. After almost the moment he walked into the room he was given his full Miranda warnings.

QUESTION: Mr. Bressler, did they give him a choice of whether to go in the room or not?

MR. BRESSLER: I assume not, your Honor.

QUESTION: I do, too.

MR. BRESSLER: Therefore, what I am trying to do is make a comparison between this case and the Brown test on this balancing question.

QUESTION: Don't we already know that the mere

giving of Miranda warnings doesn't --

MR. BRESSLER: That is correct, your Honor.

QUESTION: -- dissipate the illegality?

MR. BRESSLER: I accept that. But I am saying that in a case like this where the officers in the first place acted in good faith because they were following what was then the law of New York, where they did nothing other --

QUESTION: I know, but now you are -- we are assuming an illegality. We assume an illegal detention, an illegal seizure.

MR. BRESSLER: That's correct. But in exercising your judgment in a balancing test, as was expressed in Terry and Adams and a few other cases, I am suggesting that the question I would like answered, or what I think favors us is that if the police act in good faith, and we assume illegality, and they do very little, if anything, to exploit that illegality other than move him from one place to another --

QUESTION: And then interrogate him.

MR. BRESSLER: And then question him after warning him of his Miranda rights, telling him that he doesn't have to speak, that he can have a lawyer, and that he can terminate it at any time, that under such cases the two-pronged reasons for excluding are not benefited.

If I understand the purpose of the exclusionary rule, it is to protect the court's integrity so that they are

not using tainted evidence, and in addition having a deterrent effect.

Under the facts of this case, it would have no deterrent effect because the police thought they were doing what was allowed. As a matter of fact, arguably to this moment that is the law of New York, Morales found that.

QUESTION: That's not a Brown argument at all. That's not a Brown argument at all. That's just an argument that the exclusionary rule shouldn't apply when the officers have some subjective or objective basis, reasonable basis, for doing what they did. That isn't an attenuation argument, is it?

MR. BRESSLER: No, but,your Honor, I --

QUESTION: Did you present this argument to the Appellate Division that even if it's illegal or even if there was no attenuation, the officers were nevertheless in good faith and the evidence should not be excluded? You didn't argue that, did you?

MR. BRESSLER: I argued Morales in the New York courts, your Honor.

QUESTION: Well, Morales.

QUESTION: You were the appellee and not the appellant in the Appellate Division, were you not?

MR. BRESSLER: No, we were the appellants the last time up.

QUESTION: Because the Supreme Court had suppressed the confession?

MR. BRESSLER: Yes. The trial court suppressed, we appealed.

QUESTION: You argue Morales only insofar as you were saying this was legal under Morales.

MR. BRESSLER: Well, of course, the question before the Appellate Division was somewhat different than it is now. In the New York courts Morales is the law. As a matter of fact, the majority opinion rested mostly on those grounds, also on Brown grounds. Of course, we argued both. There was a split. There was four to one, one dissent, three concurrences on the Morales theory and the Brown theory and a concurring opinion on Morales only. That was Justice Denman.

What I am saying is in exercising this balancing test, one of the things I assume you would want to know is if suppression is to be had, will it benefit the purpose of the exclusionary rule? And I am saying that under the facts of this case it will not, on two grounds:

In the first place, as I already strived to indicate, there would be no deterrent effect if the police reasonably believed they were following the law as it exists. And the testimony of the officer on the stand clearly indicates that it does. I think, as a matter of fact, I have it -- it's

in our brief at page 27 and in the appendix at page 61. The officer said he had the right to take him downtown. "I did not have probable cause to arrest him, I did have" -- his words -- "probable cause to take him downtown," which was his way of saying reasonable suspicion.

QUESTION: Then in New York under Morales you don't ever need an arrest warrant?

MR. BRESSLER: The way the law is in New York today, that is correct, you do not, your Honor.

Now, speaking strictly to the question of attentuation, if I understand Brown correctly, that, too, is a balance of a different sort. The extent of the necessary attenuation to separate the statement from the presumed illegality is always a question of fact, if I am correct. I am suggesting that strictly under the theory espoused in Brown, the good faith of the officers, the minimum time, the lack of exploitation, the clearly voluntary nature of the statement itself shows that there was a separation in his mind when he made the statement as opposed to when he was arrested, assuming again that there was an illegality.

There is a separate matter which I ask the Court to consider as well. Originally, after the defendant Dunaway made his first statement, the police officer left. Late that afternoon or early evening, according to the testimony, which was accepted, he asked to see the officers again, and

they came back later in the evening, 9 or 10 o'clock, after their tour of duty was long over, and he said something like -- it's in the record -- he said something like, "Look, I didn't give you the whole story before. I want to make a clean breast of it." And he gave them a much more detailed statement. Now he started to name names, and he cleaned up some of the things he had told them before which weren't altogether accurate.

At trial there was a preliminary hearing, we call it a Huntley hearing, a pretrial suppression hearing, at which both statements were ruled admissible. However, it was a joint trial. And since the second statement had the names of the other defendants, there were Bruton problems, the trial attorney decided he didn't need the second statement, the first one was all he did need, and he proved himself correct. He therefore never used it.

But I would also suggest the fact of that second statement, being absolutely voluntary in the purest sense, since the defendant called the police, should also be considered on the attenuation theory.

Now, with respect to what facts -- some questions arose as to what happened. I think maybe I should spend a minute or two detailing what the New York rules are.

The Appellate Division can find facts. The intermediate appellate courts in the State of New York can

find facts. Ordinarily the highest court, the court of appeals, cannot. They are quite limited to questions of law only.

In this case I suggest that a fair reading of the opinion shows that the Appellate Division did find facts, and the facts that they found fully credited the police testimony to the extent that there was any conflict.

QUESTION: On what issue?

MR. BRESSLER: On both -- on the question of whether he voluntarily went downtown --

QUESTION: Whether he consented.

MR. BRESSLER: That's correct, that he consented to go downtown.

QUESTION: What part of the opinion do you rely upon?

MR. BRESSLER: May I have a moment, your Honor?

QUESTION: Page 124 of the appendix, I think, is the opinion you are referring to.

MR. BRESSLER: The Court will note at page 124, about two inches below Justice Moule, it says, "According to the police testimony, defendant was asked..." and so forth, "...and did so voluntarily."

QUESTION: Yes.

MR. BRESSLER: Later on in the opinion, at page 126, it's indicated with a bracketed 2, it says, "This

testimony shows that the police legally detained defendant," and so forth. And then it says at the top of page 127, "... even if we were to find that the actions of the police officers constituted an illegal detention..." clearly indicating they found otherwise.

As a separate matter, the court of appeals in the State of New York can only hear questions of law. In this case, when there was a reversal, our rules require that the reversal state specifically that it is a reversal on the law. If it doesn't say anything or says "law and facts," then it cannot go to the court of appeals.

In this case there was a motion made by the defendant, petitioner here, after the Appellate Division holding, asking them to amend their order to say that it was on the law alone, which they refused to do. They denied the motion. And for that reason it could never be heard by the court of appeals.

That's a clear indication that they found facts. And I am suggesting the facts that they found were that they credited the police testimony with respect to the only conflict, whether or not he came voluntarily.

QUESTION: Mr. Bressler, is it really that clear? Because wasn't the motion to make it exclusively on the law? So isn't it fair to say the decision was a mixed law and fact decision?

MR. BRESSLER: Yes, your Honor, that is absolutely correct.

QUESTION: And the mixed law and fact conclusion is that the police conduct here is proper under Morales.

MR. BRESSLER: That is correct, your Honor.

QUESTION: Under Morales it's proper to arrest on reasonable suspicion for questioning.

MR. BRESSLER: Well, there is an ambiguity, no question about it. But I am suggesting if the entire three-man majority opinion is read, it seems clear that they absolutely credited the police testimony on their review of the facts.

QUESTION: On page 125 it says, "We believe this case is controlled by the recent decision of the court of appeals in Morales" --

MR. BRESSLER: Yes, your Honor.

QUESTION: -- "in which the court rearticulated its view that you may detain on reasonable suspicion." That's the way they dispose of the case, and that's why they said the detention was legal.

MR. BRESSLER: That is certainly a fair interpretation, your Honor. I would urge the other one, but I think the issue is clear and it's understood.

QUESTION: Do you argue -- you haven't yet -- that the police may detain for questioning on reasonable

suspicion?

MR. BRESSLER: I'm sorry, your Honor, I didn't hear.

QUESTION: Do you take the position that the police may detain for questioning on reasonable suspicion and without probable cause?

MR. BRESSLER: Yes, I do, your Honor, as a matter of --

QUESTION: Federal constitutional law.

MR. BRESSLER: Yes, your Honor. As a matter of fact, I would like to explain why.

QUESTION: May also arrest.

MR. BRESSLER: To the extent there is a distinction, I would say an arrest, no.

QUESTION: Well, but again, the Fourth Amendment doesn't say a word about arrest. We are talking about seizing him and detaining him.

MR. BRESSLER: If I may, I will explain to you what the distinction is.

If there is a seizure, the court of appeals, New York's highest court, tries to strike a balance between the right of privacy that every individual has under the Constitution, which is essentially what the Fourth Amendment provides, and what I call the police imperative to investigate and, if possible, solve a crime.

Now, we have here the most serious crime that man can be accused of. That is, the taking of a fellow human's life, murder. They had reached an impasse, and the court of appeals tried to strike a balance. And the balance that they sought to strike was that where in a narrow class of cases, a very narrow class of cases, the police can demonstrate, they can articulate that they have reached an impasse in their investigation, but that they have reasonable suspicion, which is a step below probable cause, to suspect that one or more individuals either has information about the crime or may be a defendant, that is, a perpetrator, they can detain him for a brief period under carefully controlled conditions after fully advising him of his Fifth and Sixth Amendment rights.

As I understand it, the New York Court of Appeals said, if you do that, then such a detention is not unreasonable within the meaning of the Fourth Amendment. And that is pretty much what I am urging on this Court.

Contrast that with an arrest. In an arrest, in the first place there is a booking procedure, which they determine to be notcarefully controlled proceedings. He may and probably will be handcuffed. He will be under a clear threat of the police power, as clear as you can be. He is being handcuffed, taken down, fingerprinted, photographed, and so forth.

QUESTION: Isn't there testimony here that one

policeman held him by his belt?

MR. BRESSLER: Yes, your Honor, the testimony of the defendant or petitioner himself said that he put his hand on his belt and guided him to the car. That was disputed by each officer. Each officer testified, paraphrasing, "I didn't touch him, I didn't see or don't remember if the other officer did." They each testified that they didn't touch him. And as I say, that is another part of the testimony that I believe the Appellate Division credited.

Now, the unfortunate part here is there was a concession by the trial attorney in this case that he was in detention from the moment he came face to face with the police. Therefore, the trial judge never made a finding on the question you asked, your Honor. He never made a finding because he felt he didn't have to. He accepted the concession of detention. And the reason, quite clearly, is --

QUESTION: Under Morales how long can you hold him?

MR. BRESSLER: A reasonably brief period of time. I guess pretty much like Brown, you have to judge each case on its merits.

QUESTION: From one to 50 years.

MR. BRESSLER: Well, your Honor, in this case he waived his rights and commenced making a statement within a very few minutes after he was questioned.

QUESTION: You waived his rights when they stopped

him, because he said he was willing to go down to the police station. That's when he started waiving his rights, according to your case.

MR. BRESSLER: Well, but I don't think at that time he was advised of his --

QUESTION: That's right. That's right.

MR. BRESSLER: Then what we are talking about is the intermediate period, the 20- or 30- or 40-minute trip downtown from the time he was first deprived of his immediate liberty.

Again, I ask the Court to remember we are suggesting --

QUESTION: Why was he taken to the police station --

MR. BRESSLER: Why?

QUESTION: -- to be questioned? Yes, sir, why?

MR. BRESSLER: That question, of course, is not clear in the record. I can speculate and show many reasons why it might be --

QUESTION: It's not in the record?

MR. BRESSLER: It is not.

QUESTION: They could have questioned him right there.

MR. BRESSLER: Well, those officers, especially the two officers who were assigned to the case, could not because (a) they weren't assigned to that detail, and (b) they

knew very little about the case. It was a notorious case, and it's possible they knew quite a bit about it from hearsay and reading the newspapers, the same way I might without being involved, or anyone else. But they were not specifically charged with the investigation or even to know the names of the other people.

QUESTION: Couldn't the officer who did question him have come out to the house and question him?

MR. BRESSLER: Yes, he certainly could have. But that would --

QUESTION: Couldn't he?

MR. BRESSLER: Yes, your Honor.

QUESTION: That would be trouble for him.

MR. BRESSLER: Yes, it would, because --

QUESTION: But it wasn't trouble to bring him in.

MR. BRESSLER: Well, he didn't know where he was.

QUESTION: I mean after they talked to him. They got him at the new house.

MR. BRESSLER: That's correct.

QUESTION: And they started talking to him. Couldn't they have then called the officer to come out and talk to him?

MR. BRESSLER: Yes, and that would have meant that they detain him in the street or in somebody's house for the same period of time while the officer is coming downtown.

Forgive me, your Honor, I can't see -- if they can't bring him downtown --

QUESTION: There is a lot of difference between being questioned in your room, in your living room, and being questioned in the detention room in the middle of a place where you haven't got a single friend, isn't there?

MR. BRESSLER: There certainly is, your Honor. However, please consider the facts.

QUESTION: That's why they took him down there, isn't that true?

MR. BRESSLER: Let us consider the facts here. He was found at someone else's house, not his own. There were people in the other house. Could the police reasonably barge into somebody's house and say, "We want to talk to you here," even if he consented?

QUESTION: I didn't say that?

MR. BRESSLER: I know you didn't, your Honor, but on the facts of this case, that's what it amounts to.

QUESTION: On the facts of this case, couldn't they have called the man and had him come out there and sat in the police car?

MR. BRESSLER: Yes, they could have. However, I would respectfully, your Honor, suggest that if there is something wrong, if there is something oppressive about being in a police station in an open room, there is something

even more oppressive --

QUESTION: Open room! Is it an open room?

MR. BRESSLER: What I mean is a large room with a desk --

QUESTION: It's an open room?

MR. BRESSLER: I didn't mean unlocked. I do not mean unlocked. I am comparing the room to questioning him in a police car, for example, which, if they had asked me, I would have said it is outrageous, don't you dare do it. Police cars, I think, are more inherently coercive than rooms are. That's a personal opinion, your Honor, obviously not binding on anyone.

I think the real nub of the question is this: If the police want to investigate this matter and they have reasonable suspicion to believe that a certain individual knows something about the crime, what they want is an exchange of ideas. They want communication. You can't -- if you stop people on the street, unfortunately in our society in certain parts of town, all you are going to get is an argument and a crowd. Some people know whether they want to talk to the police or not, they can't do it on their own, if I can use the word, turf. It's a put down; it's not cool, to use the language. They may be very willing to talk, willing in the purest sense somewhere else, but not where they can be seen, because they would lose face with their fellows and

their compatriots, the people with whom they have to live, their peers, so to speak.

As a separate matter, it is not conducive to an exchange of ideas. Now, for example, contrast the questioning of Dunaway with the questioning of Cole. Cole was just as much under suspicion when they questioned him. And because they were able to talk to him, he was able to convince them that he knew nothing about it other than the hearsay, that is, he did not participate. He was able to convince them that he was innocent, and they went to the next step.

QUESTION: Cole was in jail.

MR. BRESSLER: He was, your Honor.

Now, as a separate matter, although the question has not yet arisen, one obvious argument along those lines, your Honor, might be why they didn't go to Elmira.

Incidentally, I disagree that it was 90 miles. I think it was closer to 120 miles.

The problem you have with going down to see Hubert Adams is twofold. In the first place, the information that they had gave them no direct evidence concerning Dunaway. If they credit Cole's testimony, Cole's statement, Cole heard from Hubert, who was the co-defendant Ronald "BaBa"'s brother, his older brother, the information he got from him was that maybe a direct statement had been made to the brother, but no direct statement had been made by Dunaway.

They would just have another layer of hearsay to contend with. No matter what Hubert Adams told them at Elmira, they still had to go talk to Dunaway and they would be in no better position than they were before they left.

Second of all, when you have someone who might arguably want to protect his own brother more so than he might want to protect Dunaway who was not his brother, anything that he said, anything that Adams said, is immediately suspect. He might promise them anything, either to get his brother off the hook or to get a better deal for himself or a better jail assignment or parole time or whatever. It seems to me they made a practical decision. And, of course, "BaBa" was a juvenile, and I don't think they knew where he was. My recollection of the record is that they were looking for him, too. It was just coincidence that they found Dunaway first within a day or so.

It seems to me that the New York Court of Appeals tried to develop a middle ground, a balancing test between not investigating at all and taking a step further without compromising the rights of privacy that everybody has under the Fourth Amendment.

If this case were very, very recent --

QUESTION: Say you have reasonable suspicion, may you bring a person in against his will for fingerprinting?

MR. BRESSLER: Well, if you have reasonable

suspicion, I cannot answer you directly, I don't think so. But I would suggest that there you can get a warrant, because there is provision for it. There is no provision for a warrant.

QUESTION: How can you get a warrant on reasonable suspicion?

MR. BRESSLER: I believe that that is considered less intrusive if you have -- if I recall correctly in Davis this Court condemned reanum procedures. But it seems to me, either between the lines or in dicta, there was an argument that if they could show specifically that they were looking for this individual and for what reason, then maybe there would be a method of legally but with judicial supervision bringing him down to fingerprint him.

QUESTION: Then maybe there would be probable cause.

MR. BRESSLER: Well, I think the question posited was that there was not probable cause.

QUESTION: Just reasonable suspicion.

MR. BRESSLER: Just reasonable suspicion.

QUESTION: I take it your court of appeals thinks a person should be able to be -- and you think -- should be able to be briefly detained for certain purposes on less than probable cause, merely reasonable suspicion.

MR. BRESSLER: That is correct.

QUESTION: How about a lineup, calling him in for

a lineup based on reasonable suspicion but not on probable cause?

MR. BRESSLER: Well, a lineup presents an altogether different problem because with a lineup you have a live witness, somebody who can identify him. If you have a live witness, there are other ways that you can make the same identification. So you can just bring him down and say, "Yes, that's the guy," would you have probable cause?

QUESTION: You say you can just bring him down. But supposing he doesn't want to come?

MR. BRESSLER: Forgive me, your Honor. What I mean was, assuming that I am a suspect, the reasonably suspected person, bring the victim down and say, "Do you see anybody you know," where you know the defendant -- myself in this case -- would be, and he can say, "That's the guy." Now you have probable cause.

QUESTION: But then don't you have a show-up problem? You get a show-up problem.

QUESTION: As Justice Stevens says, suppose the victim is somewhat fugacious, as a number of these -- rather the suspect is. He isn't going to show up regularly at any one place.

MR. BRESSLER: I am trying to answer your specific question. My own opinion is that the New York courts would have more trouble for a lineup because you have a live witness

than when you can't have a lineup because there is no live witness.

QUESTION: I wouldn't think they would have any question with fingerprinting, though.

MR. BRESSLER: You may be correct. I am being a little cautious about speculating because one of the things -- they have thrown these cases out.

What I started to say was that there has been about a 10-year history of this precise rule in the State of New York, and during that 10 years there has been no excessive police behavior, they haven't used it, so to speak, as a hole in the Fourth Amendment to swoop down and pick people up. They have not made any dragnets. The court of appeals and the intermediate appellate courts, and we have cited some cases in our briefs, have carefully controlled and supervised, there has been judicial supervision over this proceeding.

QUESTION: Could I just ask this? Do you therefore interpret the rule as one that relates only to bringing a suspect in for questioning and does not extend to bringing him in for a lineup or for fingerprinting? Or has the court just not passed on the lineup and fingerprinting type situation?

MR. BRESSLER: The lineup cases have always found a way to get a court order, the ones I am familiar with. So

the question has never been directly answered. I don't know that they want to extend it any further, because you have to remember that when you fingerprint -- well, I guess he could exculpate himself as well.

The real underlying theory behind Morales, as I understand it, is to have a confrontation between the suspect who may be a witness, as Cole was, so that he himself can be confronted with the question of whether he wants to talk or not. And they have said, under the controlled conditions, a reasonably brief period where your Fourth Amendment rights are protected, that is reasonable. They have added another --

QUESTION: The question is are your Fourth Amendment rights protected. That's the whole issue.

MR. BRESSLER: Well, they have said that under those circumstances, that is reasonable, and they have merely added what I consider another dimension to the definition of the word reasonable. I guess the argument is in a case where you have no place else to go, where a serious crime has been committed, that the balancing that is required between the rights to privacy and the rights to solve these crimes, if it can be done with a minimum of interference, should favor investigation --

QUESTION: I take it under the Morales case, if you have the facts as in Terry, the police could not only have

stopped the gentleman for brief -- they could have taken him down to the station --

MR. BRESSLER: No, I disagree, your Honor. Because no crime has been committed. What did they suspect him of?

Secondly, it was not the type of crime that couldn't be solved another way.

QUESTION: A crime had been committed in Terry. Carrying a weapon.

MR. BRESSLER: I understand that, your Honor, but that's not the type of crime they are talking about. They are talking about a crime that has already been committed. Every case that has reached the appellate courts where this issue was involved was a murder case where there was no live witness. They have never allowed it in any other case, not the lower courts, not any court that I know of in the State. They have limited it strictly to murder cases where in another case they said --

QUESTION: Where there is some suspicion that the person they are detaining is involved in the crime.

MR. BRESSLER: Either as a witness or possibly as a defendant, where they have reason to believe that he is involved.

QUESTION: Even a witness, then?

MR. BRESSLER: Yes.

QUESTION: Even though they don't suspect him of being a witness at all, just knowing something about it -- I mean, suspect him of being the criminal?

MR. BRESSLER: It's so close, I don't know of a case that separates it, because usually if you know about it, you may be an accomplice, although perhaps not chargeable with the full crime under investigation.

Certainly, for example, Cole was in that category. They surely had the same reasonable suspicion against him that they had against Dunaway after talking to him. He convinced them in his conversation he had with them that he knew nothing about it. Then he pointed them to Adams and to Dunaway, or Axelrod, he called him by his nickname.

QUESTION: But in this case, I take it, we proceed on the assumption that there is not probable cause to believe that Dunaway was involved in the crime or that he knew anything about it -- probable cause. There is less than probable cause.

MR. BRESSLER: That is correct. That is conceded.

Thank you, your Honors.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mr. Nowak?

REBUTTAL ARGUMENT OF EDWARD JOHN NOWAK

ON BEHALF OF THE PETITIONER

MR. NOWAK: As a point of fact, just for the record for whatever purpose it has, the district attorney has indicated that the officers who were executing the arrest didn't know anything about why they were going out there, be it for investigative purposes or whatever. I think clearly in the record that is to the contrary. On page A58 it does state -- Lt. Fantigrossi is being examined.

QUESTION: What page again?

MR. NOWAK: A58, page 58 of the appendix, the second answer from the bottom. It states: "They knew just as much about the case as I did." Fantigrossi is saying that his people who went out to execute this arrest for investigatory purposes knew just as much about the case as he did. So for the record I would like to clarify that.

Two brief points, and they are that respondent has contested that New York applies this rule -- has not been excessive in the application of whatever rule they have applied. In my brief I have set out the case of People v. Anderson in which I was counsel for the defendant before the court of appeals wherein they struck down Mr. Anderson's confession. It was a murder case. They struck it down. He was detained more than 18 hours by the police until he finally confessed. They noted in that case that the detention was illegal.

QUESTION: What's your view on these facts? Suppose

the police had been carefully briefed on Morales and their police procedures were keyed to Morales and that was the law of the State of New York, it had never been overruled, but then the case comes up here and Morales is overturned. What about procedures that had been carried on under Morales prior to the overturning?

MR. NOWAK: I think your question is the point what if the police are acting in good faith when they are trying to execute --

QUESTION: Is there any difference between that situation and when they are acting under a statute that is presumably --

MR. NOWAK: If we can presume, which I still would contest that Morales is the law, then I would say that is a factor to consider in possibly whether or not there is a sufficient attenuation of the case.

QUESTION: Wasn't that theory completely rejected in Almeda Sanchez?

MR. NOWAK: It was rejected in that case as well as, I believe, in --

QUESTION: There was a statute that expressly allowed the search in that case.

MR. NOWAK: That's correct. But beyond that, good faith alone should not be an excuse of the Fourth Amendment. I think this Court has repeatedly held that --

QUESTION: In any event, that argument -- this particular kind of argument, I take it, wasn't made in the State courts.

MR. NOWAK: I don't believe that it was. But even if it was, as I am saying, what we are trying to prevent is the deterrent effect of the exclusionary rule. My position is that we should not make our citizens prove that they are innocent to the police when they are only reasonably suspected of criminal activity. And that's what the respondent here is trying to urge, that they can go to Cole on reasonable suspicion, they can question him and make him prove his innocence, but they don't have probable cause, they can make our citizens prove, because it's a murder case, it's serious, they can make our citizens prove by detaining them and questioning them they didn't do it and that's reasonable. And I submit that it is not reasonable, that before we can compel our citizens to be interrogated, which is the greatest form of deprivation of liberty, in police headquarters, probable cause is required, and that should be clear. And I think the New York rule should be definitely overturned in this case.

QUESTION: At the police station, as I recall, he drew some diagrams of the place where the crime had been committed.

MR. NOWAK: While he was confessing, they asked

him if he would show them what he means, and he did, and the trial court as well said that had to be suppressed, it's the fruit of that illegal detention. While he is confessing he is drawing a diagram.

QUESTION: Did I understand you in your argument in chief to concede his statements and the drawing of the diagram of the room were voluntary?

MR. NOWAK: They were voluntary for purposes of the Fifth Amendment in that they were voluntary because he was read his rights and he waived them. For purposes of the Fifth Amendment, yes. For purposes of the Fourth Amendment, free will, I say no.

QUESTION: One small question. You would take the same position, I take it, if they just asked him to get in the police car, they made him get in the police car and they questioned him right there? That would be the same issue, wouldn't it?

MR. NOWAK: I am not sure that it would. He would be seized, and my position on behalf of the defendant would be yes, he is seized, they need probable cause.

QUESTION: And they get the statement, of course, in the car. It would still be the same sequence of events.

MR. NOWAK: As long as they made him get in the car.

QUESTION: To back it up one stage more, suppose standing on the sidewalk they began this conversation and then

gave him the Miranda warning and then he did there all the things that he did downtown, what would be your answer there?

MR. NOWAK: A whole different situation. Possibly that might be allowed depending on the nature of the seizure, if it be reasonable. There are a number of factors. I don't know if time would permit me to go into them. I think there on the exact question you posited, that is, the nature of the detention, it's on the street, not in police headquarters, more beneficial, more reasonable for the police. What was the length? It's brief, not long, not in the station house. Are there any exigencies, which is a crucial element in determining what's reasonable under Terry. The Court specifically said the exigencies of a situation are what control. In Terry the police are trying to prohibit crime, not solve it.

MR. CHIEF JUSTICE BURGER: I think your time is up.

Thank you, gentlemen. The case is submitted.

(Whereupon, at 11:10 a.m., the argument in the above-entitled matter was concluded.)