10-1978

Dunaway v. New York

Lewis F. Powell Jr.

Eric - I'm not sure I would reach the Morales issue (whether one may be detained for questioning w/o probable cause but where reasonable suspicion exists. As I understand facts, I think the "attenuation" here is clear enough to meet any reasonable application of Wong Sun & Brown v Ill.

Pet's second confession (next day) was initiated by him (p 3) & the finding of trial court that it was voluntary is not challenged except on basis of the exclusionary rule.

Eric - 9/27 I've missed the point. Let me know.

11-8-78 - Please See back for comment on response. E.a

Should motion to deny. No case for Exclusionary Rule. Police acted reasonably

PRELIMINARY MEMORANDUM

~~Summer List 16, Sheet 3~~ Nov 10, 1978 Conf. List 2, Sheet 1

Cert to App. Div. of Sup. Ct of N.Y. (Moule, Marsh & Witmer; Dennar, concurring; Cardamone, dissenting)

No. 78-5066

DUNAWAY (robbery, felony murder)

v.

NEW YORK

State/Criminal

Timely

SUMMARY: Petitioner, who was convicted of felony murder and attempted robbery after a jury trial, contends that the state courts erred in denying his motion to suppress of his confession, which allegedly was the "fruit" of his illegal detention for questioning effected without probable cause sufficient to justify his arrest.

FACTS: Petitioner was convicted of felony murder in the course of an armed robbery of a pizza parlor, during which the proprietor was shotgunned to death by petr's cohort. The Appellate Division and Court of Appeals affirmed his convictions over his objection that incriminating admissions and sketches made by the petitioner

Please see last page.

should have been suppressed at trial because they were the product of custodial interrogation following an illegal arrest of petitioner without probable cause. This Court then granted a petition for a writ of certiorari, vacated the judgment below, and remanded for reconsideration in light of Brown v. Illinois, 422 U.S. 590 (1975). Dunaway v. New York, 422 U.S. 1053 (1975). On remand, the Court of Appeals reaffirmed petitioner's convictions except insofar as it remitted the case to the trial court for a factual hearing as to whether petitioner had been involuntarily detained, whether there was probable cause for such detention, and whether the illegal detention, if any, tainted the confession and sketches.

At the hearing, the sequence of events leading to petitioner's confession became clear. The police received a tip from an informant that one James Cole had told the informant that he (Cole) had been involved in the robbery of the pizza parlor along with a man named Irving. The informant identified petitioner as Irving from mug shots. The police then interviewed Cole, who was at that time incarcerated at the Monroe County Jail. Cole denied any involvement in the robbery, but said that one Hubert Adams had told him (Cole) that Adams's brother had commited the crime along with an individual named Irving. Rather than interviewing Adams, who was then incarcerated at the Elmira Correctional Facility, the lieutenant who had interviewed Cole issued an order to have petitioner picked up and brought into police headquarters for questioning. Three officers went to petitioner's home and were met by his mother. Two entered and searched the house for

petitioner, who was not there. An officer who remained outside the house, however, noticed a young woman leave the house and enter another in the neighborhood. The officers then went to that house, and petitioner came to the door. He was then taken into custody for questioning, though not formally arrested. The State stipulated that, from the time petitioner met the officers at the door until he reached police headquarters, he would have been physically restrained by the officers had he attempted to leave their company. Shortly after his arrival at headquarters, petitioner was turned over to a detective for questioning and given Miranda warnings. After waiving his rights to counsel and to remain silent, he made an inculpatory statement, which was transcribed about an hour after his arrival at the stationhouse. He also made two drawings useful to the prosecution at trial at the detective's behest. The next day, petitioner asked to talk to the detective again, and he made a second, more complete statement. At the pretrial suppression hearing, petitioner had testified that he was not threatened or abused by the police, and that the statements he had made were voluntary. At the time of his interrogation, petitioner was 19 years old.

After the hearing, the court found that, contrary to the officers' testimony, petitioner had not been voluntarily escorted to the stationhouse in response to a request of the police, but rather had been taken into custody by the police and involuntarily detained. The court also found that there was "no question" that the inculpatory statements and sketches made by petitioner had

been voluntary, and that the police had fully complied with the requirements of Miranda, as had been settled at the pretrial suppression hearing.

HOLDINGS BELOW: Based on the above facts, the trial court found that petitioner had been involuntarily detained without probable cause; and, relying on Brown v. Illinois for the proposition that the Miranda warnings by themselves did not purge the taint of petitioner's illegal seizure, held that his statements and sketches were inadmissible because the State had not otherwise made any showing of attenuation. Accordingly, the court was "constrained to grant the defendant's motion to suppress his inculpatory statements and sketches."

The State appealed, and the Appellate Division reversed the trial court's order and denied the defendant's motion to suppress. The majority found People v. Morales, 42 N.Y.2d 129, 366 N.E.2d 248 (1977), controlling, wherein the Court of Appeals had held, on remand from this Court, Morales v. New York, 396 U.S. 102 (1969), that "law enforcement officials may detain an individual upon reasonable suspicion for questioning for a reasonable and brief period of time under carefully controlled conditions which are ample to protect the individual's Fifth and Sixth Amendment rights." 42 N.Y.2d at 129. Here, the information supplied by the informant and Cole, though not sufficient to provide probable cause for an arrest, did raise a "reasonable suspicion" sufficient to justify petitioner's detention for questioning. Moreover, the facts showed that the questioning was fair and conducted under carefully controlled conditions with scrupulous regard for petitioner's Miranda rights. Finally, the detention for questioning was brief, and the crime

was a brutal and serious one that had remained unsolved for five months. Accordingly, under the circumstances, the detention for questioning was proper under Morales. Brown was distinguished in passing as a "situation where the defendant was arrested, searched and accused of a crime without even a scintilla of evidence casting suspicion on him." Furthermore, the majority held, even if the detention was illegal, there was sufficient attenuation of this primary taint to render petitioner's statements and sketches admissible in view of the officer's scrupulous regard for his Miranda rights, and his own testimony that the police did not abuse him and that his statements were voluntary.

The concurring justice observed that the police conduct in this case was both responsible and reasonable, and agreed that Morales governed. He could not agree, however, that if the detention of petitioner was illegal under Morales, the confession and sketches would still be admissible, for they would then have to be regarded as the product of an illegal arrest as there were insufficient intervening circumstances between the statements and detention to attenuate any taint associated with the latter.

The dissenting justice distinguished Morales on several grounds. First, Morales did not involve the involuntary detention ab initio as here, for in that case the defendant had willingly gone to the stationhouse for questioning. Second, the evidence pointing to Morales was much clearer than the "triple hearsay" involved here. Finally, petitioner was an 18-year-old youth unacquainted with police procedure, unlike the experienced 30-year-old lawbreaker in Morales. Here there was no doubt that petitioner had been illegally arrested without probable cause, though his detention had not been

explained to him as such. Characterizing petitioner's illegal arrest without probable cause or a warrant as "flagrant" misconduct, the justice could find no attentuation of the taint in view of the temporal proximity between the arrest and confession, and the lack of intervening circumstances.

Following reversal by the Appellate Division, petitioner sought leave to appeal to the Court of Appeals. The application was dismissed on the ground that the order sought to be appealed was unappealable. Reargument was denied, and a timely petition for certiorari was filed here.

CONTENTIONS: Petitioner argues that his involuntary detention or arrest was unsupported by probable cause and therefore illegal under Brown and a number of prior decisions of this Court. He distinguishes Adams and Terry as cases involving only limited intrusions in typical street encounter settings, and argues that only probable cause can justify the full-blown seizure of the person and custodial interrogation at issue here. He invokes Brown again on the attenuation issue and, along the lines of the dissent, contends that the temporal proximity between his arrest and confession, and the lack of intervening circumstances, render this case almost on point with Brown.

There is no response.

ANALYSIS: This case may well be worthy of plenary review, inasmuch as it raises the same issue as Morales v. New York, 396 U.S. 102 (1969), namely whether a State may detain a suspect for custodial interrogation on less than probable cause. The problems with the record that led this Court not to reach the merits in Morales are not present here. Moreover it is not

clear to me that the New York courts faithfully followed this Court's mandate to reconsider this case in the light of Brown. Although the majority opinion for the Appellate Division made some effort to apply the attenuation principles of Brown, the Court apparently regarded it as simply irrelevant to the question of whether the involuntary detention of petitioner was lawful in the absence of probable cause. At the very least, a response seems to be called for.

I do note, however, that there may be some procedural problems with this case. Petitioner seeks a writ of certiorari to review the judgment of the Court of Appeals affirming his convictions, yet it would seem to me that cert properly lies at this point to the decision of the Appellate Division. Moreover, the state procedural posture of this case seems odd to me. On remand from this Court, the Court of Appeals remitted the case to the trial court for a factual hearing on the detention, probable cause, and attenuation issues. This resulted in an order granting petitioner's motion to suppress, which was then reversed by the Appellate Division. Not being familiar with New York criminal practice and appellate procedure, I do not understand how the trial court could have granted a motion to suppress after a judgment of conviction had been entered and appealed without vacating the conviction and ordering a new trial. Nor do I understand how, absent further review by the Court of Appeals, the Appellate Division's denial of petitioner's motion to suppress results in an "affirmance" of petitioner's convictions, especially as that court's mandate does not speak in those terms. Perhaps a response will shed some light on these matters. It may be that

petitioner's application for leave to appeal to the Court of Appeals was dismissed because the reviewing justice assumed petitioner was trying to appeal from a denial of a pretrial motion to suppress.

There is no response.

8/29/78 Walsh opins in petn

The Morales issue could be c/w. I would call for a response.

E.G.

(From back) -

A vote either way is supportable. If you are interested in finding this detention ~~unreasonable~~ and ~~search~~ a illegal one, even though probable cause was lacking, this might be a good case because the police's treatment of petn was generally favorable; i.e., it would not be an especially offensive case for such a holding.

E.G.

November 10, 1978

Court .....

Argued ....., 19...

Submitted ....., 19...

Voted on ....., 19...

Assigned ....., 19...

Announced ....., 19...

No. 78-5066

DUNAWAY

vs.

NEW YORK

Response requested and received.

Retired to Byron

	HOLD FOR	CERT		JURISDICTIONAL STATEMENT				MERITS		MOTION		AFFIRM	NOTATIONS
		G	D	N	NOJ	POS	REP	GRA	ARG	G	D		
Burger, Ch. J.			✓										
Brennan, J.			✓										
Stewart, J.		✓											
White, J.		✓											
Marshall, J.			✓										
Blackmun, J.			✓										
Powell, J.			✓										
Rehnquist, J.			✓										
Stevens, J.		✓											

P.S. Join grieved

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White

Circulated: 15 NOV 1978

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

IRVING JEROME DUNAWAY *v.* STATE OF NEW YORK

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

No. 78-5036. Decided November —, 1978

MR. JUSTICE WHITE, dissenting.

This case presents the issue whether a confession obtained during a detention and custodial interrogation upon less than probable cause must be suppressed. The Appellate Division of the Monroe County Court, holding that suppression was not required, relied on *Morales v. New York*, 42 N. Y. 2d 129, 366 N. E. 2d 248 (1977). In that case, the Court of Appeals upon remand from this Court reaffirmed its previous holding, 22 N. Y. 2d 55, 64, 238 N. E. 2d 307, 314 (1968), that

> "law enforcement officials may obtain an individual upon reasonable suspicion for questioning for a reasonable and brief period of time under carefully controlled conditions which are ample to protect the individual's Fifth and Sixth Amendment rights." 42 N. Y. 2d, at 135, 366 N. E. 2d, at 251.

We had granted certiorari in *Morales*, 394 U. S. 972 (1969), because we recognized that this ruling

> "is manifestly important, goes beyond our subsequent decisions in *Terry v. Ohio*, 392 U. S. 1 (1968), and *Sibron v. New York*, 392 U. S. 40 (1968), and is claimed by petitioner to be at odds with *Davis v. Mississippi*, 394 U. S. 721 (1969)." *Morales v. New York*, 396 U. S. 102, 104-105 (1969) (*per curiam*).

However, after briefing and oral argument, we were constrained to remand *Morales* for an evidentiary hearing, concluding that "there is merit in the State's position that the record does not permit a satisfactory evaluation of the facts surrounding the apprehension and detention of Morales." *Id.*, at 105. Cer-

I confess sympathy with BRW's position. The Morales issue is important. The attenuation factors do tend to muddle the case, however, which may be reason enough to let this case go and await a better one. E.G.

fiorari was not applied for after the Court of Appeals upon remand reaffirmed its previous ruling.[1]

The record in the case at hand does not contain the problems that led the Court not to reach the merits in *Morales*. The New York courts have held that petitioner's detention was involuntary and was effectuated without probable cause to arrest, and the Brief in Opposition to the certiorari petition does not contend otherwise.

This is the second time that petitioner Dunaway has sought review in this Court. On the first occasion, we granted the petition and remanded for reconsideration in light of *Brown v. Illinois*, 422 U. S. 590 (1975). *Dunaway v. New York*, 422 U. S. 1053 (1975). Applying the rule of *Wong Sun v. United States*, 371 U. S. 471 (1963), *Brown* had held that the giving of *Miranda* warnings after an illegal arrest does not "alone and *per se*, . . . break, for Fourth Amendment purposes, the causal connection between the illegality and the confession." 422 U. S., at 603.

Upon our remand, the Court of Appeals modified its previous allegiance to provide for an evidentiary hearing, and as so modified again affirmed. 38 N. Y. 2d 812, 345 N. E. 2d 588 (1975). After holding the evidentiary hearing, the trial court concluded that petitioner's detention was involuntary and that the subsequent giving of *Miranda* warnings did not purge the taint of the illegal seizure. *Dunaway v. New York*, Cr. No. 458 (Monroe County Court, Mar. 11, 1977). In reversing, the Appellate Division concluded that the detention and custodial interrogation were valid under the rule enunciated by the Court of Appeals in *Morales*, and further held that even if the initial detention were illegal, suppression was not required under the attenuation principles set forth in *Brown*. One justice dissented on the former holding; two justices dissented on the latter holding. 61 A. D. 2d 210, ——

[1] In its second *Morales* opinion, the Court of Appeals held by the slimmest vote that Morales had consented to the police interrogation. 42 N. Y. 2d at 137–138, 366 N. E. 2d at 252–253.

[2] *Monroe v. Arizona*, 384 U. S. 450 (1966).

N. Y. S. 2d — (4th Dept. 1978). The Court of Appeals dismissed the motion for leave to appeal. 41 N. Y. 2d 738, — N. E. 2d — (1978).

Because I believe that the *Morales* rule—allowing apprehension and custodial interrogation on "reasonable suspicion"—goes to the heart of the Fourth Amendment's proscription against arrest and detention on less than probable cause, see, e. g., *Gerstein* v. *Pugh*, 420 U. S. 103 (1974), I would grant the petition for certiorari. The issue here raised is as "acutely important" today as it was in 1969. As to whether there was sufficient attenuation to obviate the initial illegality, the State's position is that as long as there was no coercion and as long as the violation was "neither wanton nor purposeful," proper *Miranda* warnings should suffice to eliminate the taint. This seems quite questionable under *Brown*, for it would repeatedly invite detentions on less than probable cause with the hope that, after *Miranda* warnings, admissions would be forthcoming in response to gentle questioning.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

November 15, 1978

Re: No. 78-5066, Dunaway v. New York

Dear Byron,

Please add my name to your dissenting opinion.

Sincerely yours,

P.S.

Mr. Justice White

Copies to the Conference

November 16, 1978

No. 78-5066 Dunaway v. New York

Dear Byron:

Please join me in your dissent.

Sincerely,

Mr. Justice White

lfp/ss

cc: The Conference

November 22, 1978

Court .....
Argued ..... , 19..
Submitted ..... , 19..

Voted on ..... , 19...
Assigned ..... , 19...
Announced ..... , 19...

No. 78-5066

DUNAWAY

vs.

NEW YORK

Relisted for Mr. Justice White.

I joined Byron-dissenting my vote

Granted

	HOLD FOR	CERT		JURISDICTIONAL STATEMENT			MERITS			MOTION		ABSENT	NOT VOTING
		G	D	N	PROB	DIS	AFF	REV	ANE	G	D		
Burger, Ch. J			✓										
Brennan, J.			✓										
Stewart, J.		✓											
White, J		✓											
Marshall, J.			✓										
Blackmun, J.		✓											
Powell, J.		✓											
Rehnquist, J			✓										
Stevens, J.		✓											

LFP/lab 3/6/79

To: Eric Date: March 6, 1979

From: L.F.P., Jr.

No. 78-5066 Dunaway v. New York

The rule in New York with respect to the detention of a person suspected of crime, or of having information relevant to a crime, appears to be as follows:

> "Law enforcement officials may detain an individual upon reasonable suspicion for questioning for a reasonable and brief period of time under carefully controlled conditions which are ample to protect the individual's Fifth and Sixth Amendment rights." People v. Morales, 42 NY 2d 129. (See Appendix p. 125)

We took this case, as I recall, to decide whether the New York rule comports with constitutional protections. This case was here before, and was remanded for reconsideration in light of Brown v. Illinois. On remand, the New York Court of Appeals itself remanded the case to the New York County Court for a second suppression hearing to determine the legality of petitioner's "detention".

The county court conducted a rather full suppression hearing (Appendix pp. 50-115), and in a rather

full opinion for a trial court, concluded that there was no probable cause for the detention of petitioner and his subsequent questioning, and accordingly ordered that his confession be suppressed - although it was found (and petitioner does not deny) that his confession - several times repeated - was voluntary.

On appeal, the Appellate Division reversed. It applied the New York Morales rule, set forth above. See Appendix p. 123 et seq.

Petitioner was convicted of felony murder and attempted robbery of a pizza store. Although it was known that two persons participated in the crime, the police had no clues for about three months. Then, an informant implicated petitioner - identifying a person Cole (then incarcerated) as the source of his information. The police interviewed Cole, who confirmed that he had been told that petitioner participated in the crime. He knew petitioner's first name and nickname, and identified petitioner from a photograph.

Although I would have thought this information was sufficient to obtain a warrant on probable cause, the police elected to go to petitioner's residence. There is a conflict in evidence as to exactly what transpired. It is conceded that no arrest was made, and the police insist that petitioner accompany to the station house quite voluntarily.

Petitioner had been told by his sister that the police wanted him, and he made no objection to accompanying him. The county court found, however, that had he attempted to flee, the police would have detained him physically. There is no evidence of police abuse at any time. Shortly following arrival at the station house, and after concededly full Miranda warnings, petitioner confessed and drew sketches pertinent to the crime. He thereafter confessed a couple of additional times.

I think the facts present the validity of the New York rule. The state makes no argument that there was even probable cause to arrest, and relies on the Morales rule that "reasonable suspicion" justifies detention for questioning for a "reasonable and brief period of time". Although I think the New York rule may be difficult to square with the rationale of some of the decisions of this Court, a good deal can be said in favor of its societal soundness. There must be many situations in which probable cause cannot be shown, and yet in which there is reasonable suspicion for questioning a person. One cannot be questioned unless he voluntarily submits or is detained by the police. Although it is argued that petitioner voluntarily agreed to go to the station house, the physical facts suggest detention.

Petitioner plainly is guilty, and no one denies

this. If this a proper case for the application of the "harmless error" doctrine, we could affirm. I have never understood the standards that guide with respect to harmless error, although several of the Justices will never rely on this ground where a constitutional issue is presented.

I also could decide this case on the view I expressed in my concurring opinion in Brown v. Illinois, as the police certainly acted in good faith. I agree with the argument of the state that they would have been derelict not to have taken petitioner in custody. I do think they should have sought a warrant on the basis of the information available to them.

Although a brief memo, plus oral discussion, will suffice, I want your views.

L.F.P., Jr.

May 16, 1979

78-5066 Dunaway v. New York

Dear Bill:

Please show on the next draft of your opinion that I took no part in the consideration or decision of this case.

Sincerely,

Mr. Justice Brennan

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 16, 1979

Re: No. 78-5066 - Dunaway v. State of New York

Dear Bill:

Please join me.

Sincerely,

T.M.

Mr. Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

May 16, 1979

Dear Bill:

Re: 78-5066 Dunaway v. New York

Thanks for taking a dissent in this case.

Regards,

WEB

Mr. Justice Rehnquist

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

May 21, 1979

Re: 78-5066 - Dunaway v. New York

Dear Bill:

I am glad to join your opinion for the Court.

Sincerely yours,

P.S.

Mr. Justice Brennan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

May 30, 1979

Re: 78-5066 - Dunaway v. New York

Dear Bill:

I join your dissent.

Regards,

Mr. Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 31, 1979

Re: No. 78-5066 - Donaway v. New York

Dear Bill:

Please join me.

Sincerely,

Harry

Mr. Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 31, 1979

RE: No. 78-5066 Dunaway v. New York

Dear John:

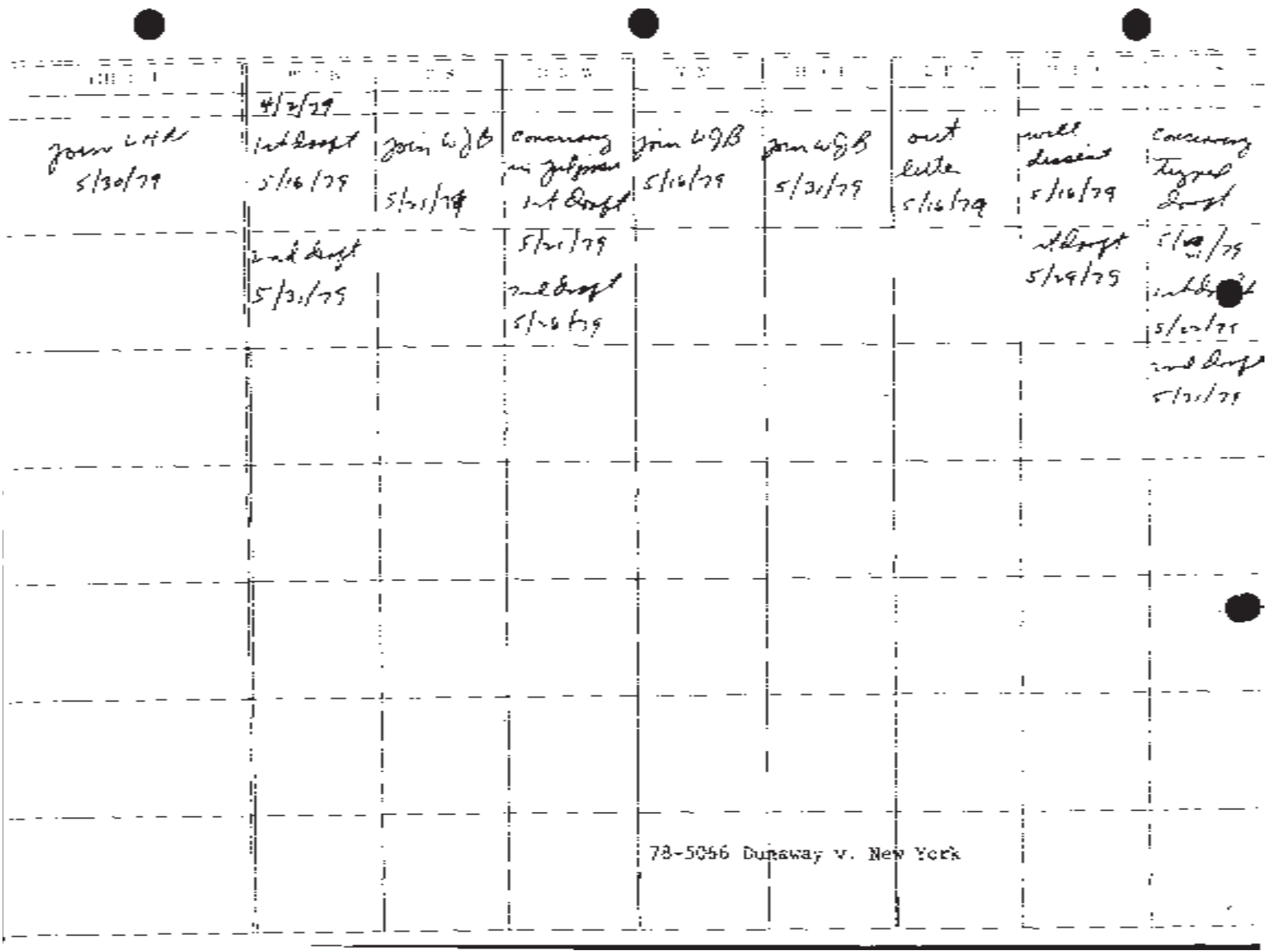
Thank you for your note. I see nothing in your added paragraph to your concurrence that requires any change in the opinion for the Court.

Sincerely,

Bill

Mr. Justice Stevens

cc: The Conference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2nd dept
5/31/79
78-5056 Dunaway v. New York