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Rawlings v. Kentucky: More on Unpoisoning the Fruit or Shall We Just Plant Another Tree?

RAWLINGS V. KENTUCKY: MORE ON UNPOISONING THE FRUIT OR SHALL WE JUST PLANT ANOTHER TREE?

The fourth and fifth amendments to the Constitution are designed to protect individual rights.[1] The fourth amendment protects a person against unreasonable searches and seizures.[2] The fifth amendment protects a person against compelled self-incrimination.[3] Both state and federal courts insure protection of the fourth and fifth amendment rights by enforcing exclusionary rules.[4] Exclusionary rules allow a court to suppress evidence that law enforcement officials obtain in violation of the defendant's constitutional rights.[5] The fourth[6] and

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[1] *See* L. TRIBE, *American Constitutional Law* 3-4 (1978) (Bill of Rights thought necessary in addition to separation and division of powers to preserve individual rights).

[2] U. S. CONST. amend. IV. The fourth amendment provides, in pertinent part:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ."

[3] U. S. CONST. amend. V. The fifth amendment provides, in pertinent part:

"No person shall . . . be compelled in any criminal case to be a witness against himself . . ."

[4] *See* Miranda v. Arizona, 384 U.S. 436, 476-77 (fifth amendment prohibits use of custodial statements made without informing defendant of his fifth amendment rights) *reh. denied* 385 U.S. 890 (1966); Mapp v. Ohio, 367 U.S. 643, 655 (fourth amendment prohibits use of evidence seized in violation of the fourth amendment) *reh. denied* 368 U.S. 871 (1961). *See generally* Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970) [hereinafter cited as Oaks].

[5] Oaks, *supra* note 4, at 665.

[6] *See* Mapp v. Ohio, 367 U.S. 643, 654-55 (1961). The principal objective of the fourth amendment exclusionary rule is to deter unlawful police conduct by removing the incentive to violate an individuals fourth amendment rights. *See* Maguire, *How to Unpoison the Fruit—The Fourth Amendment and the Exclusionary Rule*, 55 J. CRIM. L.C. & P.S. 307, 308 (1964); Oaks, *supra* note 4, at 668-72; Traynor, Mapp v. Ohio *At Large in the Fifty States*, 1962 DUKE L.J. 319, 334-35; Note, *The Fourth Amendment and Tainted Confessions Admissibility As a Policy Decision*, 13 HOUS. L. REV. 753, 754 (1976) [hereinafter cited as *Tainted Confessions*]. The fourth amendment exclusionary rule originated from dictum in Boyd v. United States, 116 U.S. 616, 635 (1886). Note, *Criminal Procedure—Fourth Amendment Exclusionary Rule*—Miranda *Warnings Do Not Per Se Render Admissible A Confession Following an Arrest Which Violates Fourth Amendment Rights*, 25 EMORY L.J. 227, 228 (1976) [hereinafter cited as Miranda *Warnings*]. In *Boyd*, the Supreme Court suggested for the first time that evidence obtained in violation of the fourth amendment should be inadmissible in a federal court. The suggestion lay dormant for thirty years before becoming law in the federal courts in Weeks v. United States, 232 U.S. 383, 398 (1914). The Court extended the right to be free from unreasonable search and seizure to state authorities in Wolf v. Colorado, 338 U.S. 25, 28 (1949). The *Wolf* Court, however, failed to impose the exclusionary rule as a means of enforcing the right to be free from unreasonable searches and seizures. *Id.* at 33. In 1961, the Court applied the fourth amendment exclusionary rule to the states, describing the rule as an "essential part" of the fourth amendment. Mapp v. Ohio, 367 U.S. 643, 655-56 (1961). *See generally* Miranda *Warnings*, *supra* (history of fourth amendment exclusionary rule); Oaks *supra* note 4, at 667-68 (same).

fifth[7] amendment exclusionary rules are based on distinct interests and policies. The fourth amendment exclusionary rule deters law enforcement officers from making unconstitutional searches and seizures by requiring the exclusion of evidence obtained in violation of the fourth amendment.[8] In contrast, the fifth amendment exclusionary rule deters police from intimidating a suspect into making an incriminating statement by requiring the police to inform the individual of his fifth amendment rights in order to make a statement admissible at trial.[9]

The United States Supreme Court has recognized two exceptions to the fourth and fifth amendment exclusionary rules.[10] Under the first exception, the independent source rule, evidence tainted by a constitutional violation is admissible if the prosecution can prove that the police also obtained the evidence from a source independent of the constitu-

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Although the *Mapp* Court held that the fourth amendment exclusionary rule was based on the Constitution, the Court may have since removed the rule's constitutional foundation. Without discussing *Mapp*, the Supreme Court later declared in United States v. Calandra, 414 U.S. 338, 348 (1974) that the rule is a judicially created remedy. *Accord* United States v. Peltier, 422 U.S. 531, 538-39 (1975). Justice Brennan wrote vigorous dissenting opinions in both *Calandra* and *Peltier*, in which he attacked the Court's "strangulation" of the exclusionary rule. Justice Brennan considered both opinions to be inconsistent with 61 years of fourth amendment jurisprudence. United States v. Peltier, 422 U.S. 531, 551 (1975) (Brennan, J., dissenting); United States v. Calandra, 414 U.S. 338, 360 (1975) (Brennan, J., dissenting).

[7] *See* Miranda v. Arizona, 384 U.S. 436, 476-78 (1966). *Miranda* warnings protect an individual against the compulsion to speak inherent in custodial surroundings. *Miranda* requires that prior to interrogation police must inform the person in custody that he has a right to remain silent and that anything he says may be used against him in court. *Id.* at 467-69. The police must also inform the person in custody that he has the right to consult with a lawyer and to have the lawyer with him during interrogation, and that, if he cannot afford a lawyer, one will be appointed to represent him. *Id.* at 469-73.

[8] *See* Mapp v. Ohio, 367 U.S. 643, 655 (1961). The fourth and the fifth amendment exclusionary rules apply to all evidence, both direct and indirect, that the police obtain as the result of a constitutional violation. *See* 3 W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 11.4 (1978 & Supp. 1980) [hereinafter cited as W. LAFAVE]. Direct evidence is evidence that the police obtain initially during the constitutional violation. *Id.* at 612. *See also* Pitler, *"The Fruit of the Poisonous Tree" Revisited and Shepardized*, 56 CAL. L. REV. 579, 579 (1968) [hereinafter cited as *Revisited*]. Indirect evidence is evidence which the police discover as a result of the evidence initially seized in violation of the constitution. W. LAFAVE, *supra* at § 11.4: *Revisited*, *supra* at 579. An example of indirect evidence that police obtain by violating the fourth amendment is a confession which follows an illegal arrest. The indirect evidence that police obtain as a result of a constitutional violation is often referred to as "fruit of the poisonous tree." *See* Nardone v. United States, 308 U.S. 338, 341 (1939). The fruit of the poisonouse tree doctrine, however, is not limited to cases in which there has been a violation of the fourth amendment. The doctrine also applies to lineups conducted in violation of the sixth amendment, United States v. Wade, 388 U.S. 218, 239-43 (1967), as well as to confessions obtained without *Miranda* warnings in violation of the fifth amendment. United States v. Cassell, 452 F.2d 533, 541 (7th Cir. 1971).

[9] *See* Miranda v. Arizona, 384 U.S. 436, 476-77 (1966); *see* note 7 *supra*.

[10] *See* Nardone v. United States, 308 U.S. 338, 341 (1939); Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920); Miranda *Warnings*, *supra* note 6, at 230-31.

tional violation.[11] The second exception, the attenuation doctrine, allows courts to admit constitutionally tainted evidence if the causal connection between the evidence and the constitutional violation is sufficiently remote, so that the taint, in effect, has dissipated.[12] Since there are distinct policies behind the fourth and fifth amendment exclusionary rules,[13] the attenuation determination is particularly difficult for courts to make when the evidence in issue is a confession made following a violation of the confessor's fourth amendment rights. The Supreme Court first addressed the claim that courts should exclude statements made by the defendant as fruits of a fourth amendment violation in *Wong Sun v. United States*.[14] Since *Wong Sun*, the Supreme Court has considered the admissibility of a confession that follows a fourth amendment violation in three cases, *Brown v. Illinois*,[15] *Dunaway v. New York*,[16] and *Rawlings v. Kentucky*.[17]

In *Wong Sun*, federal narcotics agents illegally arrested James Wah Toy without probable cause.[18] The agents broke down the door to Toy's laundry and pursued him down the hall, finally arresting Toy in a rear bedroom where his wife and child were sleeping.[19] Immediately after his arrest, Toy made statements to the agents that implicated him in the sale of narcotics.[20] Toy's statements also led the agents to Johnnie Yee,

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[11] The independent source exception is traceable to Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920). Miranda *Warnings*, *supra* note 6, at 231 n.18. The Court in *Silverthorne Lumber* held that a fact is not "sacred and inaccessible" even if the police have uncovered the fact in violation of the fourth amendment, provided that the prosecution also gains knowledge of the fact from an independent source. 251 U.S. at 392. A good example of an application of the independent source test is the Supreme Court's holding in United States v. Crews, 100 S. Ct. 1244 (1980). In *Crews*, the police unlawfully took a robbery suspect into custody. *Id.* at 1247. The police questioned and photographed the suspect and later released him. *Id.* A robbery victim identified the suspect's photograph as that of her assailant. *Id.* at 1247-48. The police again took the suspect into custody and the victim identified him at a lineup. *Id.* The victim repeated her identification in court. *Id.* The courtroom identification contributed to the defendants conviction for armed robbery. *See id.* The Supreme Court ruled that the courtroom identification of the defendant should not be suppressed as the fruit of his illegal arrest because the police's knowledge of the defendant's identity and the victim's independent recollection of the defendant antedated the unlawful arrest and were therefore untainted by the constitutional violation. *Id.* at 1250-51.

[12] The attenuation doctrine originated in Nardone v. United States, 308 U.S. 338 (1939). Miranda *Warnings*, *supra* note 6, at 231 n.19. The *Nardone* Court pointed out, in dictum, that although a defendant may always be able to demonstrate that the evidence which the prosecution used against him is somehow related to a constitutional violation, at some point the connection becomes so weak that the taint has, in effect, dissipated. 308 U.S. at 341.

[13] *See* notes 6 and 7 *supra*.

[14] 371 U.S. 471 (1963); *see* text accompanying notes 18-33 *infra*.

[15] 422 U.S. 590 (1975); *see* text accompanying notes 34-51 *infra*.

[16] 442 U.S. 200 (1979); *see* text accompanying notes 52-61 *infra*.

[17] 100 S. Ct. 2556 (1980); *see* text accompanying notes 62-82 *infra*.

[18] 371 U.S. at 479.

[19] *Id.* at 474.

[20] *Id.*

from whom the agents seized an ounce of heroin.[21] Yee claimed that he had purchased the heroin from Toy and another man known to Yee only as "Sea Dog."[22] Toy identified "Sea Dog" as Wong Sun and directed the agents to a dwelling where the agents arrested Wong Sun.[23] Several days after his arrest, Wong Sun voluntarily returned to the station for questioning at which time he gave the agents a written confession.[24] At trial, the prosecution relied heavily on Toy's oral statements and Wong Sun's written confession.[25] The federal district court convicted Toy, Yee, and Wong Sun of violating federal narcotics laws.[26]

On certiorari, the United States Supreme Court held that the arrests of both Wong Sun and Toy violated the fourth amendment because the officers made the arrests without probable cause.[27] The Supreme Court focused on voluntariness in determining whether the lower court had improperly admitted Toy's and Wong Sun's statements.[28] The Court held that the lower court erred by admitting Toy's statement because Toy's response was not a sufficiently voluntary act to purge the taint of the fourth amendment violation.[29] The Court held, however, that the admission of Wong Sun's confession was proper.[30] The Court reasoned that

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[21] *Id.* at 474-75.

[22] *Id.* at 475.

[23] *Id.*

[24] *Id.* at 477.

[25] *Id.* at 467-77.

[26] *Id.* at 470-71. The *Wong Sun* defendants were convicted under 21 U.S.C. § 174 (repealed 3 U.S.C. § 1101(a)(2), (4) (1970)) which prohibited knowingly importing any narcotic drug into the United States or receiving, concealing, buying, selling or in any manner facilitating the transportation, concealment, or sale of any such narcotic drug. Under § 174, proof of possession was sufficient to convict a defendant unless the defendant could satisfactorily explain the possession. *Id.* In *Wong Sun*, the Court of Appeals noted that a warrantless arrest was improper unless the arresting officer had "probable cause" within the meaning of the fourth amendment. 288 F.2d 366, 370 (9th Cir. 1961). Police arrested both Toy and Wong Sun without probable cause. *Id.* A tip from an informant led officers to Toy's laundry. *Id.* There was no evidence that the informant was reliable or had ever supplied reliable information. *Id.*

Police arrested Wong Sun because of Johnnie Yee's statement that he had obtained narcotics from Wong Sun and Toy. *Id.* The prosecution made no showing that Johnnie Yee was a reliable informer. *Id.* Although a tip from a reliable informant may constitute probable cause for arrest, Draper v. United States, 358 U.S. 307, 313 (1958), the reliability of the tip must be determined on the facts of each case, *see* Carrol v. United States, 267 U.S. 132, 162 (1925) (tip acceptable in light of the facts and circumstances within the officers knowledge). Nevertheless, the Court of Appeals held that the trial court had properly admitted Toy's statement and Wong Sun's confession into evidence. 288 F.2d at 371.

[27] 371 U.S. at 479, 491.

[28] *Id.* at 486, 491.

[29] *Id.* Toy made his statements after several officers broke down the door and followed Toy into a bedroom where his wife and child were sleeping. *Id.* at 474.

[30] *Id.* at 491. Although the decision in *Wong Sun* predated the decision in Miranda v. Arizona, 385 U.S. 436 (1966), the agent in *Wong Sun* did inform the defendant of his right to withhold information and of his right to the advice of counsel before Wong Sun made his statement. 371 U.S. at 476.

Wong Sun had confessed only after he had voluntarily returned for questioning.[31] The Court concluded, therefore, that Wong Sun's confession was within the attenuation exception to the fourth amendment exclusionary rule.[32] Although the *Wong Sun* Court focused on voluntariness as a determining factor in the attenuation analysis, the Court failed to set forth adequate criteria for determining when a statement must be excluded to protect the individual's fourth amendment rights.[33]

In *Brown v. Illinois*, the Supreme Court again addressed the issue of the admissibility of a confession that follows a fourth amendment violation.[34] In *Brown*, detectives acting without probable cause arrested the defendant for murder.[35] The officers took Brown to the police station, administered *Miranda* warnings, and questioned Brown about the murder.[36] After about two hours of questioning, Brown implicated himself in the crime.[37] Later the same evening, a state attorney repeated the *Miranda* warnings and questioned Brown a second time.[38] At trial, the prosecution relied on Brown's responses to both the police and the state attorney and the jury found Brown guilty of murder.[39] On appeal, the Illinois Supreme Court held that the *Miranda* warnings had broken the causal connection between Brown's illegal arrest and his subsequent statements, and affirmed Brown's conviction.[40]

On certiorari, the United States Supreme Court held that *Miranda* warnings alone would not always break the causal connection between the fourth amendment violation and a defendant's subsequent statements.[41] The *Brown* Court noted that the deterrent effect of the fourth

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[31] 371 U.S. at 491.

[32] *Id. See* note 12 *supra* (discussing attenuation exception).

[33] *See* Note, *Admissibility of Confessions Made Subsequent to an Illegal Arrest:* Wong Sun v. United States *Revisited*, 61 J. CRIM. L. 207, 209 (1970). Since the facts of *Wong Sun* provide two extreme examples of the attenuation problem, the decision provides little guidance in making the attenuation determination. Toy's statement under the circumstances was clearly not voluntary. *See* note 29 *supra*. Wong Sun's confession, coming several days after arrest upon his return to the station was clearly voluntary. *See* 371 U.S. at 491 and text accompanying note 31 *supra*.

[34] 422 U.S. 590 (1975).

[35] *Id.* at 592. In *Brown*, the brother of the murder victim gave the police Brown's name as an acquaintance of the victim, not as a suspect. Subsequently, police broke into and searched Brown's apartment without a warrant. After searching the apartment the police waited for Brown to come home. When Brown arrived he was met inside the apartment by an officer with a drawn gun. The officer informed Brown that he was under arrest. The arresting officers testified that they arrested Brown for questioning as part of a police investigation into a murder. *Id.*

[36] *Id.* at 593-94.

[37] *Id.* at 594-95.

[38] *Id.* at 595.

[39] *Id.* at 596. One of the detectives testified as to the contents of Brown's first statement, but the prosecution did not place the writing itself into evidence. *Id.* The prosecution introduced and read the second statement to the jury in full. *Id.*

[40] Illinois v. Brown, 56 Ill.2d 312, 317, 307 N.E.2d 356, 358 (1974).

[41] 422 U.S. at 603.

amendment exclusionary rule would be substantially diluted if *Miranda* warnings were held sufficient to purge the taint of a fourth amendment violation.[42] *Miranda* warnings do not inform a person of his fourth amendment rights, particularly the right to be released from unlawful custody following an illegal arrest.[43] The Court further observed that allowing *Miranda* warnings to purge the taint of fourth amendment violations would encourage police officers to violate fourth amendment rights, and then use *Miranda* warnings to cure the taint of the fourth amendment violation.[44]

Brown held that courts should decide whether a statement following a fourth amendment violation is admissible on a case by case basis.[45] The Court noted that *Miranda* warnings and voluntariness are the threshold requirements in determining admissibility.[46] Beyond these threshold requirements, the Court identified as relevant factors the temporal proximity of the arrest and confession,[47] the presence of intervening cir-

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[42] *Id.* at 602.

[43] *Id.* at 601 n.6.

[44] *Id.* at 602.

[45] *Id.* at 603.

[46] *Id.*; *see* note 7 *supra* (discussion of *Miranda* warnings). If the police fail to give *Miranda* warnings, the court may suppress the statement solely on fifth amendment grounds without conducting the *Wong Sun* attenuation analysis. 422 U.S. at 606, n.1 (Powell, J., concurring in part).

[47] 422 U.S. at 603. In enunciating the factors that are relevant in the attenuation analysis, the *Brown* court relied on a number of lower court decisions. *Id.* at 603-04 n.n.8,9, & 10. The first factor is the temporal proximity of the arrest and confession. The cases that the Supreme Court relied on indicate that the temporal factor alone does not establish attenuation. In Hale v. Henderson, police illegally arrested the defendant and questioned him intermittently for 42 hours until he confessed to a murder. 485 F.2d 266, 267-68 (6th Cir. 1973), *cert. denied*, 415 U.S. 930 (1974). The Sixth Circuit reversed his conviction because there was no break in custody between the illegal arrest and the confession, and also because the confession followed the arrest by only 42 hours. 485 F.2d at 268, 269.

The Fifth Circuit addressed the issue of temporal proximity in United States v. Owen, 492 F.2d 1100, 1106-07 (5th Cir. 1974), *cert. denied*, 419 U.S. 965 (1974). Owen was under investigation for mail fraud when the police stopped him and illegally searched his car. The police found a revolver and charged Owen with possession of a gun by a convicted felon. While the police detained Owen on the possession charge, a postal inspector told Owen that Owen was a suspect in the mail fraud investigation. After being released from detention, Owen returned to the inspector's office to discuss the mail fraud charge. The Fifth Circuit held that the prior arrest had not tainted Owen's later statement. *Id.* at 1106. *Owen* is distinguishable from *Hale* because in *Owen*, unlike *Hale*, the police released the defendant from custody and the defendant made the statement only after he had voluntarily returned for questioning.

The Third Circuit has also held that a significant time lapse together with intervening circumstances may purge the taint of an illegal arrest. Pennsylvania *ex rel.* Craig v. Maroney, 348 F.2d 22, 29 (3d Cir.) *reh. denied* 352 F.2d 30 (1965), *cert. denied* 384 U.S. 1019 (1966). In *Maroney*, police illegally arrested the defendant and held him in connection with a murder. *Id.* at 28-29. The defendant confessed, but only after police informed him of his rights, permitted him to meet with counsel, and took him before an alderman. *Id.* at 29-30. The Court held that the confession was admissible on the basis that five days had elapsed between the arrest and confession, no confession was given prior to appearing before the alderman, and the defendant had met with his attorney. *Id.* at 30-31.

cumstances[48] and, particularly, the purpose and flagrancy of the official misconduct.[49] Applying these factors in *Brown*, the Supreme Court noted that Brown's statement was separated from his illegal arrest by less than two hours, there was no intervening event of significance, and the police officers purposefully had violated the defendant's fourth amendment rights.[50] The Court held, therefore, that the lower court erred by admitting Brown's statements into evidence.[51]

In *Dunaway v. New York*, the Supreme Court again focused on the issue of whether a fourth amendment violation excessively tainted a subsequent confession.[52] The facts in *Dunaway* were almost identical to those in *Brown*.[53] Acting without probable cause, police arrested

[48] 422 U.S. at 603, 604. The *Brown* Court's reference to Johnson v. Louisiana, 406 U.S. 356 (1972), suggests that immediate presentation of the defendant before a magistrate is a sufficient intervening circumstance to attenuate a subsequent confession from a fourth amendment violation. In *Johnson*, police took the defendant before a magistrate after his illegal arrest. A robbery victim identified Johnson in a lineup. Johnson contended that the lineup identification was the fruit of his illegal arrest. *Id.* at 365. The Supreme Court held that the identification was admissible because the police had conducted the lineup under the authority of the magistrates commitment and not through exploitation of the illegal arrest. *Id.*

[49] 422 U.S. at 604. The *Brown* Court relied on United States *ex rel.* Gockley v. Myers, 450 F.2d 232 (3d Cir. 1971) *cert. denied* 404 U.S. 1063 (1972). In *Gockley*, police used an invalid warrant to arrest the defendant for check forgery and detained him for several days. 450 F.2d at 234-35. The police actually arrested Gockley because of his suspected involvement in the disappearance of two persons. While Gockley was illegally detained, police interrogated him and obtained statements that the prosecution relied on to secure his conviction for murder. *Id.* at 233-35. The Third Circuit Court of Appeals excluded the confession in order to protect Gockley's fourth amendment rights, holding that purposeful misconduct by the police required the court to exclude the statements even if Gockley's statement was voluntary. *Id.* at 237.

In United States v. Edmons, the F.B.I. had arrested four suspects on a federal charge of failure to have their selective service cards in their possession. 432 F.2d 577 (2d Cir. 1970). The real purpose of the arrest, however, was to enable F.B.I. agents to identify the suspects as participants in an earlier assault. The defendants subsequently were convicted of assault on the basis of an in court identification. The Second Circuit held that the identification was inadmissible because the Government had exploited the illegal arrests. *Id.* at 584.

The *Brown* Court also noted United States v. Kilgen, 445 F.2d 287 (5th Cir. 1971) as a case where police misconduct apparently was not purposeful. 422 U.S. at 604 n.9. In *Kilgen*, police arrested the suspects for vagrancy and discovered a large number of postage stamps in the trunk of one defendant's car. At the police station, after *Miranda* warnings, one of the defendants confessed to theft of the stamps. 445 F.2d at 289. The defendant who confessed later challenged his conviction as unconstitutional because the Supreme Court had subsequently held that the vagrancy statute was unconstitutional. The defendant claimed that the unconstitutional vagrancy statute made his prior arrest and detention illegal. *Id.* The *Kilgen* Court held that the defendants' arrest and detention were not automatically invalidated absent some showing that the police lacked a good faith belief in the statutes validity. *Id.*

[50] 422 U.S. at 604-05.

[51] *Id.* at 605.

[52] 442 U.S. 200 (1979).

[53] *Id.* at 218; *see* note 54 *infra* and text accompanying notes 35-39 *supra* (facts in *Brown*).

Dunaway for murder.[54] After *Miranda* warnings, Dunaway made incriminating statements and drew sketches implicating himself in the crime.[55] The trial court denied Dunaway's motion to suppress the sketches and statements and subsequently convicted him of attempted robbery and felony murder.[56] The New York Appellate division affirmed Dunaway's conviction.[57]

The United States Supreme Court reversed, holding that under *Brown*, the state had failed to show that the statements and sketches were not tainted by the fourth amendment violation.[58] The *Dunaway* Court reiterated the distinction that the *Brown* Court had made between "voluntariness" for purposes of the fifth amendment and "voluntariness" under the fourth amendment.[59] A statement may be sufficiently voluntary to escape classification as compelled self incrimination under the fifth amendment and yet not be sufficiently voluntary to break the causal connection between a fourth amendment violation and a subsequent statement.[60] The Court in *Dunaway* reasoned that to allow the defendant's confession into evidence under the circumstances of his arrest would permit law enforcement officers to violate the fourth amendment with impunity.[61]

The most recent Supreme Court decision involving the admissibility of statements tainted by a prior fourth amendment violation is *Rawlings v. Kentucky*.[62] In *Rawlings*, the defendant was present at the house of a

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[54] 442 U.S. at 203. In *Dunaway*, an informant told a detective that James Cole had implicated himself and a man named "Irving" in a killing. The informant did not know "Irving's" last name, but he identified a picture of Dunaway from a police file. Although Cole later denied being involved in the crime, he did state that he had learned of the killing from Hubert Adams. Cole claimed that Adams had suggested that Adams' younger brother and a man named "Irving" committed the crime. *Id.* at 203, n.1.

[55] *Id.* at 203.

[56] *Id.*

[57] 61 A.D.2d 299, 402 N.Y.S.2d 490 (1978), *reversed*, 442 U.S. 200 (1979). On appeal, both the Appellate Division and the Court of Appeals initially affirmed the conviction without opinion. 42 A.D.2d 689, 346 N.Y.S.2d 779 (1973), *aff'd* 35 N.Y.2d 741, 320 N.E.2d 646 (1974). The United States Supreme Court granted certiorari, vacated the judgment, and remanded the case for further consideration in light of the Supreme Court's supervening decision in Brown v. Illinois. Dunaway v. New York, 422 U.S. 1053 (1975); *see* Brown v. Illinois, 422 U.S. 590 (1974). The Monroe County Court received the case on remand from the New York Court of Appeals to make further factual findings. People v. Dunaway, 38 N.Y.2d 812, 813-14, 345 N.E.2d 583, 584, 382 N.Y.S.2d 40 (1975). The County Court determined that the trial court should have granted Dunaway's motion to suppress the challenged evidence. A divided Appellate Division reversed, holding that the police had not detained Dunaway illegally. 61 A.D.2d 299, 302, 402 N.Y.S.2d 490, 492 (1978). The Court of Appeals dismissed Dunaway's application for leave to appeal. The United States Supreme Court again granted certiorari to clarify the fourth amendment's requirements for custodial interrogation and to review the New York court's application of *Brown* 439 U.S. 979 (1978).

[58] *Id.* at 218-19.

[59] *Id.* at 217; *see* text accompanying notes 41-44 *supra*.

[60] 442 U.S. at 217, 219.

[61] *Id.* at 219.

[62] 100 S. Ct. 2556 (1980).

man named Marquess when police officers arrived with a warrant for Marquess' arrest.[63] Upon entering the house, the officers smelled marijuana smoke and saw marijuana seeds.[64] Two of the officers left to obtain a search warrant for the premises.[65] The remaining officers detained Rawlings and the four other occupants of the house, conditioning their release on consent to a body search.[66] Approximately 45 minutes later, the officers returned to the house, read the search warrant to the occupants, and gave the occupants *Miranda* warnings.[67] The officers ordered one of the occupants to empty her purse.[68] The purse contained illegal drugs.[69] The owner of the purse told Rawlings to take what was his and Rawlings immediately claimed ownership of the substances.[70] An officer then searched Rawlings, found $4,500 and a knife, and formally arrested him.[71]

The trial court denied Rawlings' motion to suppress the drugs and the money and to exclude the statement that he had made when the police discovered the drugs.[72] Rawlings was found guilty of possession with intent to sell LSD and of possession of other controlled substances.[73] On appeal, the Supreme Court of Kentucky affirmed Rawlings' conviction.[74]

On certiorari to the United States Supreme Court, Rawlings claimed that his statement should have been excluded in light of the *Brown* decision.[75] The Supreme Court agreed that *Brown* was the controlling case.[76]

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[63] *Id.* at 2559.

[64] *Id.*

[65] *Id.*

[66] *Id.* In *Rawlings*, two of the occupants consented to a body search and the police allowed them to leave. *Id.* Rawlings and two other occupants remained in the house. *Id.*

[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] *Id.* at 2560. In *Rawlings*, the trial court held that the search warrant for the house authorized the police to search Cox's purse. *Id.* The trial court reasoned that even if the search of the purse was illegal, Rawlings lacked standing to object to the search. *Id.*

The Kentucky Court of Appeals affirmed on different grounds. *See id.* The appellate court held that Rawlings had standing to contest the search of the purse. *Id.* The court held, however, that the detention of the occupants and the subsequent searches were legal because the marijuana smoke and seeds constituted probable cause to arrest all five occupants. *Id.*

The Supreme Court of Kentucky affirmed, but again on a different basis. According to the Kentucky Supreme Court, Rawlings lacked standing to protest the search. Rawlings v. Commonwealth, 581 S.W.2d 348, 349 (Ky. 1979), *aff'd* 100 S. Ct. 2556 (1980). The court justified the search of Rawlings' pockets as incident to a lawful arrest which was based on probable cause. *Id.*

[73] *See* 100 S. Ct. at 2560.

[74] Rawlings v. Commonwealth, 581 S.W.2d 348, 350 (Ky. 1979).

[75] 100 S. Ct. at 2562.

[76] *Id.*

In applying the *Brown* factors, the Court noted that Rawlings had received *Miranda* warnings immediately prior to making the challenged statement and that Rawlings had never argued that his admission to ownership of the drugs was not voluntary.[77] The majority reasoned that Rawlings' spontaneous reaction to the discovery of the drugs indicated that the statement was an act of free will unaffected by the unlawful detention.[78] Considering the short 45 minute time lapse between the arrest and the confession, the majority concluded that in the "congenial atmosphere" existing during the detention, the 45 minute span was sufficient to purge the taint.[79] The Court did not recognize a significant intervening event between the unlawful detention and the challenged statement. Examining the conduct of the police, the Court reasoned that although the conduct may have been improper, the police actions were not purposeful or flagrant misconduct requiring the exclusion of Rawlings' statement.[80] The Court concluded, therefore, that Rawlings' statement was admissible.[81]

Prior to *Rawlings*, lower courts had interpreted *Brown* as establishing an inflexible rule for determining whether the prosecution had purged the taint of a prior fourth amendment violation.[82] Under the inflexible rule, unless the prosecution satisfied all the *Brown* factors, the prosecution would be unable to use any statement made after a fourth amendment violation, even if the officer had committed the violation in good faith. Where the statement was essential to the prosecution of the crime, the inflexible rule would shield defendants whose fourth amendment rights had been violated. Although immunity from prosecution for a defendant whose fourth amendment rights have been violated satisfied the deterrence rationale of the exclusionary rule,[83] the inflexible rule failed to provide for society's countervailing interests in convicting the guilty criminal.[84]

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[77] *Id.* at 2562, 2564.

[78] *Id.* at 2563. The dissent in *Rawlings* disagreed with the majority's conclusion that Rawlings' admission was "spontaneous." *Id.* at 2569. (Marshall, J., dissenting). The dissent noted that the defendant made his admission in response to Cox's demand that defendant "take what was his." *Id.* Cox's statement was the direct product of the illegal search of her purse. The illegal detention made the search of the purse possible. The dissent concluded that Rawlings' statements were inadmissible as the fruit of the poisonous tree. *Id.*

[79] 100 S. Ct. at 2563.

[80] *Id.* at 2564.

[81] *Id.*

[82] *See* United States v. Perez Esparza, 609 F.2d 1284, 1289 (9th Cir. 1979); United States *ex rel.* Burbank v. Warden, 404 F. Supp. 656, 662 (N.D. Ill. 1975) *rev'd* 535 F.2d 361 (7th Cir. 1976), *cert. denied* 429 U.S. 1045, *reh. denied* 430 U.S. 911 (1977); People v. Martin, 94 Mich. App. 649, 653-59, 290 N.W.2d 48, 51 (1980).

[83] *See* Bender, *The Retroactive Effect of an Overruling Constitutional Decision:* Mapp v. Ohio, 100 U. PA. L. REV. 650, 661 (1962); Comment, *Fruit of the Poisonous Tree—A Plea For Relevant Criteria*, 115 U. PA. L. REV. 1136, 1136-37 (1967).

[84] *See Tainted Confessions, supra* note 6, at 754-55 (discussing societal interest involved in applying the fourth amendment exclusionary rule).

The Supreme Court's decision in *Rawlings* demonstrates that courts should not apply the *Brown* factors as an inflexible rule in situations where official misconduct is neither purposeful nor flagrant.[85] The Court apparently has adopted a flexible application of the *Brown* factors for determining admissibility where a statement results from an officer's commission of a good faith, non-flagrant violation of an individual's fourth amendment rights.[86] The *Rawlings* Court, however, leaves a number of issues unresolved in the fruit of the poisonous tree analysis. Foremost among these issues are the definitions of "purposeful and flagrant" misconduct[87] and "voluntary" statement.[88] Moreover, since the *Rawlings* Court held that voluntariness alone made a statement admissible, another unresolved question is whether time lapse[89] and the presence of intervening events[90] remain relevant factors in the attenuation analysis.

In *Brown* and *Dunaway*, the Supreme Court held that where an arrest is made and the arresting officers know that they do not have probable cause, a wrongful purpose is established.[91] In contrast, *Rawlings* indicates that there is no wrongful purpose where officers mistakingly believe that their actions are within the scope of a search warrant.[92]

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[85] 100 S. Ct. 2556 (1980).

[86] *Id.* at 2562-64.

[87] *See* text accompanying notes 92-103 *infra.*

[88] *See* text accompanying notes 104-112 *infra.*

[89] *See* text accompanying notes 113-118 *infra.*

[90] *See* text accompanying notes 119-128 *infra.*

[91] Dunaway v. New York, 442 U.S. 200, 218 (1979); Brown v. Illinois, 422 U.S. 590, 605 (1975). The most controversial factor is the purpose and flagrancy of official misconduct. Justice Stevens considered flagrancy to be a relevant factor only insofar as the flagrant conduct motivated the defendant in making a statement. Dunaway v. New York, 442 U.S. 200, 220 (1979) (Stevens, J., concurring). Justice Stevens observed that regardless of the state of mind of the officer, a fourth amendment violation can induce a statement, and admissibility should rest on the causal consideration. *Id.* Justice Rehnquist, however, contended that given the deterrent purposes of the exclusionary rule the purpose and flagrancy of police conduct was the most important factor in the attenuation analysis. 442 U.S. at 226. (Rehnquist, J., dissenting). Justice Rehnquist would require only that police give proper *Miranda* warnings and that the statement satisfy fifth amendment voluntariness requirements so long as police have acted in good faith in a non-flagrant manner. *Id.*

These conflicting viewpoints on the significance of purpose and flagrancy are based on different conceptions of the deterrent effect of the fourth amendment exclusionary rule. According to Justice Rehnquist, exclusion of a resulting statement where an officer has committed a violation of fourth amendment rights in good faith serves no useful purpose. *Id.* at 226. Under Justice Rehnquist's view, exclusion is applied as a substitute for punishment of an offending officer, and therefore exclusion is only proper where the officer has acted in bad faith. *See id.* at 221. Justice Stevens contended, however, that exclusion is not designed to deter the aberrant individual officer. *Id.* at 220 (Stevens, J., concurring). According to Justice Stevens courts exclude illegally obtained evidence in order to motivate the law enforcement profession as a whole to adopt and enforce regular procedures that will avoid the future invasion of the citizen's constitutional rights. *Id.* at 221. If deterrence is aimed at law enforcement personnel in general, the state of mind of the individual officer has no place in the attenuation analysis. *Id.*

Therefore, it appears that the Supreme Court has based their purpose inquiry on a subjective analysis of the arresting officers' state of mind.

A purely subjective purpose analysis has the disadvantage of failing to establish a minimum knowledge requirement to which courts can hold an arresting officer. A better approach to the purpose analysis is a combined subjective and objective test. A combined subjective and objective test generates the question whether the arresting officer knew or should have known that his conduct violated the individual's fourth amendment rights.[93] Under a combined test, the court could establish a reasonable minimum level of knowledge concerning an individual's constitutional rights to which courts could hold the arresting officer. Either an intentional or a negligent violation of the minimum knowledge requirement, therefore, would create purposeful misconduct. Additionally, a combined test would permit courts to establish a different minimum knowledge requirement for different members of the police force. For example, courts could hold detectives to a higher standard of knowledge than the standard for the officer on the street. Another advantage of a combined subjective and objective test would be that although an officer might claim an error was made in good faith, if the same officer or an officer in his department repeated the violation, the court could hold the officer responsible for knowledge of the rights involved.[94]

A combined subjective and objective test would also be consistent with the Supreme Court's prior fruit of the poisonous tree decisions. In *Brown* and *Dunaway*, the officers knew that they lacked probable cause when they made their arrests.[95] In contrast, the officers' conduct in *Rawlings* was not clearly unconstitutional and they made the error in good faith.[96] In *Rawlings* a conclusion that the officers knew or should

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[92] *See* 100 S. Ct. 2556.

[93] 422 U.S. at 606. (White, J., concurring). The "knew or should have known" formulation of the standard for judging the arresting officer's state of mind is based on Justice White's conception of the rule in Brown v. Illinois. *Id.* Justice White indicated in *Brown* that the fourth and fourteenth amendments require the Court to exclude statements obtained as fruits of an arrest that the arresting officer knew or should have known he had no probable cause to make. *Id.*

[94] The Court's decision in *Rawlings* demonstrates the potential application of a combined subjective and objective test. *See* text accompanying notes 96-97 *infra*. While the officers in *Rawlings* may have committed their fourth amendment violations in good faith, if the officers are in a similar situation and again violate a defendant's rights, the claim of good faith will be unavailable to them. The Court would be doing nothing more than requiring an officer to learn from his own, or his fellow officers, mistakes.

[95] 442 U.S. at 218; 422 U.S. at 605.

[96] *See* 100 S. Ct. at 2564. The *Rawlings* majority reasoned that the propriety of detaining a person at the scene of suspected drug activity was an open constitutional question. The Court also implied that, based on their holding in Ybarra v. Illinois, 444 U.S. 85 (1979), the *Rawlings* officers belief about the scope of their search warrant was improper. 100 S. Ct. at 2564. *Ybarra* held that a person's presence near others independently suspected of criminal activity does not, without more, create probable cause to search that person. 444 U.S. at 91. Application of the *Ybarra* holding to the facts in *Rawlings* suggests that prob-

have known that their conduct violated Rawlings' fourth amendment rights would have been unreasonable.[97]

The Court's analysis of purpose and flagrancy overlap. One type of flagrancy the Court recognizes is when an officer knowingly violates an individual's fourth amendment rights.[98] The Court's flagrancy analysis would be clearer if the Court included this knowledge based flagrancy under the purpose determination.

The second type of flagrant conduct is conduct that is unnecessarily intrusive on individual privacy.[99] A flagrancy inquiry based on intrusiveness allows a court to decide whether to exclude conduct that is not purposeful yet highly intrusive on individual privacy. The Supreme Court's decision in *Wong Sun* provides an example of this intrusive type of flagrancy analysis.[100] In *Wong Sun*, the Court excluded statements when agents improperly believed that they had probable cause for arrest when they broke down the door to Toy's laundry and pursued him into a bedroom where his wife and child were sleeping.[101]

A flagrancy inquiry that focuses on the intrusive physical circumstances surrounding the fourth amendment violation is inadequate because courts have no standard to determine how outrageous police conduct must be in order to be "flagrant." A flagrancy inquiry based on the physical circumstances of the arrest creates a completely open ended standard. In other contexts, the Supreme Court has described tests based on flagrancy as ad hoc approaches allowing five Justices sufficiently revolted by police action to overturn a conviction and let a guilty man go free.[102] Moreover, in *Mapp v. Ohio*, the Supreme Court rejected a flagrancy test as inadequate to protect fourth amendment rights.[103] Although a flagrancy test alone may not adequately protect fourth amendment rights, excluding evidence obtained in a "flagrant" manner does supplement the fourth amendment protection which the purposeful test provides.

In discussing the relevant factors in the attenuation analysis, the *Brown* Court referred to voluntariness as a threshold requirement.[104]

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able cause to search an individual within a dwelling must be established independently of probable cause to search the dwelling itself. The Court decided *Ybarra* after the occurrence of the events in *Rawlings*.

[97] The Court's conclusion in *Rawlings*, that the police misconduct was not purposeful, is supported by the Court's analysis of purpose in *Brown*. *See* note 49 *supra*.

[98] *See* 422 U.S. at 610, 611 (Powell, J., concurring in part).

[99] *Id.*

[100] *See* 371 U.S. 471, 474 (1962); *accord* Brown v. Illinois, 422 U.S. 590, 592-93; note 35 *supra*.

[101] *See* text accompanying notes 27-29 *supra*.

[102] *See* Irvine v. California, 347 U.S. 128, 138 (1954) (Clark, J., concurring).

[103] 367 U.S. 643, 661-66 (1961). In *Mapp*, Justice Black noted that the majority rejected the confusing "shock the conscience" standard as a basis for making the exclusion decision. *Id.* at 666. (Black, J., concurring).

[104] 422 U.S. at 604.

The *Brown* Court, however, failed to elaborate on precisely what voluntariness entailed. Prior to *Rawlings*, the Court described voluntariness in fruit of the poisonous tree cases as an act of free will sufficient to purge the taint of the fourth amendment violation.[105] In *Brown* and *Dunaway*, the Court held that the degree of voluntariness needed to purge the taint of a fourth amendment violation is higher than the degree of voluntariness needed to satisfy the fifth amendment prohibition against self-incrimination.[106] *Brown* and *Dunaway*, however, involved purposeful and flagrant police misconduct.[107]

In contrast to *Brown* and *Dunaway*, the *Rawlings* Court concluded that in a "congenial atmosphere," where police misconduct was neither purposeful nor flagrant, a spontaneous statement made after *Miranda* warnings was sufficiently voluntary to purge the taint of the fourth amendment violation.[108] Apparently, the *Rawlings* Court concluded that fifth amendment voluntariness is sufficient to purge the taint of a non-purposeful or non-flagrant fourth amendment violation. Therefore, these attenuation cases indicate that the Court has created a variable voluntariness standard which changes in direct correlation with the nature of the fourth amendment violation.

In light of the *Rawlings* Court's reliance on voluntariness,[109] the *Brown* Court's characterization of voluntariness as merely a threshold question[110] is apparently incorrect. *Rawlings* indicates that voluntariness is the ultimate issue in the attenuation analysis. Once a court determines the applicable standard of voluntariness by examining the nature of the fourth amendment violation, the dispositive question is whether the defendant gave the statement in a sufficiently voluntary fashion to satisfy the applicable voluntariness standard. Therefore, the other relevant factors identified in *Brown*, such as time lapse and the presence of intervening events,[111] are important only insofar as they provide evidence that the defendant made the statement voluntarily following the fourth amendment violation.[112]

In both *Brown* and *Dunaway* the Court identified time lapse as one of the relevant factors courts should consider in making an attenuation determination.[113] In *Wong Sun* the Court relied on the time element to

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[105] Wong Sun v. United States, 371 U.S. at 486; *see* text accompanying notes 29-33 *supra*.

[106] 442 U.S. at 217-19; 422 U.S. at 603; *see* text accompanying notes 41-44, 58-61 *supra*.

[107] *See* 442 U.S. at 218; 422 U.S. at 605.

[108] 100 S. Ct. at 2563; *see* text accompanying notes 75-82 *supra*.

[109] *See* text accompanying notes 77-80 *supra*.

[110] *See* text accompanying note 46 *supra*.

[111] *See* text accompanying notes 47-48 *supra*.

[112] *See* text accompanying notes 108-11 *infra*. (*Rawlings* treatment of *Brown* factors).

[113] 442 U.S. at 218; 422 U.S. at 604. The cases relied on by the *Brown* Court, in identifying time lapse as a relevant factor, suggest that time lapse alone is insufficient to purge the taint of a fourth amendment violation. 422 U.S. at 609; *see* note 47 *supra*.

hold that Wong Sun's statement was voluntary.[114] The Court in *Wong Sun*, however, did not find Wong Sun's statement sufficiently voluntary solely because the statement occurred three days after Wong Sun's illegal arrest.[115] Instead, the Court held that the statement was voluntary because during that three day period the police had released Wong Sun from custody and he had later returned of his own accord to the police station for questioning.[116]

The relationship of time lapse to voluntariness is apparently based on the premise that the longer the time lapse, the higher the probability that the defendant has made the statement voluntarily. As Justice Stevens pointed out in his concurring opinion in *Dunaway*, however, a long detention may represent a more serious exploitation of an illegal arrest than a short detention.[117] Conversely, even a confession made immediately after arrest may have been motivated by a pre-arrest event and not by the illegal arrest.[118] Although a long time lapse may, in some cases, indicate voluntariness, or a short time lapse may suggest compulsion, neither conclusion is necessarily probable nor likely. Due to its nebulous nature, the time lapse factor is unacceptable as a required element in the attenuation analysis.

The presence of a significant intervening event is another relevant factor the Court identified in *Brown* and *Dunaway*.[119] *Wong Sun* provides an example of the relationship between an intervening event and the voluntariness standard. After his illegal arrest, but prior to the challenged statement, the agents released Wong Sun from custody.[120] Wong Sun, acting of his own free will, returned to the police station several days later to make the challenged statement.[121] Wong Sun's release from illegal detention broke the causal connection between the fourth amend-

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[114] 371 U.S. at 491.

[115] *See id.*; text accompanying note 31 *supra*.

[116] 371 U.S. at 491.

[117] 442 U.S. at 220 (Stevens, J., concurring).

[118] *Id.*

[119] 442 U.S. at 218; 422 U.S. at 604; *See* note 48 *supra*. The *Brown* Court relied solely on *Johnson v. Louisiana* as an example of an intervening event. *See* note 48 *supra*. The time lapse cases in *Brown*, however, provide additional insight into the intervening event requirement. *See* note 47 *supra*. Both *Owen* and *Maroney* provide examples of intervening events. *Id.* In *Owen* police released the defendant from custody prior to his statement and in *Maroney* the defendant made his confession after meeting with counsel and appearing before an alderman. *Id.*

One commentator has noted that the presence of intervening circumstances is perhaps the only relevant factor for determining whether a statement is attenuated from a fourth amendment violation. Miranda *Warnings*, *supra* note 6, at 243. The intervening event is particularly significant because a statement following a constitutional violation can be viewed as presumptively tainted. *Id.* The commentator noted that almost by definition, an intervening event is required to break the connection or at least substantially weaken it. *Id.*

[120] 371 U.S. at 491.

[121] *Id.*

ment violation and the subsequent statement.[122] The intervening event of release from custody indicated that the statement Wong Sun eventually made was not the result of exploitation of the fourth amendment violation.[123] Although an intervening event such as release from illegal detention does not prove that a subsequent statement was an act of free will, such an event at least decreases the probability that the fourth amendment violation directly caused the statement.

An intervening event may also serve to protect fourth amendment rights in a manner other than that suggested by the voluntariness analysis. The *Brown* Court cited *Johnson v. Louisiana*[124] as an example of a case involving a significant intervening event.[125] In *Johnson*, the defendant argued that since his warrantless nighttime arrest was illegal, a subsequent lineup identification was a forbidden fruit of the fourth amendment violation.[126] The Supreme Court held, however, that since police took Johnson before a magistrate prior to the lineup, the lineup was not the fruit of the illegal arrest.[127] The Court concluded that the lineup was the result of the magisterial proceeding.[128]

Johnson illustrates an exception to the general requirement that the prosecution must demonstrate compliance with the applicable voluntariness standard in order to attenuate a tainted statement. A court's classification of the magisterial proceeding as an intervening event is not inconsistent with the general purpose of the fourth amendment exclusionary rule.[129] A magistrate's decision to keep a person in custody creates a basis for holding the person which is independent from the prior illegality.[130] If the police bring an illegally arrested individual before a magistrate, the magistrate must order that the person be released unless the prosecution proves a basis for continued detention.[131] Under the *Johnson* analysis, courts would determine whether a statement was tainted by examining the nature of the judicial proceeding that took place between the illegal arrest and the later statement, not the circumstances of the arrest itself. If the judicial proceeding provided a valid, independent, basis for detaining the individual, the later statement would be admissible.

The Supreme Court's new flexible rule for determining attenuation has created more questions than it has answered. Even if the Court can devise acceptable definitions for purpose and flagrancy, the degree of

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[122] *See id.*
[123] *See id.*
[124] 406 U.S. 356, 365 (1972); *see* note 48 *supra.*
[125] 422 U.S. at 604.
[126] 406 U.S. at 365.
[127] *Id.*
[128] *Id.*
[129] *See* text accompanying note 6 *supra.*
[130] *See* 406 U.S. at 365.
[131] *See id.*

voluntariness sufficient to purge the taint of a specific amount of purposeful or flagrant misconduct will remain unclear. Since proof of sufficient voluntariness appears to be the ultimate issue in attenuation analysis,[132] the prosecution must know how to prove that the applicable voluntariness standard is satisfied. *Rawlings* indicates that a non-purposeful, non-flagrant fourth amendment violation has a low voluntariness standard which is satisfied by giving proper *Miranda* warnings.[133] *Brown* and *Dunaway* indicate that something more than *Miranda* warnings is necessary to satisfy the voluntariness standard for a purposeful, flagrant fourth amendment violation.[134] One of the important unresolved questions is what is required to satisfy this voluntariness standard for purposeful, flagrant official misconduct. The Court has described time lapse and intervening event as relevant factors[135] but the Court has failed to define the point at which these factors must be shown in order to prove sufficient voluntariness to purge the taint of purposeful, flagrant official misconduct.

In deciding constitutional questions, the Supreme Court has the duty to set forth a rule to guide the lower courts.[136] The Supreme Court's rule in *Rawlings* tempers the potentially inflexible rule of *Brown* with a totality of the circumstances approach and emphasizes the purpose and flagrancy of police misconduct. The *Rawlings* rule may in effect be no rule at all. By creating an ambiguous test for attentuation,[137] the Supreme Court has given appellate courts almost no control over the trial judge's decisions. The Supreme Court has left protection of an individual's fourth amendment rights solely to the trial judge with virtually no guidance.

Although the Supreme Court's decision in *Brown* created a potential problem of inflexibility,[138] the rule possessed the advantage of protecting fourth amendment rights and providing a reasonable measure of guidance to the lower courts. The *Rawlings* decision, instead of building upon the decision in *Brown*, destroys any semblance of a definite rule and leaves individual fourth amendment rights at the mercy of trial courts applying an ambiguous and ill-defined standard.[139] If the fourth amendment exclusionary rule is essential to the protection of an in-

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[132] *See* text accompanying notes 109-110 *supra*.

[133] *See* 100 S. Ct. at 2256; text accompanying notes 62-82 *supra*.

[134] *See* 442 U.S. 200; 422 U.S. 590; *see* text accompanying notes 42-51, 52-61 *supra*.

[135] *See* 442 U.S. at 218; 422 U.S. at 603-04.

[136] *See* Irvine v. California, 347 U.S. 128, 134 (1954). In *Irvine* the Supreme Court rejected defense counsel's argument that the exclusionary rule should apply to recordings obtained by shocking violations of the defendant's fourth amendment rights. The Court noted that drawing a distinction based on the nature of the fourth amendment violation would provide no meaningful constitutional guidance for state courts. *Id.* at 134.

[137] *See* text accompanying notes 86-90 *supra*.

[138] *See* text accompanying notes 82-84 *supra*.

[139] *See* text accompanying notes 86-90 *supra*.

dividual's fourth amendment rights[140] then surely the test for exclusion must be based on a more solid footing. The Supreme Court's decision in *Rawlings* virtually guarantees that the courts will continue to grapple with the admissibility of confessions following fourth amendment violations and that inconsistent and arbitrary decisions will result.

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[140] *See* note 6 *supra* (constitutional foundation of the fourth amendment exclusionary rule).