Land & Water Law Review

Volume 15 | Issue 2 Article 7

1980

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LAND AND WATER
LAW REVIEW

VOLUME XV 1980 NUMBER 2

With the development and evolution of fourth and fifth amendment rights in recent years has come an increased scrutiny of each step in the criminal process. Actions of law enforcement officers have been regarded with special interest, probably because such actions are most likely to threaten individual rights. This article examines two recent decisions pertaining to the elements and effects of the arrest or detention of a suspect. The author presents an in-depth analysis of the opinions, injects his own perceptions of the law in the area, and comes to some conclusions about the procedural and substantive effects of the decisions on the law of arrest in Wyoming.

FITZGERALD V. STATE, DUNAWAY V. NEW YORK AND THE LAW OF ARREST IN WYOMING

*by Richard Scott Rideout**

In the summer of 1979, the United States Supreme Court decided the case of *Dunaway v. New York*.[1] Approximately five months later, on October 30, 1979, the Wyoming Supreme Court handed down its decision in *Fitzgerald v. State*.[2] The cases involved very similar fact patterns, yet were decided on very different theories. The purpose of this article is to attempt to explain those decisions and how they affected the law of arrest, substantively and procedurally, in the State of Wyoming.

The Law of Arrest in Wyoming Prior to Fitzgerald and Dunaway.

Prior to the decisions of *Dunaway* and *Fitzgerald*, the law of arrest in Wyoming appeared to conform to generally

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1. 442 U.S. 200, (1979).
2. 601 P.2d 1015 (Wyo. 1979).

accepted concepts. The leading case was *Rodarte v. City of Riverton.*[3] *Rodarte* was a civil case, however, and could appropriately be limited. But, whether in dicta or not, *Rodarte* set forth an extensive discourse on the law of arrest in Wyoming, including a definition of what circumstances would constitute an arrest. After a brief discussion of the facts of the case, the opinion set forth its definition:

> Excepting only where the officer temporarily detains for investigation, for an arrest to take place the officer need only subject the person he confronts to some kind of control and detention amounting to a restriction upon his or her freedom. He arrests when he, with the present ability to do so, exerts his will upon the citizen in a way which indicates an intention to detain him or to take him into custody—he arrests him when he issues an order in a way which causes the subject to believe he must obey the command which, if obeyed, results in a restriction upon freedom. The officer arrests when, in order to detain, he touches his subject or lays hands on him.
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> Any laying on of hands or any detention coupled with an act or attitude indicating the officer's apparent intention to assume physical control or to take the subject into custody is also an arrest.[4]

It would appear that this definition accords with the almost universal rules of arrest. Actions that "deprive a person of his liberty by legal authority" constitute an arrest.[5] There were exceptions to this definition, however, which are important to the understanding of *Fitzgerald* and particularly *Dunaway.* LaFave, in his treatise on the fourth amendment, cites two "extremely important propositions" that he believes emerged from *Terry v. Ohio*: first, that a seizure need not be called an arrest in order that it be subject to the requirements of the fourth amend-

3. 552 P.2d 1245 (Wyo. 1976).
4. *Id.* at 1251.
5. Terry v. Ohio, 392 U.S. 1 (1968); Rodarte v. City of Riverton, *supra* note 3; Raigosa v. State, 562 P.2d 1009, 1012 (Wyo. 1977) ("a detention of personal liberty"); *see generally,* 2 LAFAVE, SEARCH AND SEIZURE 215 (1978).

ment; and second, that a "seizure" that is limited in its intrusiveness may be reasonable under the fourth amendment even in the absence of the requirement of probable cause that is traditionally required for a legal arrest.[6] *Dunaway v. New York* focuses on the second point. It appears that the Court in *Rodarte* also accepted this proposition.[7] It was against this background that the United States Supreme Court decided *Dunaway v. New York*, and the Wyoming Supreme Court handed down its decision in *Fitzgerald v. State.*

Dunaway v. New York.

Dunaway v. New York decided a question reserved ten years earlier in *Morales v. New York*,[8] whether "custodial questioning on less than probable cause for a full-fledged arrest" violated the fourth amendment to the United States Constitution.[9] The United States Supreme Court, in an

6. LAFAVE, *supra* note 5, at 216.
7. Terry v. Ohio, *supra* note 5, sets forth the well known "stop and frisk" rule as an exception to the general fourth amendment rules. The Terry decision, however, did not create the only existing exception to such law. It had been decided, prior to Dunaway and Fitzgerald, that a brief detention for investigation or questioning did not constitute an unreasonable seizure. People v. Morales, 42 N.Y.2d 129, 366 N.E.2d 248, 397 N.Y.S.2d 587 (1977); People v. Dunaway, 61 A.D.2d 299, 402 N.Y.S.2d 490 (1978). Indeed, this author believes Rodarte, despite the disclaimer made in Fitzgerald, *supra* note 2, at 1017, expressly recognized that exception. At 1251, the Rodarte majority, in defining an arrest, specifically stated: "*Excepting only where the officer temporarily detains for investigation, . . .*" (emphasis added) and then continued with the definition noted above. Later, also at 1251, the opinion goes on to state:

> This does not mean that a person may not be detained by the officer for investigation without an arrest being effected where there is probable cause to believe there has been a crime committed or to believe one is being committed, coupled with a belief that the subject is or could be involved in its commission. Under such probable cause circumstances the person may be detained for inquiry.[2]

Footnote 2 cites United States v. Sanchez, 450 F.2d 525, (10th Cir. 1971); Terry v. Ohio, *supra* note 5; Wilson v. Porter, 361 F.2d 412, (9th Cir. 1966); United States v. Unverzagt, 424 F.2d 396, (8th Cir. 1970); United States v. Oswald, 441 F.2d 44, (9th Cir. 1971); and United States v. Harflinger, 436 F.2d 928, (8th Cir. 1970), *cert. denied*, 402 U.S. 973 (1971), all of which, in this author's opinion, were overruled by Dunaway, or are factually distinguishable as involving automobile or border situations, and which authorized a temporary detention for questioning on less than probable cause to arrest.
8. 396 U.S. 102 (1969).
9. Dunaway v. New York, *supra* note 1, at 202. Dunaway v. New York and People v. Morales have had similar histories and have traveled a long route to reach final disposition. Dunaway, after conviction at trial, appealed, and both the Appellate Division of the Fourth Department and the New York Court of Appeals affirmed without opinion. People v. Dunaway, 42 A.D.2d 689, 346 N.Y.S.2d 779 (1973), *aff'd*, 35 N.Y.2d 741, 320 N.E.2d

opinion by Justice Brennan, joined by Justices Stewart, White, Marshall, Blackmun and Stevens, held such conduct to be violative of the fourth amendment.

After questioning an inmate in a local jail, police received information that Irving Jerome Dunaway may have been involved in an attempted robbery and a homicide. It was admitted that the information in the possession of the police did not constitute sufficient probable cause to arrest Dunaway or to obtain a warrant. The patrolmen, however, were ordered to "pick up" Dunaway and "bring him in." Dunaway was taken into custody and although not physically restrained or told he was under arrest, would have been so restrained if he had resisted. After having been given his *Miranda* warnings, Dunaway waived counsel and made an incriminating statement. He also drew sketches that implicated him in the crime. Dunaway was questioned again the following day and made additional statements.

646, 361 N.Y.S.2d 912 (1974). The United States Supreme Court granted certiorari, vacated the judgment, and remanded the case for further consideration in light of Brown v. Illinois, 422 U.S. 590 (1975). Dunaway v. New York, 422 U.S. 1053 (1975). The New York Court of Appeals directed the Monroe County Court to make further factual findings on the issue of whether Dunaway had been detained, whether probable cause existed for the detention, and, in the event there was a detention without probable cause, whether the statements made should have been suppressed as having been the product of an illegal arrest as Brown required. People v. Dunaway, 38 N.Y.2d 812, 345 N.E.2d 583, 382 N.Y.S.2d 40 (1975). The county court then determined that the motion to suppress should have been granted, as the arrest was illegal and the statements had been the product of that illegal arrest. The appellate division, however, reversed, People v. Dunaway, *supra* note 7, on the strength of People v. Morales, *supra* note 7, and a finding that Brown was inapplicable. The New York Court of Appeals dismissed an application for leave to appeal, but on petition to the United States Supreme Court, certiorari was granted. Dunaway v. New York, 439 U.S. 979 (1978).

People v. Morales. After conviction at trial, both the appellate division, 27 A.D.2d 904, 280 N.Y.S.2d 520 (1967), and the court of appeals, 22 N.Y.2d 55, 238 N.E.2d 307, 290 N.Y.S.2d 898 (1968), affirmed. The United States Supreme Court granted certiorari, Morales v. New York, 394 U.S. 972 (1969) and, after a short per curiam opinion, remanded the case for further findings in light of Brown v. Illinois, *supra*. Morales v. New York, *supra* note 8. The New York Court of Appeals so directed, 26 N.Y.2d 844, 258 N.E.2d 90, 309 N.Y.S.2d 592 (1970). Again, both the appellate division and the court of appeals affirmed, People v. Morales, 52 A.D.2d 818, 383 N.Y.S.2d 608 (1976), *aff'd*, 42 N.Y.2d 129, 366 N.E.2d 248, 397 N.Y.S.2d 587 (1977), the latter case specifically holding:

> 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, *supra*, at 135; 251; 590. Brown v. Illinois, *supra*, was distinguished, since here the detention was found to be something less than an illegal arrest. Finally, the United States Supreme Court denied certiorari, Morales v. New York, 434 U.S. 1018 (1978).

At trial, the defense moved to suppress the statements and the sketches, but the motions were denied. Dunaway was then tried and convicted. On appeal, the conviction was affirmed. The United States Supreme Court granted certiorari, vacated the judgment and remanded the case for further findings in light of *Brown v. Illinois*.[10] The trial court, after hearing, granted the motions to suppress, but the decision was reversed by the Appellate Division of the New York Supreme Court on the basis of *People v. Morales*,[11] despite the specific finding by the trial court that Dunaway did not voluntarily accompany the police to the station house. The New York Court of Appeals denied certiorari, but Dunaway's petition was again granted by United States Supreme Court.[12]

The majority opinion held that Dunaway had been seized when he was taken involuntarily to the police station, citing *Terry v. Ohio*.[13] The majority held that as a general rule, such seizures are reasonable only if supported by probable cause, unless one of several narrowly drawn exceptions applies. The court then proceeded to distinguish *Terry* and its progeny as being inapplicable and concluded that since probable cause was lacking, the seizure was unreasonable and violative of the fourth amendment. *Terry* was a departure from traditional fourth amendment analysis in that it defined a special category of fourth amendment seizures that were substantially less intrusive than arrests. In such cases, the general rule requiring probable cause could be replaced by a balancing test that weighed the intrusiveness of the seizure against the necessity for the police action. The application of that test led the Court to fashion a "narrowly defined" seizure on less than probable cause. The Court has been careful to confine this rule to a narrow scope such as frisks for weapons,[14] or border patrol checks.[15] These cases did not apply the traditional rule only

10. *Supra* note 9.
11. *Supra* note 7.
12. *Supra* note 9.
13. *Supra* note 5.
14. *See* Adams v. Williams, 407 U.S. 143 (1972); Pennsylvania v. Mimms, 434 U.S. 106 (1977).
15. *See* United States v. Brignoni-Ponce, 422 U.S. 873 (1975); United States v. Martinez-Fuerte, 428 U.S. 543 (1976).

because they involved conduct that "fell far short of the kind of intrusion associated with an arrest."[16] In this case, the intrusion was substantial and in "important respects indistinguishable from a traditional arrest."[17] The majority stated that "any 'exception' that could cover a seizure as intrusive as that in this case would threaten to swallow the general rule that Fourth Amendment seizures are 'reasonable' only if based on probable cause."[18]

It was then necessary to make an analysis of the case in light of *Brown v. Illinois*.[19] The court concluded that the nexus between the unconstitutional police conduct and the incriminating statements and sketches that had been obtained as a result of the arrest were not sufficiently attenuated to allow their use at trial. Although proper *Miranda* warnings had been given and the statements may have been voluntary for purposes of the fifth amendment, the exclusionary rule, when considered in light of the fourth amendment as well as the fifth, requires further analysis so that the distinct rights and policies protected by the fourth amendment can be enforced. Therefore, a determination that the statements were voluntary is merely a threshold requirement for the purposes of this analysis. The fourth amendment focuses on the "causal connection between the illegality and the confession."[20] The courts must determine whether the statements were obtained by exploitation of the illegal arrest. If such statements were the product of the illegal arrest, they must be suppressed or the purpose of the exclusionary rule would be frustrated, as the police could flagrantly violate the fourth amendment with impunity and without sanction. Several factors are to be considered in this analysis: (1) the "temporal proximity of the arrest and the confession;" (2) the "presence of intervening circumstances"; and (3) "particularly, the purpose and flagrancy of the official misconduct."[21] The burden of showing admissibility rests on the prosecution.

16. Dunaway v. New York, *supra* note 1, at 212.
17. *Id.*
18. *Id.* at 213.
19. *Supra* note 9.
20. Brown v. Illinois, *supra* note 9, at 603.
21. *Id.* at 603, 604.

In this case, the Court concluded that the statements and sketches had been obtained by exploiting the illegal arrest. The Court noted the similarity between this case and *Brown*—here the police seized Dunaway, without probable cause in the hope that something might turn up, and Dunaway then confessed without any significant intervening event. The first statement was made within an hour after his arrest; a second more complete statement was made on the following day. The majority concluded that to admit the statements and sketches in this case would permit a flagrant violation of the fourth amendment while allowing admission of evidence obtained by exploitation of that illegality. Such a result would encourage unconstitutional police conduct and make the courts a party to that illegality.

Justice Rehnquist, joined by the Chief Justice, dissented. The major contention of the dissent was that the case did not involve a seizure: "In my view, this is a case where the defendant voluntarily accompanied the police to the station to answer their questions."[22] The dissent saw nothing unconstitutional about such volitional cooperation. After reciting the facts that he believed supported a finding that no seizure occurred, and noting the apparent confusion in the decisions below, Justice Rehnquist remarked that while it may be true that "a police request to come to the station may indeed be an 'awesome experience' ", it does not mean "that in every instance where a person assents to a police request to come to headquarters, there has been a 'seizure' within the meaning of the Fourth Amendment."[23] The dissenters found that Dunaway acted voluntarily and, hence, no seizure resulted and the statements should have been admissible.[24] The majority relied on the determination, made

22. Dunaway v. New York, *supra* note 1, at 222 (dissenting opinion).
23. *Id.* at 224 (dissenting opinion).
24. The dispute between the majority and the dissent on this issue was similar to the split between the majority and the dissent in Fitzgerald v. State, *supra* note 2, although not identical. Since the majority opinion in Dunaway based its holding on the Morales issue, the case would not be dispositive of Fitzgerald. The dispute does point out the importance of clear factual determinations and the need for counsel to have the rulings below specifically reflected in the record. Not only will such a decision govern the trial, but it may determine the scope of the issue and the result on appeal of a conviction. This author would agree with Justice Rehnquist, and the

by the trial court, that this case did not involve a situation where the defendant voluntarily appeared at police headquarters in response to a request of the police.[25] Justice Rehnquist, however, objectively reviewed the record and made his own determination of the issue, and from that review, concluded the defendant had acted voluntarily.[26]

After reaching this conclusion, the dissent continued, however, and argued that despite a finding that Dunaway had been seized, the sketches and statements need not have been suppressed under *Brown v. Illinois*.[27] Justice Rehnquist would have held that any connection, or taint, that resulted from the allegedly illegal arrest was sufficiently attenuated to permit use of the evidence at trial. He pointed out that *Brown* listed several factors that should be considered in the determination of whether "inculpatory statements were sufficiently a product of free will to be admissible under the Fourth Amendment." Justice Rehnquist listed these factors as follows: (1) voluntariness of the statements as a "threshold requirement"; (2) the giving of *Miranda* warnings—"an important factor". Also relevant are: (3) the "temporal proximity of the arrest and the confession,"; (4) "the presence of intervening circumstances,"; and (5) "the purpose and flagrancy of the official misconduct."[28]

Justice Rehnquist would have held that given the deterrent purposes of the exclusionary rule, factor five, listed above, was the most important in the consideration of the question. Where the police had acted in "good faith"

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majority in Fitzgerald, that there is nothing improper or unconstitutional if a suspect voluntarily cooperates with the police in an investigation, even if he thereby incriminates himself. *See*, Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (consent to search). The real question is how can we determine whether those acts were in fact volitional, for the fate of the defendant may well rest on the resolution of that issue.

25. Dunaway v. New York, *supra* note 1, at 223-24 (dissenting opinion).
26. In this regard, Justice Rehnquist, in his dissent in Dunaway, would probably agree with Justice McClintock, in his dissent in Fitzgerald, as to the scope of the duty of an appellate court to independently review the record below to determine a constitutional issue.
27. *Supra* note 9.
28. Dunaway v. New York, *supra* note 1, at 226 (dissenting opinion), quoting Brown v. Illinois, *supra* note 9, at 603, 604.
Note the possible effect of such an analysis, for example, on the trial court's ruling in Fitzgerald and the majority's implicit finding of voluntariness for purposes of the fourth amendment.

and not in a flagrantly illegal manner, the dissent would require no more than proper *Miranda* warnings and a determination that the statements were voluntary for purposes of the fifth amendment.[29] In regard to the other factors, the majority conceded that Dunaway received proper *Miranda* warnings, that his statements were voluntary, and that the police acted in good faith. The record was clear that the police had never threatened or abused Dunaway and their conduct could in no manner be considered flagrant. One statement was given voluntarily about an hour after petitioner arrived at the station; the other statement was given the following day. Thus, the dissent would have found that the statements and sketches were sufficiently purged of the primary taint of the alleged illegal detention.

This author agrees with the majority in *Dunaway* that the concept of temporary detention for interrogation, or investigation, is clearly a seizure for purposes of the fourth amendment. *Terry v. Ohio* seemed to have resolved that issue.[30] Justice Rehnquist, in his dissent, would also have agreed.[31] The majority and dissenting opinions in *Dunaway* disagreed on whether the petitioner had voluntarily cooperated with the police.

Fitzgerald v. State.

On October 30, 1979, the Supreme Court of Wyoming handed down the decision of *Fitzgerald v. State*,[32] affirming the conviction of the appellant for murder in the second-degree. Three issues were raised on appeal, but only the first, whether the trial court erred in not suppressing state-

29. Although beyond the scope of this article, it is interesting to note the emphasis placed on the supposed deterrent effect on police misconduct as a justification for the exclusionary rule. Both the majority and the dissent note this point. This position has been questioned by several constitutional scholars as being a misinterpretation of the origin of the rule. *See*, Kamisar, *A Defense of the Exclusionary Rule*, 15 CRIM. L. B. 5 (1979), who makes a valid argument that if such a deterrent effect is the underlying basis for the exclusionary rules, critics could validly and forcefully attack the rule by, for example, statistical evidence that police conduct was not in fact deterred, and hence, the rule, which excludes otherwise probative evidence, should be judicially eliminated.
30. *See also*, Davis v. Mississippi, 394 U.S. 721 (1969).
31. Dunaway v. New York, *supra* note 1, at 222 (dissenting opinion).
32. *Supra*, note 2.

ments made by Fitzgerald that the appellant contends were the product of an illegal arrest, is relevant for purposes of this article.

After the body of the victim was found on September 22, 1977, police learned that the deceased had last been seen leaving a local tavern with two young men not residents of the area. Further investigation, with the assistance of composite drawings, led the police to suspect that Fitzgerald may have been involved, or that he may have information relating to the crime. On September 27th, the police approached Fitzgerald while he and a friend were having dinner at a restaurant. Four policemen were involved in the confrontation and at least two were inside the building.

The police asked Fitzgerald if he would talk to them about the incident at the station headquarters and he apparently agreed. He asked if he could finish dinner first, but was told the police would prefer that he accompany them now and that they would buy him dinner after their talk. Fitzgerald was not told he was under arrest at that time. During the ride to the station house, in response to his question, he was informed by one of the policemen that he had not been arrested. At the station house, Fitzgerald was read his *Miranda* rights and after questioning made several incriminating statements implicating himself in the crime. The State conceded that at the time the police approached Fitzgerald they did not have probable cause to arrest him or to obtain a warrant.

A motion was made before trial to suppress the statements as having been involuntary and as having been made as the result of an illegal search and seizure of the appellant. The trial court denied the motion to suppress, but made no specific finding on the question of whether Fitzgerald had in fact been arrested. The trial court simply ruled that the statements should not be suppressed. Fitzgerald did not testify at the suppression hearing. The officers, however, stated that the appellant voluntarily agreed to accompany

the police to the station to answer questions concerning the matter. Fitzgerald, they testified, had been very cooperative. On appeal, Fitzgerald contended that the statements were the fruit of an illegal arrest.

The majority initially cited *Dunaway*, but dismissed it as having no bearing on the case. Justice Rose, for the majority, believed *Dunaway* had been "foreshadowed" by *Rodarte v. City of Riverton.*[33] The majority stated that the law was clear: "If Fitzgerald was taken involuntarily to the Buffalo police station then he had a right, under the facts of this case, to have the statements suppressed despite adequate Miranda warnings."[34] The issue for the majority was whether the record supported a finding that Fitzgerald went voluntarily with the police to the station house, for the trial court must have found, when it denied the motion to suppress, that the defendant did in fact leave the restaurant with the police of his "own free will."[35]

Preliminary to the discussion, the court made several observations: (1) that Fitzgerald did not testify at the suppression hearings; (2) that the issue whether Fitzgerald voluntarily accompanied the police would be resolved by the preponderance-of-the-evidence standard; and (3) under appellate rules of review, the evidence would be viewed most favorably to the party who prevailed below.[36] The majority then recited the evidence and found that the trial court could "reasonably conclude" that Fitzgerald did in fact voluntarily cooperate with the police, and found no

33. *Supra*, note 3. This author respectfully disagrees with the conclusion. See note 7, *supra*. In this regard, compare Mr. Justice Rehnquist's dissent in Dunaway v. New York, *supra* note 1, at 221, where he states that if the issue were simply one of deciding the "question of the legality of custodial questioning on less than probable cause for a full fledged arrest" that he would not hesitate to join the majority. Apparently, Justice Rehnquist would have had no problem in finding such "custodial interrogation" a seizure. He believed, however, the record in Dunaway showed the petitioner voluntarily accompanied the police, and hence, it was improper to decide that issue. There seems no doubt, however, that the majority in Dunaway did not hold that voluntary cooperation with the police would trigger the constitutional protections of the fourth amendment. In this respect, this author also disagrees with Mr. Justice McClintock that Dunaway is dispositive of the Fitzgerald decision.
34. Fitzgerald v. State, *supra* note 2, at 1017, 1018.
35. This author cannot agree, as an implicit finding of voluntariness from such a ruling ignores the Brown decision.
36. Discussion on issues 2 and 3 will occur *infra*.

reason to disturb the trial court's implicit finding that the appellant acted in a voluntary manner. *Dunaway*, it was stated, did not require, on the facts of this case, a finding of involuntariness as a matter of law.[37] *Childs v. State*,[38] decided *after Dunaway*, seemed more in point to the majority and indicated that voluntary cooperation could not be equated with an arrest. As no arrest occurred, the trial court did not err in failing to suppress the subsequent statements on the basis of their having been obtained as the result of an illegal arrest.

A sharp dissent was registered by Mr. Justice McClintock, who focused primarily on the issue of whether the appellant voluntarily accompanied the police. Initially, Justice McClintock argued *Dunaway* was "most pertinent" to the determination of the case and remarked that the factual settings were virtually identical.[39] While *Dunaway* was factually very close to *Fitzgerald*, the issues decided in the two cases were quite distinct. *Fitzgerald* involved the issue of voluntariness for purposes of the fourth amendment—whether the appellant voluntarily accompanied the police to the station. If in fact he did, no arrest occurred. The majority in *Dunaway* would most likely agree, for despite Justice Rehnquist's concern, nothing in the *Dunaway* opinion even suggested that voluntary cooperation should trigger fourth amendment protections. Indeed, the majority noted that the specific issue was whether "custodial questioning on less than probable cause for a full-fledged arrest" violated the fourth amendment.[40] The majority cited the trial court's specific finding that the case "does not involve a situation where the defendant voluntarily appeared at police headquarters in response to a request of the police."[41] In this light, Justice Brennan had no trouble deciding that such a detention for custodial interrogation was a seizure, and an unreasonable seizure, prohibited by the fourth amendment unless based on probable cause.

37. Fitzgerald v. State, *supra* note 2, at 1019.
38. 584 S.W.2d 783 (Tenn. 1979).
39. Fitzgerald v. State, *supra* note 2, at 1023 (dissenting opinion).
40. Dunaway v. New York, *supra* note 1, at 202.
41. *Id.* at 205.

In order to understand this concept, and to put *Dunaway* in proper context, it is necessary to review the decision below and the case of *People v. Morales.*[42] The origin of the concept of "detention for custodial interrogation" or "investigatory detention" on less than probable cause was in some ways similar to the rationale of *Terry v. Ohio.* Such an act was viewed as a seizure, but as in *Terry,* it was a seizure that was not, under the relevant facts and circumstances, unreasonable. Indeed, such action was perceived as a necessary and proper police procedure. Hence, the majority in *Dunaway,* after pointing out that such a detention was in fact a seizure, went to great lengths to construe *Terry* and its progeny as narrowly as possible. Reasonableness, with the noted exceptions, was to be defined by the concept of probable cause. If the cases are read in this light, *Dunaway* would be irrelevant to the disposition of *Fitzgerald.* The decision, as the majority in *Fitzgerald* stated, turned on the issue of voluntariness. If Fitzgerald acted voluntarily, no arrest occurred; if his actions were involuntary, he had been arrested. In the latter situation, *Dunaway* might have been relevant, for the decision would preclude the State from attempting to justify that seizure on the basis of a detention for investigation. That disagreement appears to be the major point of contention between the majority and dissenting opinions in both cases.[43]

Fitzgerald failed to answer, to Justice McClintock's satisfaction, the question of how voluntariness should be determined, and it is in this regard that the dissent scored

42. *Supra,* note 7.

43. *See* People v. Morales, People v. Dunaway, *supra* note 7. This author believes the cases were decided on the rationale that, under the limited exigent facts and circumstances of the case, the "detention" (which would be without doubt a seizure under Terry) was not unreasonable. People v. Morales, *supra* note 9, at 58, 310, 902; "People v. Morales II" reaffirmed "Morales I". *Compare,* People v. Dunaway, *supra* note 7, at 305, 494, Denman, J., concurring. After stating the police conduct was reasonable, citing "Morales II", Justice Denman stated that "Rights protected by the Fourth Amendment are not violated until the conduct of the police becomes *unreasonable.*" Thus, the New York courts were attempting to justify the decisions on a Terry analysis, although Terry v. Ohio, *supra* note 5, itself was never cited. "Morales II" found that an alternative basis for the decision existed in that an express finding was made by the trial court that the defendant had consented to the police detention. The court of appeals did, however, reaffirm its decision in "Morales I". People v. Morales, *supra* note 7, at 138, 252, 592.

some telling points. Justice McClintock suggested that the matter should have been remanded to the trial court for further determinations of fact on the specific issue of whether Fitzgerald's actions were voluntary. Such an approach would seem reasonable and proper and would have avoided the reliance by the majority opinion on inferences to decide the case, particularly where other and contrary inferences were as reasonable as the ones made. Remand for such determination is clearly within the power of an appellate court and, indeed, was the initial procedure adopted in *Dunaway* and *Morales* to clarify similar issues. It seems that because the question itself was one of fact, remand should have occurred so that the matter could be resolved by the trier of fact instead of by resort to what appeared to be an implicit finding subsequently supported by inferences.

It appears that another important point over which the majority and the dissent have split is on the duty of an appellate court to review the record. Mr. Justice Rose, for the majority in *Fitzgerald*, made several conclusions relating to the resolution of the illegal arrest issue. He noted that Fitzgerald did not testify at the suppression hearing; he held that the issue of whether Fitzgerald went to the police station voluntarily could be resolved by a preponderance-of-the-evidence standard, citing *Lego v. Twomey*,[44] and *Lonquest v. State*;[45] and he stated that under the rules of appellate review the court was required to view the evidence most favorably to the party who prevailed below. He then quoted from *Repkie v. State*:[46]

> An appellate court, in assessing evidence as to its sufficiency, is bound by the following rule:
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> 'In passing upon the sufficiency of the evidence to support a verdict of guilty, an appellate court will not weigh conflicting evidence nor consider the credibility of witnesses; and it must view the evidence in a light most favorable to the prosecution and determine questions of law as to whether there

44. 404 U.S. 477 (1972).
45. 495 P.2d 575 (Wyo. 1972).
46. 583 P.2d 1272 (Wyo. 1978).

> is substantial evidence, direct or circumstantial, or both, which, with the reasonable inferences that may be drawn therefrom, will sustain the verdict.'[47]

The majority then made an analysis of the facts and stated its conclusion that Fitzgerald voluntarily accompanied the police to the station house and found that the record supported the implicit finding of the trial court to that effect. Mr. Justice McClintock took issue with such an approach and stated that the matter should have been remanded for a specific finding on the question. He also disagreed with the conclusion that the issue could be resolved by a preponderance-of-the-evidence standard and that the basic rules of appellate review cited by the majority applied. The dissent would have placed the burden to prove volition on the State and would have required that such voluntary cooperation be proven by clear and positive evidence. In addition, the State should have been required to establish the absence of "duress or coercion, actual or implied."[48] Mr. Justice McClintock could not agree that the appellate rule requiring the court to view evidence favorable to the prevailing party had any application in this case: "When an appellate court is faced with a constitutional issue it is 'required to examine the entire record and to make an independent, reflective constitutional judgment on the facts.' "[49] The dissent, after such a review, was unable to conclude, by clear and positive evidence, that the consent was freely given.

Remand to the trial court for specific findings on the fourth amendment issue would, as noted, appear to have been the most reasoned resolution of the matter. The failure to remand resulted in a contortion of appellate review standards in constitutional matters in an effort to reach a specific conclusion.

The argument is not persuasive that the trial court implicitly found that the questioning was consensual and that the actions of Fitzgerald were voluntary simply because

47. Fitzgerald v. State, *supra* note 2, at 1018.
48. *Id.* at 1025 (dissenting opinion), (quoting Judd v. United States, 190 F.2d 649, 650-51 (D.C.Cir. 1951).

the court refused to grant a motion of the defense to suppress the statements made after Fitzgerald was at the station house. The trial court made a determination regarding the voluntariness of the statements for fifth amendment purposes only. It could conceivably have found those statements voluntary *and* admissible *despite* an illegal arrest of Fitzgerald if, for example, it determined that *Brown v. Illinois* would not have precluded their admission. Indeed, a quick review of the facts indicate that *Brown* may well have been applicable. In *Brown*, the question before the Court was whether an inculpatory statement made after an admittedly illegal arrest was admissible. The Court rejected the argument that *Miranda* warnings in and of themselves sufficiently dissipated the taint of the illegal arrest so as to make the statements admissible. "The question whether a confession is the product of a free will under *Wong Sun* must be answered on the facts of each case."[50] The court noted that several issues were to be evaluated, *Miranda* warnings being "an important factor."[51] In addition, the proximity in time between the illegal arrest and the subsequent statements must be considered, as well as the presence of other significant, although unspecifed, intervening circumstances, and, particularly, "the purpose and flagrancy of the official misconduct."[52] Although reasonable men might will disagree whether the trial court would have acted properly in determining that, under the *Brown* analysis, the statements made by Fitzgerald would be admissible even if the defendant had been illegally arrested, such a determination, even if erroneous, is as plausible as assuming the trial court must have found that the defendant had not been arrested. It is clear that the only issue specifically decided was that the statements made should be admitted into evidence.

It does appear, however, that the standard adopted by the majority for determination of the question of whether Fitzgerald voluntarily accompanied the police was proper,

49. *Id.* at 1026 (dissenting opinion).
50. Brown v. Illinois, *supra* note 9, at 603.
51. *Id.*
52. *Id.* at 604.

or at least not demonstrably incorrect. It certainly accords with the rule of *Lego v. Twomey.*[53] The issue of voluntariness, for purposes of the fourth amendment, is to be determined by the preponderance-of-the-evidence standard.[54] *Lego* and *Dodge v. State,*[55] clearly adopted the preponderance-of-the-evidence standard for determination of the voluntariness of incriminating statements. A review of the cases indicates no reason why that rule should not be applied to fourth amendment issues, as well as the fifth amendment, as the court did in Fitzgerald.[56] *Lego* specifically noted that states are allowed to adopt a higher or more stringent standard for review of such issues,[57] and several states have apparently adopted such an approach.[58] *Lego*, however, seems to provide sufficient authority and justification for adoption of the preponderance standard. The court rejected the idea that the exclusionary rule, a product of both the fourth and fifth amendments, would require proof beyond a reasonable doubt at a suppression hearing. There was no substantial evidence that "federal rights have suffered from determining admissibility by a preponderance of the evidence. . . . [I]t is very doubtful that escalating the prosecution's burden of proof in Fourth and Fifth Amendment suppression hearings would be sufficiently productive in this respect to outweigh the public interest in placing probative evidence before juries. . . ."[59]

Lego is broad enough to cover both the fifth and fourth amendment issues, as *United States v. Matlock* shows.[60] *Matlock* involved a question of consent to search given by a person other than the defendant. The Supreme Court, after

53. *Supra*, note 44.

54. Fitzgerald v. State, *supra* note 2, at 1018. *See* Dodge v. State, 562 P.2d 303 (Wyo. 1977); and Lego v. Twomey, *supra* note 44.

55. *Supra*, note 54.

56. *See also*, 3 LAFAVE, SEARCH AND SEIZURE 516 (1978).

57. Lego v. Twomey, *supra* note 44, at 489.

58. Blair v. Pitchess, 5 Cal.3d 258, 486 P.2d 1242, 96 Cal. Rptr. 42 (1971); People v. Reynolds, 55 Cal. App.3d 357, 367, 127 Cal. Rptr. 561, 567 (1976) (attempts by the government to justify a search on the basis of consent must be proven by "*clear and positive evidence* that the consent was freely, voluntarily and knowledgeably given."); State v. Amply, 259 La. 161, 249 So.2d 560, 566 (1971) ("clear and convincing").

59. Lego v. Twomey, *supra* note 44, at 488-89.

60. 415 U.S. 164 (1974).

a review of the law relating to third party consent and the evidence of the case, stated:

> It appears to us, given the admissibility of Mrs. Graff's and respondent's out-of-court statements, that the Government sustained its burden of proving by the *preponderance of the evidence* that Mr. Graff's voluntary consent to search the east bedroom was legally sufficient to warrant admitting into evidence the $4,995 found in the diaper bag.[61] (emphasis added)

Footnote 14 of the opinion then explained the factual background on the burden of proof issue, including an argument that the district court and the court of appeals applied an "unduly strict standard of proof." The court dismissed the matter, but stated that "[i]n any event, the controlling burden of proof at suppression hearings should impose no greater burden than proof by a preponderance of the evidence."[62]

The preponderance-of-the-evidence standard adopted by the *Fitzgerald* majority was appropriate and was supported by sufficient authority.[63] In any event, the decision appears to have settled the issue in Wyoming.

61. *Id.* at 177.
62. Lego v. Twomey, *supra* note 44; United States v. Matlock, *supra* note 60, at 178.
63. *See, however,* 3 LAFAVE, *supra* note 56, at 498 *et. seq.*, citing Bumper v. North Carolina, 391 U.S. 543, 548-49 (1968): "When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving the consent was, in fact, freely and voluntarily given. This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority." If the analogy is valid between a search and a seizure, would such a rule require a higher standard than the preponderance of the evidence? The cases cited by the dissent in Fitzgerald clearly seem to require more than proof by a preponderance of the evidence, but all were decided prior to Lego (1972) and Matlock (1974). Perhaps the argument should have focused on the authority of state courts to afford greater protection under their constitutions than provided by federal constitutional law. Lego clearly allows this and the Wyoming Supreme Court has adopted this approach in an earlier decision, *i.e.*, Clenin v. State, 573 P.2d 844 (Wyo. 1978).

    This author does not believe Johnson v. Zerbst, 304 U.S. 458 (1938), supports the argument of the dissent. Clearly, Johnson set standards for waiver of constitutional rights, but interestingly enough, Johnson applied the preponderance of the evidence standard to determine whether the defendant had in fact intelligently and voluntarily waived his sixth amendment right to counsel.

    See generally, Saltzburg, *Standards of Proof and Preliminary Questions of Fact*, 27 STAN. L. REV. 271, 296 (1975), who argues that in search

Conversely, however, it also appears that both the *Dodge* and *Lego* courts would have disapproved of the majority's implicit finding that in *Fitzgerald*, the trial court must have found that the defendant voluntarily accompanied the police or it would have suppressed the subsequent statements. As noted, such a holding ignored *Brown v. Illinois*. In both *Dodge* and *Lego*, the courts expressly declared that it was the *prosecution's* burden to establish that the statements were voluntarily given. *Dodge* required that a separate hearing be held, in accord with *Jackson v. Denno*,[64] and that a "reliable determination on the issue of voluntariness" be made by the court before the statement would be admissible.[65] The conclusion of voluntariness "must appear from the record with unmistaken clarity",[66] and that decision must be able to be ascertained from the record.[67] *Dodge* clearly seems to require a *specific* finding by the trial court on the issue of voluntariness and that such a finding should be ascertainable from the record with *unmistakable clarity*. It is difficult to conceive how an implicit finding would satisfy that requirement, particularly when the burden is on the *State* to prove the issue. *Dodge*, it is true, involved the fifth amendment, but the analysis should be applicable to fourth amendment issues as well.

Lego v. Twomey[68] also would support such an analysis. In *Lego*, the court specifically stated the rule for determination of the admissibility of statements made by a defendant and held that the issue of voluntariness can be determined by the preponderance-of-the-evidence standard. Nothing in the decision appears to require a different rule for fourth amendment issues. The court, however, empha-

and seizure cases the preponderance of the evidence standard is sufficient, as evidence obtained in violation of the fourth amendment generally presents no problem of reliability, other rules exist to effectuate the policies of the exclusionary rule and protection of privacy interests, and as it is clear that such preliminary questions of fact are "unrelated to the merits of the case." Fifth amendment issues, however, should, if anything, require a higher standard of proof to ensure protection of the rights guaranteed by the amendment.

64. 378 U.S. 368 (1964).

65. Dodge v. State, *supra* note 54, at 308.

66. *Id.* at 309.

67. *Id.* at 310.

68. *Supra*, note 44.

sized that the defendant was entitled to a "reliable and clear-cut determination" that his confession was indeed voluntary, and that the prosecution must carry the burden of proof on that issue.[69] It would seem that such a rule would contemplate, if not require, a specific determination and finding by the trial court, or fact-finder, on the issue. The remand of the cases in *Morales*, *Brown* and, initially, in *Dunaway*, support that reading. Each case was remanded with orders to the trial court to make more specific findings on the issue of fact deemed necessary for the determination of the case. As pointed out by the dissent in *Fitzgerald*,[70] such would also have been appropriate in that case.

Finally, the traditional appellate rule requiring the court to view the evidence in a light most favorable to the prevailing party should have had no application to the determination of the *Fitzgerald* case. It is important to keep in mind that the issue to be resolved involved a question of constitutional law—whether the defendant was illegally seized in violation of the fourth amendment. The review rule applied by the majority in *Fitzgerald*, and also in *McCutcheon v. State*,[71] had only been applied previously to determine questions involving the sufficiency of the evidence of each substantive element of a crime to sustain a conviction upon appeal; all the cases cited involved that question, and *not* issues of constitutional law.

It would seem that the use of such a rule would be at variance with the duty of an appellant court, as defined by the United States Supreme Court, to "examine the entire record and to make an independent, reflective constitutional judgment on the facts."[72] Although the Wyoming Supreme

69. Lego v. Twomey, *supra* note 44, at 489.
70. *See, for example*, Morales v. New York, *supra* note 8. The United States Supreme Court in a per curiam opinion vacated the judgment below and remanded the case for specific findings of fact by the trial level courts in light of Brown v. Illinois, *supra* note 9. The court declined to decide the case as the "record does not permit a satisfactory evaluation of the facts" on the issues of Morales' apprehension. In the absence of a record that "squarely and necessarily presents the issue and fully illuminates the factual context in which the question arises", remand for further findings was deemed appropriate. Morales v. New York, *supra*, at 105.
71. 604 P.2d 537 (Wyo. 1979).
72. Fitzgerald v. State, *supra* note 2, at 1026 (dissenting opinion).

Court has not yet spoken on the issue, aside from *Fitzgerald* and *McCutcheon*, the United States Supreme Court has made its position on such matters clear:

> It is our duty in this case, however, as in all of our prior cases dealing with the question whether a confession was involuntarily given, to examine the entire record and to make an independent determination of the ultimate issue of voluntariness.[73]

The *Fitzgerald* majority espoused a rule of review that would indeed examine the entire record, but which would not require an "independent determination." To the contrary, the court, if it continues to apply this rule, will view the evidence in a "light most favorable to the prosecution" and determine whether there is substantial evidence, direct or circumstantial, or both, which, together with all the reasonable inferences that can be drawn from the evidence, is sufficient to sustain the decision.[74] Obviously, the two approaches are incompatible and this writer agrees with Justice McClintock that such a rule has no place in the determination of constitutional issues. The decision has the effect of eliminating the court's ability to act as a guardian and protector of constitutional rights, as it will require the court to unduly defer to the determination below and, in fact, will allow a shift of the burden of proof on the issue to be decided on appeal. The duty to protect such fundamental rights should not be allocated primarily to the trial bench, and appellate courts should not so readily abdicate their responsibilities.

THE LAW OF ARREST IN WYOMING AFTER FITZGERALD AND DUNAWAY

It would appear after analysis of both decisions that no major substantive change has been made in the law of

73. Davis v. North Carolina, 384 U.S. 737, 741, 742 (1966). *See also*, Ashcraft v. Tennessee, 322 U.S. 143 (1944); Bachellar v. Maryland, 397 U.S. 564, 566 (1970) (when a claim of violation of a constitutionally protected right is involved, it is the duty of the court to make an independent examination of the entire record).

74. Fitzgerald v. State, *supra* note 2, at 1018.

arrest. An arrest can still properly be defined as any action that deprives a person of his liberty by legal authority. It would also seem apparent that voluntary cooperation with the police will not constitute an arrest. As discussed above, neither *Fitzgerald* nor *Dunaway* requires a different conclusion. In *Dunaway,* the concept of "detention for custodial interrogation" was laid to rest once and for all. The *Terry* "stop-and-frisk" rule, however, is still alive and well, although narrowly construed, as would seem appropriate. Several additional problems appear to have arisen, however, that need resolution and the basic differences between the majority and dissenting opinions in *Fitzgerald* emphasized these problems.

It seems that the basic and initial problem is to define and develop a method for determining whether a confrontation constitutes an unreasonable seizure for purposes of the fourth amendment, or a voluntary colloquy. The question becomes when and under what circumstances can we say that a consensual or volitional act has occurred. For Justice Rose, in *Fitzgerald,* and Justice Rehnquist, in *Dunaway,* the issue was volition, and neither saw any problem with such consensual or volitional conduct. Justice Brennan, in the majority opinion in *Dunaway,* went to great lengths to limit the opinion to involuntary conduct, which would not preclude volitional cooperation. Justice McClintock, in his dissent, seemed to raise the basic problems most clearly—how can we be sure the defendant acted voluntarily? How can we analyze and resolve the issue? And what is the role of the appellate court in that determination? Interestingly, but not surprisingly, all the Justices, Brennan, Rehnquist, McClintock and Rose, disagreed in their opinions on the issues being decided. Given the character of the issues involved and the questions raised, the burden placed on the prosecution *and* the defense has grown heavy.

THE IMPLICATIONS

The decisions of *Fitzgerald* and *McCutcheon v. State,* and to a certain extent, *Dunaway,* suggest several observa-

tions. First, it apparently will be the responsibility of the defense to ensure that the record is specific and detailed on the issues to be raised on appeal, for if evidence is weak, or lacking, the court may well infer the existence of findings *and* facts sufficient to sustain a conviction.

Second, at any suppression hearing, it may be important to have the defendant testify on his perceptions of the event with both the fourth and fifth amendment issues in mind. It could be crucial, as all agree, to determine what the defendant's perceptions of the event were—did he subjectively believe his liberty was restrained or that his actions were involuntary.[75] Such evidence would go a long way in proving either consent or volition as opposed to an involuntary detention.[76]

Third, counsel for the defense may be well advised to specify in his motion each ground relied upon and to flesh out the record at hearing on each point.[77] Specific rulings from the trial court on each issue appear desirable. The analysis given in *Brown* provides a useful framework for guidance when such issues arise. It would appear that many of the issues involving the fourth amendment also involve the fifth as in *Fitzgerald* and *Dunaway*, for the object of

75. Dangers are presented by having the defendant testify at the suppression hearing. Although it would appear to be the rule that such evidence could not be used at trial on the issue of guilt or innocence, it may be that the testimony could be used for purposes of impeachment on a similar theory as set forth in Harris v. New York, 401 U.S. 222 (1971). *See*, People v. Douglas, 66 Cal. App. 3d 998, 136 Cal. Rptr. 358 (1977); People v. Sturgis, 58 Ill. 2d 211, 317 N.E.2d 545 (1974); 3 LAFAVE, *supra* note 56 at 518, 519. As LaFave notes, at 119: "Of course, a defendant who has testified at the suppression hearing does not thereby waive his constitutional right to decline to take the stand in his own defense at the trial. People v. Williams, 25 Ill.2d 562, 185 N.E.2d 686 (1962)."

76. Justices Rose and McClintock, in Fitzgerald, were concerned about the subjective belief of the appellant. *See* 601 P.2d 1018 n.1, and 1023 n.5 (dissenting opinion). Mr. Justice Stevens, concurring in Dunaway, *supra* note 1, at 220, also indicated the same concern. Quaere the effect of testimony by the defendant that he believed, for example, that he had been arrested. It would appear, in such an event, the decision should turn on the existence of other objective evidence relating to the event, *i.e.*, the conduct of the police. What if the person seized was unreasonable in his belief? How much weight should be given to such a belief and what standard should be used to evaluate it?

77. *See generally*, 3 LAFAVE, *supra* note 56, at 498, which notes the dilemma confronting a defense counsel—some degree of specificity may be required at the risk of possible waiver of the issue on appeal. Yet, the more specific the motion, the more the prosecution becomes educated to the theories and factual basis of the defense.

determining the legality of the arrest in a criminal case is usually to obtain the protections of the exclusionary rule. *Brown*, as noted, may help provide a method for that determination. A breakdown of the issues probably should include the following: (1) voluntariness of the statements—the "threshold requirement." It appears clear, as noted above, that the prosecution should bear the burden of proving voluntariness by at least the preponderance of the evidence; (2) whether proper *Miranda* warnings were given; (3) the "temporal proximity" of the arrest and the making of the statements; (4) the existence of relevant intervening circumstances; and (5) the purposefulness and flagrancy of the police misconduct, if any.

Initially, of course, it should be determined if an arrest occurred and if that arrest was legal. In the latter event, *Miranda* will be the key to admissibility of any subsequent statements.[78] If the arrest was illegal, the *Brown* analysis should be determinative.

There are, of course, dangers lurking in such an approach. It should be the *prosecution's* burden to prove by a preponderance of the evidence that, for example, a statement was voluntary, or that the conduct of the defendant was volitional.[79] But, *Fitzgerald*, and perhaps *McCutcheon*, present a dilemma to the defense. If defense counsel presents his case thoroughly, and loses, he will, without doubt, reduce dramatically the possibility of prevailing on appeal. If, however, he fails to present his case and adopts the stance that the burden should be on the prosecution, he may well find that if he loses the motion, on appeal findings may be inferred and the record reviewed in a light most favorable to the prosecution, granting all reasonable inferences that can be drawn from that evidence. The defense will be required to tailor its approach with care on a case-by-case basis, for resolution of the motion might well decide the case.

78. *See*, Dryden v. State, 535 P.2d 483 (Wyo. 1975); Richmond v. State, 554 P.2d 1217 (Wyo. 1976).
79. Regarding the burden of proof, *see generally* 3 LAFAVE, *supra* note 56, at 498, for a discussion of the distinction between the "burden to produce evidence" and the "burden of persuasion."

CONCLUSION

In summary, it appears that neither *Fitzgerald* nor *Dunaway* produced any noteworthy change in the *substantive* law of arrest as it existed in Wyoming. *Dunaway* merely clarified, or sharpened, what many already considered to be the law, and *Fitzgerald*, with the above noted exception, produced no dramatic change. *Fitzgerald's* greatest impact, however, will be procedural, as the case will affect pretrial tactics and strategy, particularly for the defense bar. The case could also have a negative effect on appellate review of constitutional issues. The end result is that a greater burden will be placed on the defense to present its case or bear the risk that upon review, the Wyoming Supreme Court will not independently seek to protect the constitutional rights of defendants.