Supreme Court of the United States

In the Matter of:

CARMINE VINCENT PALMIERI, Petitioner, vs. FLORIDA Respondent	Docket No. 131

Place Washington, D. C.

Date November 20, 1968

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

NA 8-2345

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1968

Carmine Vincent Palmieri,

Petitioner,

v. No. 131

Florida,

Respondent.

Washington, D. C.
Wednesday, November 20, 1968.

The above-entitled matter came on for argument at 11:45 a.m.

BEFORE:

EARL WARREN, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
ABE FORTAS, Associate Justice
THURGOOD MARSHALL, Associate Justice

APPEARANCES:

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P R O C E E D I N G S

MR. CHIEF JUSTICE WARREN: No. 131, Carmine Vincent Palmieri v. Florida.

Mr. Goldman?

ORAL ARGUMENT OF PHILIP GOLDMAN

ON BEHALF OF PETITIONER

MR. GOLDMAN: Mr. Chief Justice, may it please the Court:

This hearing is on a writ of certiori to the Supreme Court of Florida. By way of background, on February 6, 1965, at about 7:30 in the morning a small grocery store in Dade County, Florida, was robbed. One of the prosecuting witnesses indicated that they had about one to two minutes' time to observe the robbery.

About a month later on March 1, 1965, the petitioner, Carmine Vincent Palmieri, was arrested in his home at about 1:30 in the morning without a warrant. He was taken directly to the jail. He was not taken before a magistrate.

The next day on March 2, 1965, he was placed in a lineup at the jail without counsel where he was identified by Loy Diehl, the manager of the grocery store. Again, he had not been taken before a magistrate. At least one other lineup was held on March 8, 1965, some eight days later, at which time the petitioner was again identified by the son of the manager of the grocery store. Still he had not been taken before a magistrate.

For ten days the petitioner was held without being taken before a magistrate, without being arraigned and without benefit of counsel and not until petitioner had secured counsel and applied for petition for writ of habeus corpus, was he charged with armed robbery.

At the trial of this case the sole evidence used against him was this lineup evidence, this illegal lineup evidence of the two witnesses.

Q Is it your contention that he was arrested without probable cause?

A Your Honor, I don't think there is any doubt but what he was arrested without probable cause. That question was not presented before the Supreme Court of Florida. That question is not spelled out in the petition.

Q Does the record show what information the arresting officers had at the time he was arrested?

A Not specifically except that the only evidence that they used at the trial was illegal evidence that they gathered at the time.

Q That is not my question.

A No, sir, the record does not speak as to what they had.

Q I thought in reading briefs, but without combining them, that the record did show that he was arrested only after the victim of the holdup that identified his picture as the picture of the man who had held him up.

A Mr. Justice Stewart, if the Court please, this is an argument made by the respondent.

Q I am not talking about arguments.

A I say this is an argument advanced by them, but it doesn't reflect that. The record reflects on page 15 that they took some photographs after the arrest to the prosecuting witness and that he identified one of the photographs. Nowhere in the record does it say that the person who was identified was the petitioner, Carmine Vincent Palmieri.

As a matter of fact, if we are going to draw an inference from the silent record, the record does show that when the son was taken down, he couldn't identify him. The inference is that the photograph which was identified by the father is not that of the petitioner, if we are going to take an inference.

But the record is silent on that point.

The record reveals a reflection on the lineup, that the robber was described as a small person, 130 lbs., 5 foot 6. They made a lineup where there were no small people in the lineup except the petitioner. The prosecuting witness indicated that he picked out the smallest person in the lineup which, we say, goes to the dubious reliability of the lineup.

It is also in the record that the father and son told their story to the police together and he had only one to two minutes to observe them. The State states in its brief that the procedure used in the case was similar to the procedure in

Simmons v. U. S. I respectfully submit this isn't the case.

The Simmons Case involves the identification of a pre-trial photograph, not an illegal lineup. Despite the continued objections of petitioner's trial counsel the illegal lineup evidence was used against the petitioner. As a result, although this is important as a colloquy in the record, that shows that the judge would not allow the jury to hear the discussions as to the defects in the lineup, but nevertheless the jury returned a verdict of guilty and he was sentenced to 20 years in prison.

Q What would you say occurred in the lineup that offends the due process?

A No. 1, there was no counsel.

I don't want to get into the question of semantics with you, Mr. Justice Harlan, but I think the question of the steno decision of the Dennis Decision is that there will be no reversal, per se, of lineups without counsel which took place prior to that date. It doesn't cure the illegal lineup. It was still illegal having been had without counsel.

As I understand the case, if you take the lineup plus something else ---

Q What is the plus?

A The plus here is he has not been taken before a magistrate for ten days. He was held incommunicado while the case was made against him.

They didn't turn him loose until they had a case

against him.

Q Are you implying the McNabb Rule?

A I sure am, sir. You are a little ahead of me.

Q Is that crucial?

A I don't think it is absolutely necessary. I suggest to Mr. Justice Black that it fits, but it could be that you could use the plurality of the circumstances rule of the Bynam Case and take all the circumstances to bring about a reversal under the Fourth Amendment.

Q In conjunction with his being taken before the magistrate, when did the lineup occur?

A They occurred before he was ever taken before a magistrate.

Q What is the connection between the two? The lineup certainly doesn't make him look more like the villain.

A Mr. Justice Fortas, if he had been taken before a magistrate, in my judgment he would have been turned loose, because if we presume the magistrate would do his duty, there was no probable cause. In other words, all the evidence used at the trial came later.

No. 2, he would have had an opportunity to secure counsel. That is one of the purposes of preliminary hearing. He would have had the opportunity to counsel.

Q It sounds to me as if you are really relying on the absence of counsel despite the fact that it was before ---

A I am relying on the whole picture. Primarily on the failure to take him before the magistrate within that time, which shocked me.

My practice is essentially civil with a corporate firm. I was shocked to find that this sort of thing still goes on. As I dove into it, I was even more shocked to find the extent to which it goes on.

Many states have these statutes and most of the states apparently have ignored the statutes, as I have cited the cases in footnotes in the brief which I think is the case-in-point.

MR. CHIEF JUSTICE WARREN: We will recess now.

(Whereupon, at 12 o'clock noon the hearing recessed, to reconvene at 12:30 p.m. on the same day.)

AFTERNOON SESSION

12:30 p.m.

MR. CHIEF JUSTICE WARREN: Mr. Goldman, you may continue your argument.

ORAL ARGUMENT OF PHILIP GOLDMAN, ESQ.

ON BEHALF OF PETITIONER (cont'd)

MR. GOLDMAN: Mr. Chief Justice and may it please the Court, I believe we recessed at the point where the defendant had been convicted by the trial court. Appeal was taken to the First District Court of Appeal, which would in Florida be the final appellate court.

That court's opinion, after reviewing the sequence of events, showed on the face of it that it was upset with the wrongs done the petitioner.

Without attempting to be facetious in any manner, that court concluded that under the doctrine, they had previously approved matters where men had not been taken before a magistrate timely while evidence had been gathered against them. They were firm on that basis.

They had some reservations and under the Florida constitution, Article 5, Section 4, they certified the question to the Supreme Court of Florida on the question of great public interest.

The Supreme Court of Florida affirmed again and they answered the question that had been propounded to them

and this court also reviewed the sequence of events and concluded that the petitioner had been wronged.

The Supreme Court of Florida went on the basis that it was harmless error that he had not been harmed or had not been prejudiced and I really do not understand how this result could be reached in the face of the fact that all of the evidence adduced at the trial was evidence that was developed during the unlawful detention.

The court also noted that the petitioner had not requested to be taken before a magistrate and based its decision in part on that. Actually the record on this point is silent and, as this court has stated in the Carnley decision, waiver cannot be inferred, is not permissive from a silent record, and the record here is silent.

Also, in the Carnley case the court pointed out with respect to assistance of counsel, the assistance of counsel does not turn on request, and I respectfully submit that by analogy, the right to a hearing before a magistrate should not turn upon a request.

Actually in its brief before this court the state continues to rely on the fact of a lack of prejudicial error and, as I submitted before, if this man had been taken before a magistrate as required by law under Section 901.23 of the Florida statute or if it became a constitutional mandate, he would have had to be turned loose because all of

the evidence used against him was gathered after that took place.

The only other point is the point suggested by Mr. Justice Stewart that perhaps there had been misidentification. As I pointed out, in this record there was no identification of a photograph of this particular individual.

Q It is not part of your submission, however, as I understand it, that this arrest was made without any proper cause, is it?

A It is not a part, in other words, we are not using the case.

Q You do not claim this was an illegal arrest, do you?

A That's right. Our major point is that the McNabb-Mallory rule should be applied to state court proceedings as a constitutional mandate.

As this court knows, the McNabb-Mallory rule stems from a decision of this court which holds that if a defendant is unlawfully detained in violation of rule 5(a) under criminal rules of procedure, evidence gathered during that time cannot be used and conviction based upon such evidence will be reversed.

Similar provisions in the form of legislation requiring that an arrested person being taken before a magistrate exist in practically every state of the union. I have a

collection of footnotes of those in our brief. Interestingly enough, as I pointed out in my brief, many, many states ignore this as the Florida case does. As a matter of fact, I am sure the Attorney General can tell us since this decision, the Supreme Court of Florida has in a number of cases continued to ignore the provisions of 901.23.

Although the McNabb-Mallory rule has been a rule applicable to Federal court proceedings, I think it is an interesting coincidence in the case of Milton versus Cochran, which is a Supreme Court of Florida case, the Supreme Court recited that if it didn't start to do something about stopping these failures to take men before a magistrate, this court or some other Federal court would adopt the McNabb-Mallory rule and, without attempting to be facetious, I respectfully suggest the time has come to make a profit out of the Supreme Court of Florida because the McNabb-Mallory rule is an essential part of due process.

In the McNabb case Mr. Justice Frankfurter makes an eloquent exposition as to the rationale of that case the public policy behind the rule.

Certainly due process requires that the police must with reasonable promptness show a legal cause for retaining an arrested person. This is an important safeguard not only to constricting the innocent but toward actually constricting the guilty in an enlightened society.

This rationale of these cases apply certainly to state court proceedings. I think it is also interesting that in both McNabb and Mallory decisions this court did not reject the constitutional concept. It says it wasn't `getting to it, in other words, it didn't reach the constitutional question and decided it was a question of legislative intent and construction and interpretation of rule 5(a).

Q Mr. Coldman, even if the court should accept completely your submission that the McNabb-Mallory rule should become a constitutional rule, that would not automatically win your case for you, would it, because it is necessary to go one step beyond that? McNabb and Mallory themselves involved admission of statements made by a man in custody before and who was not brought before a magistrate within a reasonable time. Are there any Federal cases?

A The Krapholz case cited is in Second District Court, which this court denied search and seizure. This is an argument made by the state, too. It is true that both McNabb and Mallory were confession cases but in fairness, because I am an advocate, but in attempting to be objective in reading it, the rationale of those decisions is unlawful detention. In other words, this court has never held that confession per se is illegal. It is only confession gathered under certain circumstances which is illegal and the circumstance of McNabb-Mallory is violation of rule 5(a).

Certainly there is nothing in either of those decisions that indicates that if the tainting was something other than a confession, that a different result would be reached, but there is that difference in the cases, yes, your Honor.

Now I think, as this court knows, the purpose of a preliminary hearing is to weed out groundless or unsupported charges of grave offenses and to relieve an accused of the degradation and expense of a criminal trial.

Certainly a quick determination of probable cause is a necessity in any scheme of due process. A preliminary hearing also serves another purpose. It gives an opportunity for bail which is, of course, a constitutional right. It gives an opportunity for counsel being appointed or being retained which is also a constitutional right.

The fact that so many of our states, practically all of our states have enacted legislation in effect adopting rule 5(a) as part of their own statutes is indicative of the extent to which this is engrained in our concept of due process of law.

We respectfully submit that under decisions of this court certainly the due process provisions require that a state afford a defendant due process of law, not only during the period of the formal trial but throughout his entire accusatory period. I think that was the Escobedo case.

We are suggesting it is a part of that due process which requires that a man be taken before a magistrate within a reasonable period of time. In some cases you might have an exploration of outer orbits of what constitutes a reasonable period of time.

I submit you don't have to decide that now because ten days is certainly an unreasonable period of time. The record here reflects when counsel asked the police officer, he said, "Are you aware of the statute requiring you to take him before a magistrate?" And he said, "Yes, sir." He said, "Why didn't you do it?" He said, "Well, it was 2:30 in the morning."

The record is silent as to why he didn't do it the next day or the next day or the next day after that for ten days when they still didn't do it.

This idea of a constitutional requirement of the McNabb-Mallory rule is not as unique as it might sound at first blush. This court has in many instances in cases we cited in our brief reversed state court convictions where the persons were unlawfully held incommunicado without advice of counsel or friend.

That by analogy is also appropriate here. This man was actually held incommunicado for ten days. The case of Watts versus Indiana, which Mr. Justice Marshall will recognize, although this court did not expressly apply the

McNabb-Mallory rule, it came very close to it in reversing the state court conviction and one of the grounds cited was that a preliminary hearing as required by laws of Indiana had not been given.

We respectfully submit that this should be a part of due process. It will probably be urged that the application of the McNabb-Mallory rulein state court proceedings is going to hamper effective law enforcement. That seems to be the present cry these days.

I respectfully submit that nothing could be further from the truth. As this court knows, the Federal Bureau of Investigation has had to live with the McNabb-Mallory rule for over 15 years and they still remain one of the most effective law enforcement organizations in this country.

Actually with respect to the lineups, the language of this court in the Wade case is singularly appropriate here. In that case the court points out the vagaries of a witness identification. Here there was from one to two minutes an opportunity to observe.

The case points out the fact that criminal law history is rife with instances of mistaken identification and difficulty with identifying strangers.

I think the part that is singularly applicable here is the part where this court points out that it is a matter of common experience that once a person has made up his mind,

nothing can change it, so identification takes place actually at pre-trial rather than trial.

We respectfully submit that under this case the McNabb-Mallory case should apply and I think it fits. In fairness to this client, I wish to urge that if this court in its wisdom does not think the McNabb-Mallory rule should be applied, then I suggest the totality of circumstance rule which this court has applied in other instances requires a reversal under mandate of the 14th amendment to the constitution.

Certainly the facts in this case, the taking of the man from his home at night, 1:30 in the morning, over a month after the crime was committed, subjecting him to two lineups over a ten-day period without counsel, without benefit of a magistrate, all of these facts together constitute in my judgment a monstrous affront to the dignity of man and this conviction should be reversed.

Q What was the conviction for?

A Armed robbery conviction, 20 years in prison.

That completes my submission.

MR. CHIEFJUSTICE WARREN: Thank you. Mr. Mendelow.

ORAL ARGUMENT OF HAROLD MENDELOW, ESQ.

ON BEHALF OF RESPONDENT

MR. MENDELOW: Mr. Chief Justice and may it please the court, I wish to apologize to Mr. Justice Stewart if at

any time in reading the factual declaration by the state in its brief he has come to the conclusion that the State of Florida meant to say that the photographs shown to the victim in this case were identified by him as the petitioner. If we did say that, we apologize.

Q I think I understand you to say on page 10 of your brief.

A Yes, sir, we did say that and we wish to apologize to the court at this time for that statement.

Q What is the fact?

A The fact is that he did pick out a picture and that is the extent of the record, your Honor, but we feel and in our argument we have so stated that the--

Q He picked out a picture?

A A picture but it does not designate that he picked out a picture of the petitioner in this matter.

Q What you are telling us now is that the picture he picked out was someone other?

A We do not know, sir. The record is not clear.

Q The record simply doesn't show, am I right in my understanding, that at no time has there been any claim that the arrest was illegal?

A That is correct, Mr. Justice Stewart, and at no time was it raised on direct appeal and at no time was it raised on the certified question culminating in the petition

for certiorari.

Q For that reason there was no canvassing of the issues as to what probable cause there might have been with respect to the knowledge of the arresting officer?

A Other than what is reflected in the record per se and we submit that from this record it can be gleaned that there was sufficient probable cause to make an arrest.

Q Mr. Mendelow, what was he charged with when he was arrested?

A The record does not reflect any charge but we would assume--

Q Is there anything in the record at any time that shows any charge that was ever filed during the whole ten days?

A Yes, sir, there is, your Honor.

Q Where is it?

A By reasonable inference.

Q So you held him for ten days without any charge at all?

A We would assume he was arrested and booked for a charge but it does not reflect in the record. It does reflect in the record that he was arrested.

Q Just on general principles?

A No, sir, I would assume not.

Q Don't you think that to hold a man for ten days

requires the state to show what he was being held for?

A I would think it would, your Honor.

Q And in this case it does not show it?

A Not specifically per se in the record.

Q What in the record helps you on this point?

A The fact that he was arrested and 25 hours after his arrest a lineup was held and the victim of the particular robbery that he was arrested for came in and picked him out of a six-man lineup.

Q Did he pick him out or did he pick the shortest man out who was there?

A Mr. Justice Marshall, there were two lineups held in this case. The first lineup was the six-man lineup held 25 hours after arrest of the petitioner. There is nothing in this record that depicts exactly how many short men or tall men or fat men or skinny men were in this lineup. This record is completely void of any reference to the description of any of the particular six men in this particular lineup.

There was a subsequent lineup held six days later in which the son of the victim appeared at police headquarters and picked the petitioner out of a lineup consisting of five men of which the record reflects that he picked out the shortest man in the lineup.

The record also does not reflect the various sizes between the men in the lineup, just that he picked out the

shortest. He picked out a man 5 foot 6. There could have been a man 5 foot 6-1/2, 5 foot 7 and 5 foot 8 in the lineup, but the record does not reflect that, sir.

Q Was he charged then?

A The ultimate charge was placed against him ten days after his initial arrest.

Q How many days after he was identified? That would be about six?

A Eight days, your Honor. A petition for writ of habeas corpus was filed. It does not reflect exactly when it was filed but sometime during this ten-day period a petition for writ of habeas corpus was filed by petitioner through counsel at which time subsequent to that and at the tenth day the information was filed by the state.

Q Is it a fact that there has been no issue of illegal arrest in this case?

A That is correct. There still isn't as far as the State of Florida is concerned. We feel that the record reflects sufficient probable cause for arrest and initial detention.

Q Even if the record doesn't, there has been no contention that there was no cause for arrest?

A That is correct.

Q When was the petition for habeas corpus filed with respect to that second lineup?

A The record does not reflect that, your Honor. I don't know. It was somewhere in between.

Q I suppose you could tell me what date the lineup was on and what date the petition was filed, couldn't you?

A No, because it has not been made an exhibit or part of the exhibits in this file. The initial lineup was held on March 2nd. Six days subsequent to that the second lineup was held. On March 10 the information was filed. Sometime during that period a petition for writ of habeas corpus was filed by petitioner's counsel and that is the only thing that I can safely say that the record reflects.

I wish to also take issue with one fact that has been insisted upon by petitioner. That is that the sole evidence, the sole evidence that petitioner's conviction was based upon was the identification that occurred at the lineup.

The record is replete that an in-court identification was made by both the victim, Loy Diehl, and the witness, Loy Diehl, Jr., his son, from activity or incident or the crime, the actual robbery that occurred sometime previous to his arrest.

The testimony concerning the lineup was merely corroboration to that identification. Further, this is fortified by the fact that in both instances when the

identification was made by the victim and his son, they noticed the difference in the petitioner's appearance from the time they saw him at the U-Tote'm Grocery Store that was robbed and his appearance in court and that also related back to the incident and not to the lineup.

They noticed in both cases that he was heavier. He appeared heavier.

Q How did the fact of the lineup get in the evidence involved?

A The first witness called by the state was the victim, Loy Diehl. He testified as to the events that occurred at the robbery. He also, being a former military policeman, testified that when the police arrived at the U-Tote'm Store after the robbery he gave a detailed, and I mean detailed, description of the robber describing his height, weight, even so far as describing his complexion which he described as pimply and acne complexion to the police officers.

This identification was then made in court based on that description and based upon seeing the petitioner in court.

Q What I am trying to get at, were the facts of the lineup brought out on direct examination or on cross examination?

A Initially they were brought out on direct examination and then they were brought out on cross

examination but they were brought out, we submit, on direct examination merely for corroboration and not for the primary identification of the petitioner in this manner.

Q Is there anything else that occurred during the time of the detention which I take it was agreed was unlawful under Florida law? Was there anything else except for the lineup that occurred according to the record? We have only this appendix which is not the complete transcript.

A I will submit, Mr. Justice Fortas, that nothing other than two lineups were held.

Q Two lineups?

A That is correct.

Q Is there any evidence in this record of prolonged questioning?

A There is no evidence in the record, in the record in fact and the appendix which is before the court, that indicates any questioning in any way, manner or form, nor was petitioner's conviction based upon any inculpatory statement or exculpatory statements or any admission or any statement whatsoever made by him while in custody.

Q That is what is sort of baffling about this case, that is to say, that we have before us a record showing that a man was kept in jail for ten days in apparent violation of a Florida statute which requires him to be taken before the magistrate and the courts below seem to agree that it was

in violation of the Florida statute. But the record doesn't show anything that happened except the two lineups.

A That is correct. I would like to address myself a little later in my argument concerning the violation or the technical violation of Florida statute 901.23.

Q Am I correct or incorrect in recalling that the court below seems to agree that it is a violation of the Florida statute but says that, number one, it indicates that maybe the remedy is not to set aside the conviction; number two, that it is not prejudicial?

A Basically you are correct, Mr. Justice Fortas. I will try to refine that a little bit in the course of my argument, if I may.

Q Thank you.

A Petitioner asks this court to extend the McNabb-Mallory rule and make it applicable to the states and also make it applicable to confessions. We submit that this would be a double extension.

Q You mean make it applicable to a lineup.

A Excuse me. Make it applicable to a lineup. I am sorry. We submit that this would be a double extension of a rule that was initially promulgated by Congress as a Federal rule of criminal procedure and treated by this court in its supervisory powers over the Federal courts and criminal procedure requirements of Federal prosecutions. The rule as

effectuated by the cases of McNabb versus United States and Mallory versus United States make it clear that its prime purpose was to alleviate the evils arising out of secret interrogations, secret interrogation. Nowhere in any of the cases that I have been able to research decided by this court has the rule been used other than in confession cases.

Nowhere have I been able to determine that this rule has ever been made applicable to the states. In fact, this court many times and in many cases has stated that this is a rule of Federal criminal procedures and it is not applicable to the states.

Further, we say that the void, which there is a void, that is created by not making this rule applicable to the states has been filled, the breach has been filled by decisions of this court whereby the constitutional rights of the accused have been looked after and made applicable to state prosecutions and has protected the accused in every stage that would be applicable to this case, and we cite to the court starting with Ashcraft versus Tennessee which this court stated that the detention in a confession case is inherently dangerous in a confession case.

Then we have the Mapp case which protects the accused in illegal search and seizure cases, even if the illegal search and seizure is during detention. We have the Wong Sun case where if there is primary illegality and

taint has not been purged, that any evidence secured as a result of that primary illegality is excludable.

We have the Escobedo case, the Massiah case, the Miranda case, which certainly afford the accused the protections of the 5th and 6th Amendments to the United States Constitution in confession cases.

We have Wade and Gilbert and Stovall that are particularly applicable to this case where the only evidence secured is that of identification by lineup. And both petitioner and respondent do agree that the right to counsel in lineups is here today and it has been here since June 12, 1967, but that ruling in the Stovall decision makes it only prospective and not retroactive.

Q Mr. Mendelow, do you know of a case where the Supreme Court of Florida has said that failure to comply with the statute requiring that an accused be taken before a magistrate is ground for reversalof a criminal case?

A No case, to my knowledge, has ever been decided.

Q What good is the statute if it is not followed?

A Your Honor, the Supreme Court of Florida has consistently held that a preliminary hearing is not a critical stage in a criminal prosecution case, and may I explain why.

The Florida criminal procedure statute which

requires an accused who is arrested without a warrant to be taken before a committing magistrate without unnecessary delay, that preliminary hearing resulting from that statute would only be a preliminary hearing according to our statute to decide probable cause of the charges.

Q No question about appointing counsel or anything?

A I assume that is what the magistrate would do when accused is presented before him. I am only interpreting the literal expression of the statute, but I would assume a magistrate who has an accused brought before him would advise him of his right to bail, his right to counsel, and his right that anything he might say would be used against him.

Q I don't know the answer, but Mr. Goldman said that this man was held incommunicado.

A I don't believe the record reflects that. He was held pursuant to lawful arrest and that is all I can say to this court and that is all that I feel the record reflects.

Q On what charge was he booked? Was it for investigation?

A Mr. Justice Marshall asked me that question a little while ago. I am afraid I didn't have the answer, Mr. Justice Fortas. I can only assume from the record he was booked for the crime for which he was ultimately tried.

Q You don't know whether that is so or not?

A Well, I do not know, but the only thing I can infer from the record is that 25 hours after his arrest he was placed in a lineup and the victim of this particular robbery that he was arrested for was called down to identify someone.

Q You also said in response to Justice Marshall's question, as I understand it, that there are no cases under this Florida statute?

A Yes, there are.

Q What is the maximum period of detention? How long can a person be held without being charged or taken before a magistrate? Is there any indication as to that in the Florida case law?

A I just do not have the answer for you, Mr. Justice Fortas. All I know is that under most every circumstance this particular statute has not been held to be a critical part. The circumstance where it would be a critical part in my understanding is where at a preliminary hearing the accused has pled guilty and then had withdrawn his plea of guilty prior to trial and that evidence was sought to be introduced against him, the guilty plea at the preliminary hearing, and that the Florida Supreme Court has said this was critical.

But as far as the time or amount of time after

arrest and before arraignment, to my knowledge or at least at this time I cannot cite to you a case which would say how much time would be allowable.

Q A while ago you indicated that the issue of illegal arrest had not been raised. I gather it really was raised before the trial judge both in the oral motion and written motion?

A Yes, it was before the trial court.

Q And it was denied. Where did that occur?

A On direct appeal.

Q I don't find a mention of it in the District Court of Appeals' opinion.

A That is correct, because it wasn't presented.

Q Was that point raised anywhere in those courts?

A Not to my knowledge. The point raised in the District Court was the detention and sufficiency and the certified questioning to the Florida Supreme Court was merely on the detention aspect of the case.

Q In Florida, if at a preliminary hearing it was found there was no probable cause to hold a person over for trial, does that prove he was illegally arrested?

A No, because there are many, many circumstances why a magistrate would say there would be no probable cause. However, I would like to discuss with the court the factor that even if petitioner was brought before a committing

magistrate and he was released by this committing magistrate, under the Florida procedure and under procedure approved by this court in Beck versus Washington, the assistant or the state attorney's office or state prosecuting official for Florida would still bring formal charges against the petitioner.

I don't know what would happen at the preliminary hearing but suppose additional evidence was brought in. Even on the same evidence I would make that statement.

Q But they couldn't be arrested?

A They could be arrested. We could arrest them, yes, sir, on capias issued by the state attorney's office after he had been discharged by the committing magistrate.

Further, counsel for petitioner has stated that there was no probable cause and surely the committing magistrate would have released the petitioner. I say, and this is a point that I think is very important under a due process argument, let us suppose that after the petitioner was arrested, he was brought before the committing magistrate and this victim who had given such a clear and precise description to the officers in the case had appeared at the preliminary hearing and had pointed to the petitioner and said, "Yes, this is the man who robbed me."

We ask the court, which would be moresusceptible to suggestive identification, that one-on-one confrontation

before the magistrate or the procedure that was used in the instant case where the victim had to point the particular petitioner out of a six-man lineup.

We feel that due process was not violated here by requiring the petitioner to stand in a six-man linup 25 hours after his arrest.

Q Wouldn't this language in the Opinion of the Court of Appeals indicate that they did challenge the probable cause for arrest? It says:

"It is urged that if the directions of the statute had been followed, the magistrate would have been required to release the defendant for lack of probable cause to retain defendant in jail. It is pointed out that the evidence against the defendant was procured at the jail subsequent to the time at which appellant would have been released if he had been taken before a magistrate."

Wouldn't that indicate that it was raised in that court?

A It was raised in that court the same way that it was raised here, your Honor, and in the Supreme Court of Florida on the basis that speculatively the petitioner would have been released. It is pure speculation and nothing more.

Q I understood you to say that it was not raised except in the trial court.

A The actual lawfulness or illegality of the arrest

per se was not raised except in the trial court.

We submit, respectfully so, that the petitioner was not prejudiced in any way, manner or form by his not being taken before a committing magistrate immediately after his arrest. One, because the probable cause necessary for his arrest still existed and he could have been charged and rearrested by the state prosecuting officials, and, number two, a prosecution could have been forthcoming based on that information, and, number three, his conviction, and this perhaps is the most important aspect of the case, his conviction was not based on the lineup identification solely.

His conviction was based on the in-court identification independent of any lineup identification that was subsequently made after his arrest and that is clear from the record.

Therefore, if his prosecution was not dependent upon the lineup and his conviction was not dependent on the lineup, how can we say that the petitioner was prejudiced by not being brought before a committing magistrate?

There is just no cause or connection between the prosecution or the conviction and his not being brought before a committing magistrate in the opinion of the respondent in this matter.

Therefore, we respectfully submit that the McNabb-Mallory rule to be extended to the states under this factual

circumstance and situation would be a double extension and not necessarily called for by the factual situation in this case.

Further, we respectfully submit that the petitioner's conviction was not in any way based upon his not being brought before a committing magistrate. We respectfully ask this court to affirm the decision of the Supreme Court of the State of Florida in this cause.

Thank you very much.

MR. CHIEF JUSTICE WARREN: Mr. Goldman.

MR. GOLDMAN: I have no further argument.

MR. CHIEF JUSTICE WARREN: Mr. Goldman, before we pass to the next case, I should like to express the appreciation of the court to you for your diligence in representing this indigent defendant. We consider that a real public service and we are always pleased to know that lawyers are willing to undertake that.

Mr. Mendelow, we appreciate also the fair and diligent manner in which you have represented the interest of your state.

(Whereupon, at 1:15 p.m. the argument in the above entitled matter was concluded.)

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