In the

Supreme Court of the United States

GERALD SHADWICK,

Appellant,

v.

CITY OF TAMPA,

Appellee.

No. 71-5445

Washington, D. C.
April 10, 1972

Pages 1 thru 55

HOOVER REPORTING COMPANY, INC.
Official Reporters
Washington, D. C.
546-6666

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Washington, D. C.,

Monday, April 10, 1972.

The above-entitled matter came on for argument at 10:54 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

DANIEL A. REZNECK, ESQ., Arnold & Porter, 1229 Nineteenth Street, N. W., Washington, D. C. 20036; for the Appellant.

GERALD H. BEE, JR., ESQ., Assistant City Attorney, 725 East Kennedy Boulevard, Tampa, Florida 33602; for the Appellee.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments next in No. 71-5445, Shadwick against City of Tampa.

Mr. Rezneck.

ORAL ARGUMENT OF DANIEL A. REZNECK, ESQ.,

ON BEHALF OF THE APPELLANT

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

This is an appeal from a decision of the Supreme Court of Florida. The court below upheld the constitutionality of certain Florida statutes which authorize clerks of the municipal court of the City of Tampa to issue arrest warrants for persons who are accused of violations of municipal ordinances. It raises the issue --

Q Mr. Rezneck, let me know at the start, has Mr. Shadwick ever been tried and convicted?

MR. REZNECK: No, sir.

Q Well, do we have a final judgment here, then?

MR. REZNECK: I believe that you do. In the first place, I think that counsel for the city, as I understand it, at page 2 of his brief, does characterize this as a final judgment of the Supreme Court of Florida. I think that it is a final judgment under State law, but --

Q Is it a final judgment under federal statute?

MR. REZNECK: I believe that it is. This was

commenced as an independent proceeding by way of common-law certiorari in the Circuit Court of Hillsborough County, which is a court of general jurisdiction, to review the decision of the Municipal Court of Tampa, refusing to quash the warrant in this case. And it was -- the writ of certiorari was denied and that was affirmed by the District Court of Appeals and by the Florida Supreme Court, so that this common-law certiorari proceeding, which is an independent and inseparable proceeding under Florida law, is at an end. And I think that that does make this final for this Court's purposes, as well.

In other words, it's not a part of the pending criminal proceeding.

I would, in that connection, Your Honor, refer you to this Court's decision in Camara v. Municipal Court, the case involving administrative searches in this Court, which involved a writ of prohibition in advance of a trial for violation of a municipal ordinance; and the case came all the way to this Court on the writ of porhibition without any factual record or without any trial of the issue; and it was decided by this Court and thereby deemed final.

So that I do think that under the test this Court has laid down that you do have a final judgment under the Judicial Code.

Q Was that passed upon specifically in Camara, Mr. Resneck?

MR. REZNECK: That particular issue?

Q Yes.

MR. REZNECK: I do not believe that it was raised and that the issue was litigated as to whether it was final judgment or not; but since that, I suppose, would be deemed a jurisdictional matter for this Court, I think the fact that this Court went on to decide the case does decide the jurisdictional issue, at least by implication.

The appellant here was arrested in March of 1969 on a warrant which charged him with violation of a Tampa ordinance: careless driving of a motor vehicle while impaired by alcohol or a drug. This warrant was applied for by a police officer of the City of Tampa and it was issued by a deputy clerk of the City of Tampa, who had been designated as a Clerk of the Municipal Court.

The affidavit and the warrant appear at pages 6 and 7 of the Joint Appendix here.

This offense is triable in the Tampa Municipal Court and it carries a penalty of not less than five days nor more than six months in jail, or a fine of not less than $250 or more than $500, or both.

As I indicated, there was a motion to quash the arrest warrant in the Municipal Court, which was denied, and then the common-law certiorari proceeding was brought in the Circuit Court; it was denied there; affirmed by the Circuit

Court of Appeals and by the Florida Supreme Court.

The Florida Supreme Court opinion is at pages 41 to 43 of the Appendix, and the Florida Supreme Court held that clerks and deputy clerks of the Municipal Court are authorized under Florida law to issue arrest warrants, and it further held that such clerks are neutral and detached magistrates under the Fourth and Fourteenth Amendments, and I am quoting, "by virtue of the Florida Statutes fixing their powers and duties to issue arrest warrants."

Q Tell me, Mr. Rezneck, are these clerks permitted sometimes to substitute for the judge, as an acting judge in the trials of --

MR. REZNECK: No, I don't believe so. All trial jurisdiction is lodged in the Municipal Court judges.

Q Only in the judges?

MR. REZNECK: Yes.

Q Of course, I know in my own State the local police magistrates, clerks, could, by statute, exercise judicial powers of the police judges in certain instances, when the police judge himself was absent; but that's not so in Florida?

MR. REZNECK: No, as I understand the Florida laws, the only judicial function which is provided to the clerk is the issuance of the arrest warrants.. For example, he does not even have the authority to issue a search warrant. That

is confided solely to the Municipal Court judges and of course to other judges of the State of Florida; but it is --

Q That's by virtue of the limitation that the Florida Legislature imposed, is it not?

MR. REZNECK: Yes. That's correct.

Q In other words, they gave a limited quasi-judicial power to the clerk?

MR. REZNECK: Yes, that is presicely right.

Q How is that very much different from what's done in the federal system?

MR. REZNECK: Well, I think it is very much different because the arrest warrant powers are lodged in only -- first of all, it must be lodged in a judicial officer in the federal system, and that means either a federal judge or a United States magistrate. Those are the only officers who constitute judicial officers for purposes of executing processes in the federal system.

Q How about commissioners, when we had commissioner

MR. REZNECK: Well, the commissioners were judicial officers at that time. They operated under the --

Q Was there a time when the United States Commissioners were not required to be lawyers?

MR. REZNECK: They were not required to be lawyers until the United States Magistrates Act was passed in 1968.

Q So that until 1968, would you say that the postur

of a United States Commissioner was very different from that of the clerk exercising these functions in this case?

MR. REZNECK: Yes, I would say that it was, because he was clearly a judicial officer. He was responsible solely to the courts, he had a specified term of office, and in that sense he had a guaranteed tenure. It is true that some of them were not lawyers, but that is only part of our argument here. We do not rest this case at all on --

Q Well, to whom is the clerk of the court responsible, Mr. Rezneck?

MR. REZNECK: Well, I think that it is not at all clear from the Florida statutory structure, you have a kind of mixed situation here. He is actually a deputy city clerk, and he is appointed by the city clerk who is the administrative officer; he has membership in the city civil service, and in that sense he really is an administrator or an executive officer. He is designated by the city clerk to work in the Municipal Court as a deputy Municipal Court clerk. In that sense he is responsible or answerable, I suppose, to the Municipal Court judges in his duties, but he also is responsible to the city clerk, to whom he is a deputy.

So that you do not have, it seems to me, a clear chain of command here, such as you do in the U. S. Magistrates system, and as you did under the U. S. Commissioner system of responsibility by the officer solely to a judicial authority.

Q You don't think this clerk is responsible solely to judicial authority when he is performing quasi-judicial duties?

MR. REZNECK: Well, what I meant was that in terms of his job, the appointive power, his responsibilities also run to the clerk who appointed him. I have no doubt that his decisions on an arrest warrant could be reviewed, and in fact an effort was sought to review them in this proceeding before the municipal judge, after the fact, after the warrant had been issued.

But what we are concerned about, I think, are his status and his independence in exercising the judgment to issue the warrant in the first instance.

In other words, I don't think it's sufficient that his decisions can be reviewed later on by way of quashing the warrant before a municipal court judge. I don't think that that's what this Court contemplated when it spoke of an independent judicial officer or a neutral and detached magistrate issuing the warrant in the first instance.

Q Well, is there anything that says he's not neutral?

MR. REZNECK: Is there anything that says he's not neutral? No. And I don't think that --

Q Is there anything that says he's not detached? He's certainly not connected with the police deepartment?

MR. REZNECK: No, we're not alleging that he's connected with the police department. But we do not think that this case ought to turn on an inquiry into whether a particular clerk or deputy clerk is impartial or neutral or detached or capable as an individual, of having those qualities. I think that the problem about the Florida procedure here is not personal, really, but it's institutional in the sense that the clerk has not been given the kind of status, independence, there are no qualifications for the office which would allow him to exercise these powers in the manner contemplated by this Court.

Q Well, I doubt that the Florida statute has any limitation on the ability of a magistrate.

MR. REZNECK: Well, the magistrate is clearly a judicial officer.

Q But they don't say what he has to be.

MR. REZNECK: Well --

Q They don't say he has to be detached, does it?

MR. REZNECK: No, but I think that the assumption of detachment or the inference --

Q Well, what does the statute say about detachment?

MR. REZNECK: It doesn't deal with the point of detachment in those words, but I --

Q If it did, it would be different from any State I've ever heard of.

MR. REZNECK: No, I think the inference of detachment entirely arises from the fact that he is clearly a judicial officer. In other words, he has a guaranteed tenure in office, for example, a municipal court judge has a four-year term in office. He is a judge. He does perform judicial functions.

Q Well, how long does the clerk have?

MR. REZNECK: Pardon me?

Q How long does the clerk have?

MR. REZNECK: The clerk is under -- is a civil service employee. As a municipal court clerk in terms of exercising this arrest warrant function he does not have a specified tenure in office. In other words, he is a civil service employee who has been given this particular function to exercise.

Q Well, I still don't see the tie-in between him acting as a magistrate and acting as a clerk.

MR. REZNECK: Well, his primary duties are clerical duties, and they are the usual duties that one would associate with a clerical job. He has been given this one particular judicial function.

Q Well, suppose Florida says that the deputy clerk of any county may also act as magistrate?

MR. REZNECK: In effect that's what Florida has done here. That's what the Florida Supreme Court did. Giving him

the title of magistrate without giving him any of the status of a judge, without changing his essential status from that of a clerical officer --

Q You keep saying "the status of a judge", the magistrates are not judges.

MR. REZNECK: They do not have the name of judges, they do not have the title of judges, but they --

Q And they don't have the authority of judges.

MR. REZNECK: Well, I think that they exercise judicial authority, they have a guaranteed tenure in office, there are limitations as to the power of removal over them --

Q Is that true in Florida?

MR. REZNECK: Yes, the magistrates, such as the municipal court judges, have a four-year term. They are elected and have a four-year term; justices of the peace --

Q But no qualifications required?

MR. REZNECK: In Tampa they have to be members of the bar.

Q Magistrates?

MR. REZNECK: Yes. Municipal court judges.

Q That's in advance.

Q Does Florida law require that all magistrates with authority to issue warrants must be lawyers?

MR. REZNECK: No. Under a new constitution which is going to go in, which has been approved in Florida and will

become effective several years from now, all judges with the exception of county judges, in counties with small population, below a specified limit, will have to be members of the bar. That's --

Q Who issues warrants in felony cases in Florida? Or does it vary from jurisdiction to jurisdiction?

MR. REZNECK: Under the Florida rules of criminal procedure, as I understand them, either a felony or a misdemeanor warrant may be executed, may be issued by one who is defined as a committing magistrate under the rules, and committing magistrates include all the judges and magistrates of the courts of Florida, down to and including municipal court judges, and the justices of the peace.

However, they do not include court clerks for this purpose, so you have rather a paradoxical situation here. Therefore a felony or for a misdemeanor warrant,which is a far more serious offense, there would have to be an independent judicial determination by a judge or magistrate. In other words, by an officer in whom the Florida Constitution vests judicial power, but only for a violation of a municipal ordinance is a deputy clerk or a clerk of the court, who is not a judicial officer and does not have judicial power under the Florida Constitution, only for that kind of warrant can he act to issue it, and as I said he could not do it for a search warrant either.

So it seems to me that you have a rather strange and anomalous situation here where, for more serious offenses and for search warrants, Florida clearly does carry out the purpose of this Court's decision and provides for an independent judicial determination before any such warrant should issue. But for municipal ordinances they part from it and in this one instance they do authorize the clerk to do it.

Q Mr. Rezneck, for Fourth Amendment purposes, if a police officer had looked over the facts here and thought that there was probable cause to arrest and went out and arrested without a warrant at all, whatever the situation might be under Florida law, what about the Fourth Amendment?

MR. REZNECK: Well, I think that would involve the question, what --

Q Let's both assume for the moment that there was clearly probable cause.

MR. REZNECK: Yes. He could not do that under Florida law.

Q I'm not -- how about the Fourth Amendment?

MR. REZNECK: Yes. Well, I think that would require the decision by this Court, which I don't believe has been made as to what the probable cause requirements of the Fourth Amendment are with respect to municipal ordinances. I think at common law it would be that, where you're dealing with an offense of that character, that the arrest power of an officer

without a warrant would be limited to a situation where it was committed in his presence.

Q Well, that was at common law, what about the general proposition of the police being able to arrest without a warrant, when there is probable cause?

MR. REZNECK: I think that there is legislative authority in some situations, certainly, and I know it has been exercised here in the District of Columbia, to give the police the authority to arrest on probable cause for certain misdemeanors.

Q What about the States?

MR. REZNECK: I assume that there are similar statutes in the State, and I think that that power would --

Q Well, would you say that that's unconstitutional?

MR. REZNECK: No. No, I don't think so. I think that there would be a power in the Legislature to define a reasonable search or seizure to that extent; but I would point out we're not dealing with that here, because Florida hasn't purported to do that. In other words, it --

Q Well, it's purported to say that a clerk can determine probable cause and authorize an arrest.

MR. REZNECK: Yes, but it requires a warrant. In other words, this is an arrest warrant which is required here under the State law.

Q But you would say Florida could authorize the

police, the Florida Legislature could authorize police themselves to determine probable cause and make an arrest?

MR. REZNECK: For this kind of offense, I'm not sure that I would want to concede that, because I don't think that we're dealing with this kind of offense that you have this sort of necessity that might justify that practice, even for a serious misdemeanor.

Q For a felony, you would --

MR. REZNECK: Well, for a felony, I think it's clear under the common law and under the Fourth Amendment which incorporated the common law rule that a police officer can arrest on probable cause without a warrant for a felony.

Q But, he may not do so for a less serious, municipal offense?

MR. REZNECK: Well, certainly at common law he could not. I think there might be a legislative power to vary the common law rule in the instance of certain misdemeanors, whether, when you get down to the municipal ordinance level, that power would also extend, I don't think it's really necessary to decide here. As I say, Florida has not purported to do that.

In other words, here you are dealing with an arrest warrant. It's a Fourth Amendment warrant.

Q The Florida court here has said that under Florida law the clerk is sufficiently independent to perform

this function, as a matter of Florida law, I gather.

MR. REZNECK: Well, I think that that is --

Q In their opinion, anyway.

MR. REZNECK: That is a conclusion, drawing from the Florida Supreme Court.

Q Yes. Yes.

MR. REZNECK: I don't believe that it's possible to point to anything in the Florida statutory structure which -- anything objective, which would give the clerk the kind of independence that a judge has.

Q There's nothing in the statute that indicates he isn't, either, or that the Florida Supreme Court is wrong, as a matter of judicial judgment, in vesting this clerk with some independence?

MR. REZNECK: Well, I think that you have here a supervening federal question, it seems to me, under the Fourth Amendment, as to who is a neutral and detached officer for Fourth Amendment purposes.

Q Yes.

MR. REZNECK: And that's a federal question. I don't think that the Florida Supreme Court can decide that. In effect, they have given their opinion. They are satisfied that he is a neutral and detached magistrate; but I don't think it's possible to point to anything in the Florida statutes here that would give him this kind of independence and

stature that a United States Magistrate, for example, has; or that other judicial officers in Florida have, or that judicial officers elsewhere in the United States who issue warrants have.

Q Well, tell me again, then, what is the source of his authority to be issuing a warrant? From what does it derive?

MR. REZNECK: From the statutes of Florida; one statute of general applicability, which gives clerks of the Municipal Court the authority to issue warrants in municipal ordinance cases. And then from two specific statutes applicable in Tampa, which are part of the Tampa City charter.

Q Well, isn't that a legislative decision that these are proper officers, as Justice White suggested?

MR. REZNECK: Oh, absolutely, we are dealing with a legislative act here, we do not deny that, and we are challenging the constitutionality of that statute on its face, on the grounds that it isn't sufficient for the Legislature just to say that somebody who is a clerical person is, ipso facto, a neutral and detached magistrate because we've chosen to give him the power to issue arrest warrants and have said that he is a neutral and detached magistrate.

In other words, that's really all that you have here. You have a statute that has confided to function but has not confided or conferred any of the protection that we would normally associate with the holding of judicial office. It's

giving him only this one judicial function, it isn't as if it had given him a whole range of judicial functions. It certainly has not called him a judge or a magistrate. And while I would not suggest that the title is dispositive, I would point out, Your Honor, that one of the reasons why the term U. S. Commissioner was changed by Congress to U. S. Magistrate was because the title of U. S. Magistrate connoted that he was a judicial officer and they were conferring judicial authority on him.

Florida hasn't done any of these things, nor has the Florida Supreme Court. They have simply said, "We're satisfied that he is a neutral and detached magistrate."

Q As you say, Mr. Rezneck, you're not, of course you're not, relying on the title, sort label of clerk, but you're rather relying on the nature of this man's job and duties and position.

MR. REZNECK: Yes.

Q Where does that appear in the record? I've looked for it, and I --

MR. REZNECK: Well, --

Q I gather that what you say is correct, that this is the only -- that this authority to issue arrest warrants for violations of municipal ordinances is the only power, the only duty he has in his job to perform any tasks that have traditionally been considered judicial tasks. But

do we have anywhere here what the job content is?

MR. REZNECK: Yes. It's not in the record before you, I believe, it is contained in various places in the City Code, in the City Charter of Tampa, and various civil service regulations. And his functions are predominantly, and, I would say, in fact entirely clerical, with the exception of this one function.

Q Well, does he file papers and keep track of them?

MR. REZNECK: He receives papers for filing and --

Q Or does he attend in the courtroom and act as a bailiff?

MR. REZNECK: Some of them do that, yes.

Q Or what does he do?

MR. REZNECK: He receives fines, for example, and gives receipts for fines in traffic cases; he prepares the dockets and the records; he issues the commitment once a judge has ordered, has imposed a sentence on someone, the deputy clerk makes out the commitment papers, and --

Q The equivalent of a clerk's office in any --

MR. REZNECK: Yes, in any court.

Q -- court, this Court or any court?

MR. REZNECK: Yes. And more specifically, I would say, in any police court or any municipal court in the country that you will find --

Q The fact of fines paid, and disbursements, and --

MR. REZNECK: He will note if the case is continued for trial, and so on.

Q Is he in charge of the payroll for the court?

MR. REZNECK: That I don't know. I think the City Clerk probably would have that function, I don't believe that this --

Q Does he issue subpoenas?

MR. REZNECK: Yes. He is, I believe, entitled to issue subpoenas.

Q Mr. Rezneck, if Florida, by legislation, could authorize a policeman to arrest if there were in fact probable cause in this situation without a warrant, and if in fact there is probable cause in this case, do you have really a Fourth Amendment point, simply because the policeman has taken a warrant issued by a clerk that made a finding of probable cause?

MR. REZNECK: Well, I think that you do, because I think that Florida has utilized the arrest warrant procedure here, and it has made a determination that it's not proper for a policeman to arrest simply on probable cause for offenses not committed in their presence.

In other words, --

Q That's a State law point, isn't it?

MR. REZNECK: Yes. Well, not entirely. For example,

in the Brophy case, as I recall, Brophy v. Wisconsin, which dealt with the right to a change of venue in a misdemeanor case. I think this Court said that it was not passing on the question as to whether he would have had, for example, a jury trial right as an original matter; but they said that the State had provided a jury trial right, and once they did that, that that invoked the partial trial guarantee of the Federal Constitution through the Fourteenth Amendment, and therefore they could not provide for such a transfer of venue in a felony case, but not in a misdemeanor case.

So I think it is of significance that the State has elected to utilize the familiar arrest warrant procedure. In other words, you really are dealing here with what I would call, frankly, an ordinary garden variety arrest warrant. There is no, nothing innovative that Florida has done here, in the sense of deciding that they will extend the common law arrest powers of police. They have directed the policemen, as would be true all over this country, to go and get a warrant in this kind of situation.

We would submit that that is sufficient to make it a Fourth Amendment warrant, and to invoke the decisions of this Court which do require that, as I understand them, he be a judicial officer.

Q Mr. Rezneck, how would you categorize the power to issue a warrant -- a subpoena, rather, as distinguished

from a warrant?

MR. REZNECK: I think that that would be called a ministerial power, it would not be classified as a judicial power, because you do not have the elements of discretion and judgment that enter into the warrant decision. Certainly it is not a Fourth Amendment type of decision where this Court has made it clear that where you're dealing with the question of probable cause to arrest a person --

Q Well, then, when we consider the traditional language of the subpoena, it usually has the archaic form of speaking: "You, the undersigned, are directed to appear before a particular court at a time and place, laying aside all other business", and sometimes it will recite "on pain of penalties of the law for failure to appear". Now, you seem to dismiss that as a ministerial duty?

MR. REZNECK: No, I don't dismiss it. In fact, if Florida has provided for such a system here, to wit, a summons or subpoena system, I don't think we would be here today, because I don't think we would have the same problem. In other words, that does not effectuate an arrest, that is a summons or subpoena to appear. It does not result in the defendant being bodily taken into court. He, of course, has got the right to come in; he has the option to come or not to come, but he can come in and try to challenge the process.

In other words, if what you had here was utilized as

simply a summons or subpoena procedure issued by the clerk, I think you would have an entirely different case, because then you would not have an arrest of the person. It's the fact that this is an arrest warrant which authorized the police officer to take the defendant immediately into custody and with all that that implies, in terms of loss of liberty, having to post bail, possible embarrassment or humiliation in terms of employment and his family, and of course an arrest record. All those consequences flow from what happened here, because it was an arrest warrant rather than a summons or a subpoena procedure.

So that I think that the subpoena or summons procedure -- particularly where you're dealing with municipal ordinances; in other words, these are not emergency situations, these are not serious crimes in the sense of felonies, where you can dispense with the warrant altogether. I think that's really the proper way to proceed.

In that connection, I would like to direct Your Honor's attention to the decision of the Supreme Court of Minnesota in the Paulick case, which we've cited both in our brief and in our reply brief, and the Court there took precisely that position: that the proper way to proceed in these cases was through a summons procedure, if it was too burdensome on the judges to issue arrest warrants, but that it would not be constitutional under the Fourth and Fourteenth Amendments for

a deputy clerk in Minnesota to issue arrest warrants.

Q Mr. Rezneck, if this Florida statute -- I'm looking at your brief at page 3 -- in that third line, after where it says "and may issue a warrant" --

MR. REZNECK: Yes.

Q Is that where -- and had in there, "and may on a finding of probable cause issue a warrant", what would your position be?

MR. REZNECK: As far as the clerk is concerned?

Q Yes.

Just change this statute by adding "on a finding of probable cause"?

MR. REZNECK: Well, our position would be exactly the same, because the Florida courts have read in a requirement, and I think this case does it, that the clerk must find probable cause. I think it would clearly be unconstitutional if it made it a ministerial duty, where he had to issue the warrant. I don't understand Florida as going quite that far.

But that wouldn't make any difference, because our point would be that a clerk does not have the status of a judicial officer to make that determination.

Q And I take it your position would be the same if the statute said only that the "clerk may exercise the powers of the local magistrate insofar as he may administer an oath, take an affidavit" and so forth, "and issue a warrant"; what

would you think of that?

MR. REZNECK: Oh, I think he could administer the oath. I think if it's simply --

Q No, but if the statute said that the "clerk may exercise the powers of a local magistrate" in these respects?

MR. REZNECK: Then I don't think it would be any different. I think it would be the same case.

Q You would still be here?

MR. REZNECK: Yes. That they would be confiding to the clerk a judicial determination of probable cause, without giving him any of the status or qualifications of an independent judicial officer. And that they could not do that.

Q You mean they'd have at least to go so far as to say "the clerk, in the absence of the magistrate, may perform the functions of the magistrate", period?

MR. REZNECK: Well, if the functions of the magistrate extended to issuing arrest warrants or search warrants, I would say the clerk could not do that, could not be given the power, and --

Q He couldn't be designated an acting magistrate in the absence of, either?

MR. REZNECK: Not without more; not if he remained simply a clerk and was not given any additional status, any additional protections in office. That would simply be changing the label.

Q As I suggested earlier, if that's right, then that whole system in New Jersey is --

MR. REZNECK: Well, New Jersey is one of the few States, I might say, that does authorize its clerical personnel to issue arrest warrants. There would only be a relatively few States, I think no more than six or seven, that authorize this.

Q Well, New Jersey still goes as far as you suggested, to permit the clerk to actually function as the magistrate in the absence of?

MR. REZNECK: Yes, I believe they do. But, of course, the New Jersey statute, with respect to the warrant procedure, goes quite far in a number of respects. For example, it authorizes the issuance of arrest warrants by police chiefs, police officers in charge of police stations. In other words, the parts that I think are already invalid in the light of this Court's decision in Coolidge vs. New Hampshire, this isn't adding very much to that, in our view.

As I said, there really is a paradoxical situation here, where, for the municipal -- violation of a municipal ordinance, which is presumably the least serious of offenses in the State, that here a deputy clerk of the Municipal Court, which is the court at the bottom of the judicial pyramid, is authorized to issue the arrest warrant; but for any other offense, no other clerk in Florida is authorized to do so.

And I think what that suggests is that you do not

have a very fundamental State policy here in favor of the issuance of such warrants by clerical personnel.

If I have any time left, Your Honor, I would like to reserve it for rebuttal.

MR. CHIEF JUSTICE BURGER: I think you've consumed it all, but we'll see what the situation is, Mr. Rezneck.

MR. REZNECK: Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Bee.

ORAL ARGUMENT OF GERALD H. BEE, ESQ.,

ON BEHALF OF THE APPELLEE

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

First I would like to go to the appellant's argument concerning, in the very last portion of his brief and on argument here, as concerns this appellant in relationship to the issuance of a summons to come to court; in other words, an invitation.

In this sense, the appellant in this case of course was charged, he has not been tried, was only charged, and then immediately the proceedings commenced. So he has not been tried or convicted.

Q What was the offense?

MR. BEE: The offense was under the ordinance called generally "careless driving while drinking", which is a phrase they use, but more specifically "careless driving while his

ability to drive is impaired by the use of alcohol or a drug". But they shortened that and call it "careless driving while drinking".

Now, this is a violation of, and one of the more serious violations of our municipal ordinances. In other words, we're covering an area here, and you have to realize it's all the way from a parking ticket, speeding, stop light, all the way on through up to the more serious offenses, such as this one.

Q In Tampa, do you have to get a -- does the policeman have to get a warrant to issue a parking ticket?

MR. BEE: No, sir. That is one of the distinguishing features. Of course, if a parking ticket is issued and the fine is not paid, then they are summoned to court. There is a difference here between this type of offense and ones that are less offensive, those that do not outwardly, what you would call, jeopardize life and property.

Summons. The appellant was arrested on this particular offense, and if you accept what appellant is saying here, that he should be summoned rather than arrested on the street, that is, invited to court, what we are concerned here with is a situation where last year, throughout the entire United States, 28,000 deaths occurred by reason of drunken drivers.

Now, that is not to mention the ones that were maimed

and injured. 28,000 deaths caused by drinking drivers.

Now, that's a small city annihilated.

Now, if you accept appellant's argument that he should be summoned and invited rather than arrested in this particular case, what you're really saying is that if the officer sees the man driving the automobile down the road, cars going every which-way, the drunken driver weaving from side to side, he pulls the man over, he stops him. The door opens, the man falls out. He writes down a summons, tears it off and says, "Here is your summons, now you go home, sober up, and appear in court tomorrow morning."

In effect, this is saying if you use a summons system, not in the parking ticket kind of situation, --

Q Well, what is done in Tampa? The man opens the door, and the man falls out.

MR. BEE: Yes.

Q Then what does the policeman do in Tampa?

MR. BEE: Then what he does is he picks him back up and they call the paddy wagon, Your Honor, and they take him down and they put him in a drunk tank for approximately four hours, if he is unable to manipulate himself whatsoever.

Q Well, that's not at issue here at all, is it?

MR. BEE: No, sir.

Q Well, where do you get this idea about him going out and keep on driving?

MR. BEE: Well, because appellant has argued, and in his brief says that we should give this man a summons rather than arrest him on the street, because by arresting him on the street what you are doing, the appellant says, --

Q I thought appellant's position was that you couldn't that warrant unless you got it from a judicial officer. Period.

MR. BEE: Yes, sir, that is his issue. There is no question about that. I am only stating, starting with the summons portion, that this type of offense, you just can't use a summons, Your Honor, because this way you don't physically arrest him and leave him in jeopardy on the street.

Q Well, why can't you give him a summons when he gets out of the tank?

MR. BEE: Why can you not?

Q Yes, sir.

MR. BEE: Well, sir, because once you physically place a person under custody, when the police officer takes that man and puts him in custody, that, technically, is an arrest, even though he doesn't say "You are under arrest" or even if the man doesn't understand it. Once a police officer --

Q If I understand you correctly, this man was put in the tank --

MR. BEE: No, sir; I'm not saying that this particular man was put in the tank.

Q Well, didn't you say any drunken driver is put in the tank?

MR. BEE: I am saying if he is so inebriated that he can't control himself, he's put in the drunk tank.

Q All right.

MR. BEE: If he is not, he is not put in the tank, sir.

Q If he is, and he's put in the tank, you say you go get a warrant from the deputy clerk and arrest him after that. Right?

MR. BEE: No, sir. I am saying --

Q Well, you couldn't go get the arrest warrant while the man was laying out in the street, could you? Let's get this straight now. What do you do?

MR. BEE: Yes, sir. If the man is there, he is arrested, on the street.

Q Right.

MR. BEE: He does not go back, because the officer has observed the offense with his own five senses. Therefore, it is a warrantless arrest.

Q And then he never gets a warrant after that?

MR. BEE: No, Your Honor, but he does write up a complaint, where he puts down the various factors that he has observed. To answer your question: Yes, sir, he is arrested there on the street.

Q Well, then the point is that what we're talking about is where it's not in the policeman's presence? Is that what we're talking about in this case?

MR. BEE: I'm not saying that in this case, because in this case we don't know from the record what it is. This case, I wish I did know and I wish I could answer your question, Your Honor, but, on the record, and the original record as filed here, commences as the appellant started this case, which is a motion to quash the original affidavit and warrant.

Q Well, pursuing brother Marshall's questions, in what kind of cases is this applicable? When a policeman hears and sees and/or smells and touches, is using his five senses, knows that an offense is committed in his presence, then he arrests the person and this procedure is not applicable at all, as I understood your answers to Justice Marshall's questions. Is that right?

And that this warrant procedure is applicable only where there's a complaining witness or something like that who comes to a policeman --

MR. BEE: Yes, sir.

Q -- or comes to the deputy clerk; is that it?

MR. BEE: What you are saying is true, unless the man is incarcerated, posts bail. Now, this is, he is arrested in the officer's presence. He is incarcerated. He posts bail

and gets out. He is assigned a court date to come back to court. But on that date he does not come back. Then the police officer does take his complaint, another complaint, and he goes down and makes out a re-arrest warrant, such as involved in this case, the man is immediately re-arrested, but in the original arrest it was the violation on the street initially that was really the arrest.

So it can have --

Q And there was no warrant at all in that?

MR. BEE: No, there was no warrant for that at all, no, sir.

So, the answer to your question can be in two ways: a warrant can issue as a re-arrest, but --

Q Or as an original arrest, if it was not --

MR. BEE: Or as an original arrest if it was not in the officer's presence.

Q Right. Right.

Q Incidentally, who is the marshal under? What office is that? The marshal.

MR. BEE: Yes, sir.

Q Does he --

MR. BEE: 168.04, which is the general statute, I think that you are referring to, is in two severable parts. The first part dealing with the clerk, and the second part dealing with the "marshal may issue a warrant in the absence

of the clerk and the mayor". This is the general law.

Q Yes, but who is the marshal under?

MR. BEE: Now, in Tampa, we do not have a marshal. We have a chief of police. We have, by our -- a chief of police. The marshal does not -- well, we simply don't have a marshal in Tampa.

Q Well, isn't the marshal a policeman wherever they have a marshal?

MR. BEE: Yes, sir. But the general law which provides that runs throughout for all the municipalities of the State of Florida, whether they be in population of, say, 200 people. In that case, obviously, the Legislature has to take care of the small municipalities as well as the larger ones.

Q Well, this statute, then, means that not only the clerk, but,in the absence of the clerk and the mayor, then the police officer may issue a warrant for the arrest of the person complained against; is that right?

MR. BEE: Yes, sir. That is true under the general law.

Now, the point is this, and this is a point that bothers me also. This particular statute is in two parts, and the obvious intent of the Legislature, in passing that second sentence, involving the marshal, is the fact that oftentimes in your small towns, not always, the town may only have

a mayor, one clerk, and one marshal; and it would not be unusual for the mayor and the clerk to be gone at the same time in one day. Now, you just can't let law enforcement fall down for the one day that the clerk happens to be gone or the mayor's out of town.

Q But the clerk issued the one here, didn't he?

MR. BEE: But -- that's it. This case involves the clerk. In any event, if the Court goest to that second sentence, involving a marshal, and would by dictum hold it unconstitutional or whatever, it is severable from the first sentence which deals with the clerk, which is the case here.

Now, the State of Florida, as has been referred to before, has passed a revision of its judicial article, its Article V, consolidating its judiciary especially in the trial court system to more adequately keep up with caseload. But the point is that this question may become moot by 1977. It provides in that Article that the municipal courts shall be abolished by the year 1977. The City of Tampa has filed with Chief Justice Roberts, Supreme Court of Florida, a resolution of intent; a resolution of intent to abolish its municipal courts by the end of this year. That would be January 1st of 1973.

What, in effect, I am saying is simply this: that all these municipal courts and their clerks will be abolished by 1977; Tampa is moving to do so by 1973.

Q That wouldn't affect the applicability of the statute to other parts of Florida, though, would it?

MR. BEE: No, sir, it would not. But I felt, in justice, this should be pointed out to the Court and brought to the Court's attention, that Tampa is moving in this direction, and that the clerks --

Q You mean abolished or renamed?

MR. BEE: They will be --

Q Certainly you're going to have a municipal court there. Well, where are you going to try the traffic violations?

MR. BEE: No, sir, --

Q You're going to give them up?

MR. BEE: No, sir. What will happen, when I say abolish the municipal court, they will be transferred to what is called --

Q Well, that's what I thought.

MR. BEE: Yes, sir. They will be transferred to what's called a county court, and these municipal judges will then become State judges, and these clerks will then become State clerks.

Now, there is -- there are some issues that were raised as side issues in the appellant's brief concerning the conclusory terms of the affidavit, its forum, the rubber-stamp arguments, and simply the insufficiency of the affidavit.

I would merely show the Court, if it looks at the original motion to quash and the order of the first municipal judge, that what appellant originally attacked in this case is the constitutionality of these particular statutes, vesting the power in the clerk to issue these warrants.

Furthermore, there was never a question of: did he determine probable cause? The question attacked the power of the clerk in the first instance. If you look at the order in the municipal court, you will find that it was submitted, really, as a question of law to the court. The appellant did not produce or question probable cause or the conclusory terms or form. There was no testimony of Officer Larder, the arresting officer; there was no testimony given by the appellant; there was no testimony of the clerk; and there was no testimony taken of any other witness in this cause.

In other words, the question of the affidavit or "did he determine probable cause?" was never an issue.

This is borne out on certiorari to the Circuit Court, which was the next step. And again there were four specific places that the appellant put directly in question the issues that were raised and are here. And on page 8 of my brief, I show the Court that this position said, and the position taken by appellant:

"The position taken by the petitioner in the original brief is that the City Charter did not authorize the Clerk to

issue an arrest warrant."

Then on page 14 -- this is on page 14 of the Appendix, the appellant says again: "So we are here today solely on the question of the constitutionality of both statutes."

Appellant says again on page 14 of the Appendix: "It is the contention of the Petitioner that a Clerk of the Court is an administrative officer and not empowered to exercise any discretion."

And then he goes on again to re-emphasize to that Circuit Judge, quote, "We are dealing here with whether or not a particular officer can exercise judicial functions."

Q Mr. Bee, in this connection, do you agree with Mr. Rezneck that we have a final judgment in this case under 1257 of Title 28?

MR. BEE: Yes, sir, I think --

Q You do?

MR. BEE: I do.

Q And you do so on the ground that this common law writ of certiorari you have in Florida equates with the writ of prohibition or something of this kind?

MR. BEE: Yes, Your Honor, I think that would be sufficient to bring it up in the cause determined by the Supreme Court of Florida, in particular dealing with the issues, that it would be classified as a final judgment.

Q And yet Mr. Shadwick may be acquitted in his

case?

MR. BEE: Very -- he could be. He could be. What, in essence, is this, this is not an appeal from a conviction of Mr. Shadwick. Mr. Shadwick was arrested, then immediately the motion was filed with the Municipal Court, then certiorari, then appeal to the District Court of Appeals, and then to the Supreme Court of Florida.

Q Well, suppose it were a motion to suppress evidence, made in advance of trial; what happens in your system? Do you have a common law writ of certiorari there?

MR. BEE: Yes. In the State of Florida, the essential requirements of law, or if the defendant feels that the court has not performed within the essential requirements of law, he has a right to common law writ of certiorari to the Circuit Court; from there he can take it to the District Court of Appeals, and then to the Supreme Court of Florida.

Q Isn't this a handy State way to avoid our usual barrier of the finality of judgment?

MR. BEE: Yes, sir, it is usually a way to avoid that in the finality of judgments; that's true. This is one of the --

Q I'll confess that I, for one, am bothered by this issue in your case. It's really your opponent's problem, not yours.

MR. BEE: Yes, sir, I understand. In the record

itself, in the Appendix, you will find, when I argued before Judge Neil McMullen, at the Circuit Court level, on certiorari, I argued the wrong remedy. That was -- I do not have the page in the Appendix, because it was not in my brief --

Q That's all right.

MR. BEE: -- but it is, I did argue the remedy problem, that it should not go up by certiorari originally.

Q Mr. Bee, supposing that Mr. Shadwick had not wanted to file a special writ of certiorari, and had simply gone to trial, would he, at some time during the trial proceedings, have had an opportunity to raise the validity of the warrant as a part of those proceedings?

MR. BEE: Yes, Your Honor. In other words, once he has raised this and it is in his record and he has the order of denial, this goes with him up the scale. He can -- if he is convicted, see, he will never appeal to the Circuit Court, and the only way he's going to use the appellate procedures of the Circuit Court is if he is convicted.

Now, suppose Mr. Shadwick filed the regular motions he did here, they were denied, he went to trial, he was convicted, then he would use the appellate procedure to the Circuit Court, and he would have in his appeal the assignments of error, that being, i.e., the denial of his motion in the lower court.

Q Mr. Bee, assuming that attack is made on the

search warrant in Florida, could you take that all the way up here, the same way, before trial?

MR. BEE: I believe the normal approach of attacking validity of the search warrant and the affidavit, that if the motion is filed and the judge denies it --

Q No, my hypothetical is using the exact same proceedings used in this case.

Is that possible? In Florida.

MR. BEE: I would -- Your Honor, that's a hard question to answer. I think -- I think it would be. And the reason I say "I think" --

Q Well, my question is: if we rule with the petitioner in this case, then every preliminary motion in any criminal case comes right straight up here, before the man is ever brought to trial?

MR. BEE: It could possibly very well do that way by common law writ of certiorari; if the appellant claims that the essential requirements of law have not been followed, then he can go by writ of certiorari and on up to this Court.

Q Like my brother Blackmun, I've got problems, too.

MR. BEE: Yes, sir.

Q Well, this is, however, an independent action, as I understand it, under Florida law, equivalent or roughly similar, at least, to action for a declaratory judgment, and an injunction, or for a pretrial habeas corpus, which is

historically well known.

MR. BEE: You're talking about the writ of certiorari?

Q Yes.

MR. BEE: Yes, sir.

Q And this is a final judgment and an independent action, is it not?

MR. BEE: I would call it a final and independent. It definitely affects the rights of the appellant, whoever that appellant may be, or the one petitioner taking the risk.

Q It's not part of the criminal prosecution, is it? It's an independent action to --

MR. BEE: That's correct.

Q -- independently to test a provision of Florida law?

MR. BEE: Yes, Your Honor, it is independent action.

Q Well, as I say, at least similar to an action for a declaratory judgment, an injunction, --

MR. BEE: Yes, sir; that's correct.

Q -- or for an equivalent in other ways to a pretrial habeas corpus?

MR. BEE: It's another avenue of approach, outside of the avenue of appeal.

Q Right.

MR. BEE: And by error.

Q Do you have declaratory judgment procedure in Florida?

MR. BEE: Yes, Your Honor.

Q Could this issue have been tested there?

MR. BEE: I believe not, I believe that would be more in the civil field. They would not ask for a declaratory judgment, as such; and I have not heard it -- it has not arisen as such out of our municipal courts, let me put it that way, Your Honor.

But we do in civil cases.

Q Mr. Bee, was there a seizure as a result of the -- a seizure of evidence as a result of the arrest in this case?

MR. BEE: No, Your Honor, there is no question of seizure in this case, to my knowledge.

Q Well, does that mean, Mr. Bee, that if you lose up here, all you do is go to the clerk's boss and get a new arrest warrant and start this prosecution all over again?

MR. BEE: Would I go get another warrant for him?

Q If you lose here, on the ground that this arrest was invalid, then what do you do with the case?

MR. BEE: Well, Your Honor, I would certainly not prosecute it if I lose, or request that it be prosecuted at this level, it would probably be nolle prossed.

Q But you could. The issue is whether you could.

Q Why?

MR. BEE: Whether we could continue prosecution?

Q Yes.

MR. BEE: Yes, sir.

Q Just go to the magistrate now and get the same arrest warrant issued by the magistrate, wouldn't you, and arrest this man all over again?

MR. BEE: No, sir.

Q Why not?

MR. BEE: We wouldn't re-arrest him. He is always within the jurisdiction. His case has been -- factually, his case has just been continued until the disposition of this, and then a trial date will be set down.

Q Well, is he on bail or something? Is that it?

MR. BEE: Yes, sir; originally he was out on bail. As I understand it.

Q So the determination of this issue up here will have virtually nothing to do with his trial on the merits?

MR. BEE: Not on the merits, no, sir. I can't see that -- let me say this, the disposition of the case here would have something to do, and that would have to happen after the determination of what this Court arrives at.

Q But if Mr. Rezneck should prevail here, and this Court should simply hold that as a matter of the Fourth and Fourteenth Amendments, Florida could not constitutionally

confer this power upon a deputy clerk, my brother is correct in saying that has nothing to do with the merits of his -- whether or not he committed this offense, nothing to do with his trial for this offense, and, absent a statute of limitations or something like that, you would just have him arrested under a warrant issued by a magistrate, wouldn't you?

Q Or by a policeman.

MR. BEE: I'm not -- Your Honor, I'm not sure that I follow exactly your question.

Q All that's in issue before us here is the validity of Florida's law that confers upon this person the power to issue an arrest warrant.

MR. BEE: Yes, sir; that's correct.

Q And if we hold that Mr. Rezneck is correct, and that Florida acted unconstitutionally in conferring --

MR. BEE: He would not be --

Q -- this power upon a deputy clerk, it has nothing whatsoever to do with whether or not the petitioner committed this offense. And has nothing whatsoever to do with his trial, and has nothing whatsoever to do with whether or not he cannot, after this Court's decision, be validly arrested under a warrant issued by a magistrate; does it? Unless there is a statute of limitations problem.

MR. BEE: It would have nothing to do with his trial, no, sir, whatsoever; this is true.

Q Nor with his guilt, nor with anything --

MR. BEE: Nor with his guilt or innocence.

Q -- nor with any evidence that might come into that trial, or anything else.

MR. BEE: That's true. I agree.

Q So why wouldn't your answer to my brothers White and Rehnquist's questions be: Yes, we would go ahead, presumably, and have this man arrested and -- re-arrested if this arrest was invalid, have him re-arrested and then go to trial?

Q If he's still around.

Q There may be a statute of limitations problem, but if there isn't, I don't see why your answer wouldn't be "Yes, of course we would."

MR. BEE: Well, yes, of course we would proceed with the prosecution, but not -- if this particular warrant type of situation is held unconstitutional, then we certainly wouldn't come back and use the same type of warrant to go out and arrest him.

Q No, but you'd go before a judge and get a warrant.

MR. BEE: Yes, sir. Yes, sir. That's correct.

The real, what appellee feels is the real jugular vein of this case is the fact that the appellant, when you take the Fourth Amendment and you say "no warrant shall issue but

upon probable cause, supported by oath and affirmation", there are two things that must happen here.

The appellant is saying he wants to change the test that came out of Giordenello and Johnson cases, that is a neutral and detached magistrate. Now, when you take the Fourth Amendment and you look at it, nothing there says who is it that shall issue this warrant.

I submit to the Court that the appellant wants to change this test from a neutral and detached magistrate to that of a strictly judicial officer; that is, a judge who adjudicates.

Now, even so, the second thing under the Fourth Amendment, where it says "no warrant shall issue but upon probable cause supported by oath or affirmation", nothing is said of what kind of a function this is.

Now, that, I contend, is the jugular vein of this case is what the function is. And this function is like a broad spectrum. You have over here strictly judicial functions, in the middle you have the quasi-judicial functions, and over at the other end are the ministerial, which are those involving clerks.

We are simply saying, by virtue of these statutes, that the Legislature has delegated to this clerk a quasi-judicial power. He has moved him from his normal clerk's -- he still does the ministerial duties of a clerk; but they

have moved him into the middle field where these quasi-judicial areas are. For instance, many civil service boards issuing subpoenas and doing, and giving out quasi-judicial acts. That is all this statute has done.

Q Well, could the Legislature do that with the prosecuting attorney and all of his deputies?

MR. BEE: No, sir, under --

Q Just saying that: we know his normal duties are to prosecute cases, but we're going to give him this little sliver of judicial power, and allow him to issue arrest warrants and even search warrants. Could it do that?

MR. BEE: No, sir.

Q Why not?

MR. BEE: My answer to that is simply this: As I recall the Coolidge case, the test, and the reason why he cannot, a State's Attorney or a prosecutor, is because he is so enveloped with law enforcement, and the test of this of course is a neutral and detached magistrate, must be interposed between law enforcement and the public. Yet, if you have a prosecutor who is there driving his case home, or a State's Attorney, or this type, then I would say that he does not fulfill the neutral and detached magistrate test.

Q Or a policeman?

MR. BEE: Or a policeman does not.

Q Well, under your statute, you told me earlier,

in the absence of the judge and mayor, or the mayor and clerk, lets the policeman issue the warrant.

MR. BEE: No, sir, we do not have that system.

Q The statute says so?

MR. BEE: Yes, sir, the statute says that, but the special acts do not, in the City of Tampa. We do not have marshals.

What I am saying to the Court, if you're looking at that issue --

Q You mean in Tampa if the mayor and clerk are absent, then no one can issue it?

MR. BEE: No, we have many clerks. There are many clerks there. What I --

Q You have many clerks of the court?

MR. BEE: There are many deputy clerks, yes, Your Honor In other words, it's not the situation of the small town.

The point is, this Court has ruled, in Ocampo, and has stated specifically that the function of determining probable cause for an arrest is only quasi-judicial,in the middle, and not a strictly judicial function or one for a judge to adjudicate sentence and find innocent.

Now, as to the neutral and detached magistrate, the clerk of that Municipal Court is appointed by the City Clerk, he is not appointed by a chief of police, he does not wear a uniform, he does not have powers of arrest, he is not a sworn

police officer, he doesn't wear a uniform, he doesn't carry a badge, and he doesn't carry a gun. And he certainly doesn't prosecute cases.

He is assigned to the judicial department of the City of Tampa. What I am saying is, under the broad definition that I pointed out in my brief, the magistrate -- the clerk does fit the broad definition of the magistrate that this Court held in Compton vs. State of Alabama. And Florida has also followed that in Miller vs. McLeod case.

So I submit to the Court, in conclusion, and pray the Court to affirm final judgment on appeal of the Supreme Court of Florida.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Bee.

You've run out of time, Mr. Rezneck, but we'll give you two minutes or three minutes, if you think you need it. There may be some questions to you also.

REBUTTAL ARGUMENT OF DANIEL A. REZNECK, ESQ.,
ON BEHALF OF THE APPELLANT

MR. REZNECK: Yes; thank you.

Q Tell me, Mr. Rezneck, do you want empiric victory for your client, if you prevail?

MR. REZNECK: I think that's for the State of Florida or for the City of Tampa to decide, Your Honor, as to where they want to proceed from here.

Q Well, I know, but so far as -- if you win, what's

to prevent them just from getting a proper arrest warrant and --

MR. REZNECK: Well, I think that's a decision that they will have to make; but that --

Q But there is nothing to prevent their making it, because you win?

MR. REZNECK: I believe that's correct.

Q We've got to assume, if it's relevant at all, that they will do so; isn't that true?

MR. REZNECK: I don't think we can assume on way or another.

Q But they have the power?

MR. REZNECK: I believe that they do, provided that they comply with constitutional standards in how they do it. I would like to spend the brief time that I have on this question of finality, since it is obviously of some concern to the Court.

The test, as was laid down most recently in the Mercantile National Bank vs. Langdo? case, this is at 371 U.S. 555, as I understand it is whether the order is a separate and independent matter anterior to the merits and not enmeshed in the factual and legal issues comprising the plaintiff's cause of action.

Q Was that from the federal courts or the State courts?

MR. REZNECK: State. Here from the State court, yes.

And my understanding is that that is the test in this Court for appellate jurisdiction under 1257(2), and we would submit that we have met that.

There are some other cases I think I could cite in that connection. I believe this Court, in Mills vs. Alabama, at 384 U.S. 214, upheld appellate jurisdiction over the denial of the demurrer by a State Supreme Court, even though the State Supreme Court had remanded the case for trial. So that the separability doctrine has been applied in a number of cases.

I believe also in the old Ku Klux Klan case, State ex rel. Bryant vs. Zimmerman, that came to this Court, I believe, on habeas corpus in advance of trial and was decided by this Court in the exercise of its appellate jurisdiction, even though there had been no trial on the merits, and the case was still awaiting trial in the State court. I did also cite the Camara case, which I think is close to this one.

Q Of course, in Mills, didn't the Court say that the ruling on the demurrer was, for all practical purposes, a determination of the litigation, that a remand was just going to result in a formality --

MR. REZNECK: Well, there were other issues being raised by the defendant. I would suggest that with respect to this particular issue that's before the Court here, namely, the constitutionality of the Florida arrest procedure, that

there's nothing further to be done, there's nothing more to be said on that point, and a further proceeding would not illuminate that point at all. And I would think that that would meet the point that the Court was getting at in Mills.

In other words, there's nothing further to be raised on that particular point.

Q But in Mills they were talking about the merits, nothing further could be done on the merits, --

MR. REZNECK: Yes.

Q -- but here the merits were a criminal prosecution, not an abstract --

MR. REZNECK: Yes, I understand there is that distinction. But I do think, in terms of the issue, I would --

Q Mr. Rezneck, suppose in this case when you filed your action they had gone and gotten a warrant from the chief judge of the court; would you have been here?

MR. REZNECK: And have re-arrested him?

Q Yes, sir.

MR. REZNECK: I would suppose that we would not -- would not be here then; that would have mooted the case. But they didn't do that.

I just want to make one final point on the State law. I think that, contrary to Mr. Bee's statement that it is not at all clear that this issue could be preserved in the State court at trial, and this common law certiorari pleading

may well have been required as a method of preserving this point, there is one Florida case that I would like to give the Court the citation to, because I think it does bear out, it's a case called Campbell vs. County of Dade, at 113 So.2d, 708. It's a District Court of Appeals decision, not a Supreme Court decision in Florida.

But it does deal with the question of challenging the validity of an arrest. At the trial itself, and I think that in view of that decision that appellant here was really quite justified and perhaps required under Florida law to resort to this independent proceeding; and it is an independent proceeding under State law. And I do think that you have appellate jurisdiction here.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Rezneck.

Thank you, Mr. Bee.

The case is submitted.

[Whereupon, at 11:58 o'clock, a.m., the case was submitted.]

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