In the

Supreme Court of the United States

RICHARD E. GERSTEIN, State Attorney for Eleventh Judicial Circuit of Florida, Petitioner,	)	
v.	)	No. 73-477
ROBERT PUGH, et al., Respondents.	)	

Washington, D.C.
March 25, 1974

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Washington, D. C.,

Monday, March 25, 1974.

The above-entitled matter came on for argument at 11:19 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:

LEONARD R. MELLON, ESQ., Assistant State Attorney for the Eleventh Judicial Circuit of Florida, 1351 N. W. 12th Street, Miami, Florida 33125; for the Petitioner.

RAYMOND L. MARKY, ESQ., Assistant Attorney General of Florida, The Capitol Building, Tallahassee, Florida; for Florida as amicus curiae.

APPEARANCES [Contd]:

BRUCE S. ROGOW, ESQ., 733 City National Bank Building, 25 West Flaglet Street, Miami, Florida; for the Respondents.

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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 will hear arguments next in 73-477, Gerstein against Pugh.

Mr. Mellon, before you proceed, I observed we have allowed an hour and a half here. Having allowed it, we will honor that, but it occurs to us that this may not warrant it, and if you gentlemen can shorten your submission, it will help.

ORAL ARGUMENT OF LEONARD R. MELLON, ESQ.,

ON BEHALF OF THE PETITIONER

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

I am the Assistant State Attorney in Florida, and I represent the petitioner here, Richard E. Gerstein, State Attorney in and for the Eleventh Judicial Circuit of Florida, in and for Dade County.

Petitioner was the appellant below and one of the defendants at trial in the United States District Court for the Southern District of Florida.

We're here on a writ of certiorari to review the August 15th, 1973 decision of the Fifth Circuit Court of Appeals, in which that court held, in affirming the United States District Court for the Southern District of Florida, that the Fourth Amendment and the Fourteenth Amendment to the Constitution of the United States mandated that preliminary

hearings be given for all persons being held in custody, even in instances where they are charged by information filed by a State Attorney, in which he has certified that there is probable cause to hold those persons in custody pending trial.

The respondents at the time of the initiation of this litigation were defendants then in custody in the Dade County jail, charged with various crimes, felonies and misdemeanors, charged by information or informations which had theretofore been filed by the Dade County State Attorney, the petitioner here.

In their suit they brought -- in the class action which they brought, they ask that the District Court declare and mandatorily compel the Dade County Circuit Court to grant them a preliminary hearing on the charges then pending against them.

The United States District Court, in its ruling, held, among other things, that these defendants were entitled, under the Constitution, the Fourth Amendment and the Fourteenth Amendment, to a preliminary hearing, even though they had been charged in an information in which the State Attorney had certified the issue of probable cause.

We are here confronted with that question: Do persons in State custody, charged under an information in which there has been a certification as to probable cause by

the prosecuting attorney, that is the State Attorney, do they have a right to a preliminary hearing before a magistrate on that question of probable cause?

Throughout this litigation, the petitioner has relied on a line of cases by this Court beginning with Hurtado vs. California, in which this Court held that a man need not charged by a grand jury indictment but can in fact be charged by information.

Lem Woon vs. Oregon has been argued throughout this litigation. This Court has held that no prior probable-cause hearing is necessary prior to the making of an arrest.

We have relied especially on this Court's language in Ocampo vs. United States, in 234 U.S. There it was held that the function of determining probable cause is only quasi-judicial, and therefore that function need not be confided to a strictly judicial officer or tribunal.

This Court in recent years, in its decision in Shadwick vs. Tampa, for example, held that a magistrate must meet two tests. First, that he be neutral and detached; and the second, that he be capable of determining probable cause.

When this Court held, in Coolidge vs. New Hampshire, that the very Attorney General who would act as a magistrate in the issuance of a search warrant, that Attorney General who had been the chief investigator in the case leading up to

the application for a search warrant, and who would be the chief prosecutor, did not have the degree of neutrality and detachment necessary to -- in that instance.

We submit that we are not here confronted with a similar situation of Coolidge vs. New Hampshire.

The State Attorney in Florida, and the State Attorney in this instance, the petitioner, in his determination as to whether or not there are sufficient facts to file an information, has a degree of neutrality, and has certaindy a degree of detachment, for he does not make the case. The case is brought to him by a law enforcement agency.

He sits, in effect, at that juncture in the proceeding in a quasi-judicial capacity. He meets --

QUESTION: Mr. Mellon, I wonder if I could interrupt you to ask you if you can help me get clear the chronology of how this happens. Is there first an arrest by a policeman, presumably, at least so far as this case goes, a valid arrest, because no arrest is being attacked in this case; and then the policeman comes to the prosecutor of the county and gives him the case that he thinks he has against the man and then the prosecutor files the information?

Or does the information come first, and then is followed by an arrest?

MR. MELLON: It occurs both ways, Mr. Justice Stewart. In the majority of cases -- the majority of cases in

our jurisdiction in Florida, in Dade County, are warrantless arrests, where the officer comes upon the scene and makes an arrest on probable cause.

QUESTION: Unh-hunh.

MR. MELLON: In that case the information is filed subsequent to the arrest.

QUESTION: After the arrestee is in custody.

MR. MELLON: Is in custody, Your Honor, that's right. In the --

QUESTION: Is there a time limit?

MR. MELLON; Yes, Your Honor, --

QUESTION: In which he must act.

MR. MELLON: Yes, Your Honor, under the present rules of criminal procedure in Florida, which were amended effective March 1st of this year, he must file an information within 96 hours after the initial appearance. And the initial appearance is held within -- it conforms to your rule, Rule 5; must be held within 24 hours after the arrest.

But the majority of cases are of the warrantless variety.

On the other hand, there are instances where a police officer comes to the State Attorney's office, testifies to the State Attorney or his assistant as to the nature of his case, and thereafter a warrant, a capias or warrant is issued when an information is filed.

QUESTION: So in that kind of a case the arrest follows the issuance of information, and it's by virtue of a capias issued by the prosecuting official.

MR. MELLON: Yes. The capias issues in Florida under the Florida rules, unless the man is already in custody, or unless he is out on bond.

In those two instances a capias will not issue.

However, if he's at large and has not been arrested at a prior time, a capias will issue.

QUESTION: Unh-hunh. By the same man who files the information, presumably.

MR. MELLON: No, Your Honor, the capias is issued by the court -- by the clerk acting at the court's behest.

QUESTION: Acting in the prosecutor's behest, isn't it?

MR. MELLON: The prosecutor indicates that -- the rule provides that a capias shall issue at the time the information is filed.

QUESTION: I see. Unh-hunh. Issued by --

MR. MELLON: Unless the prosecutor requests that it be issued at some subsequent time.

QUESTION: And now that I've interrupted you, can you tell me what determines, in Florida procedure, whether a prosecution is to be initiated by information or whether it's to be instituted by grand jury indictment?

MR. MELLON: The only mandatory requirement in Florida is in the area of capital offenses, that a grand jury indictment must be handed up.

QUESTION: Unh-hunh.

MR. MELLON: Otherwise all crimes are prosecutable by information.

QUESTION: And are they in fact prosecuted by information, or are they sometimes prosecuted by grand jury indictment, other crimes?

MR. MELLON: Oh, yes. Other crimes are -- very many crimes are prosecuted by indictment.

QUESTION: Well, what determines that?

Who is it who decides it and on what criteria?

MR. MELLON: The grand jury generally makes that determination, and the State Attorney quite often will bring matters before a grand jury, matters dealing with public corruption, for example; matters which historically have been brought before a grand jury.

Florida has a unique law, a Sunshine Law, which requires that all executive agencies conduct their business in the sunshine, in effect, in that there are not to be executive sessions.

QUESTION: Unh-hunh.

QUESTION: Can the grand jury take up a case that the prosecutor doesn't want them to take up?

MR. MELLON: Yes, sir. Indeed they can.

QUESTION: How? How?

MR. MELLON: Simply by directing the prosecutor to bring that matter before them.

QUESTION: When you have this hearing before the prosecutor, are the witnesses sworn?

MR. MELLON: Yes, Your Honor, all the -- the prosecutor must certify in his information that he has had sworn testimony taken, and they are in fact sworn.

QUESTION: And where is that in the statute?

MR. MELLON: Where is that in the statute?

QUESTION: I didn't see that in the statute. Can you tell me where it is?

MR. MELLON: Your Honor, counsel for amicus will -- it's set out in the Florida Rules of Criminal Procedure, that the matter must be --

QUESTION: And you say that this was a detached person, the prosecutor?

MR. MELLON: At that juncture, yes, Your Honor.

QUESTION: And, as I understand it, most mine-run criminal offenses are proceeded against by information; capital cases have to go by way of an indictment, and some cases involving official corruption and so on go by way of indictment, but most mine-run criminal offenses are initiated -- the prosecution is initiated by information; is that --

MR. MELLON: That is correct.

QUESTION: Do I understand that correctly?

MR. MELLON: That is correct.

QUESTION: Unh-hunh. And is this case confined to Dade County, Florida, or is this a Statewide problem in question?

MR. MELLON: It's a Statewide question, Your Honor, since we're dealing here with the problem -- Dade County has a unique magistrate system, which arose during the time this case was pending on appeal. And Florida provides, on a Statewide basis, under its rules for a preliminary hearing now.

But its ramifications are clearly Statewide.

QUESTION: Unh-hunh.

QUESTION: Mr. Mellon, since this case started, I understood it concerned both accused -- persons accused of felonies as well as misdemeanants. Is the misdemeanant aspect of it before us now?

MR. MELLON: It is, Your Honor.

QUESTION: So we're concerned both with the --

MR. MELLON: Both with felonies and with misdemeanors.

QUESTION: Mr. Mellon, before you proceed, did I understand you to say that the State's Attorney would require sworn evidence before he issued an information, or would he rely, say, on an affidavit from the policeman?

MR. MELLON: In Dade County, in instances where informations are filed after an officer has come to the State Attorney's office and has exposed the case to the State Attorney. In those instances, sworn testimony is taken in each instance.

QUESTION: From the officer --

MR. MELLON: From the officer and --

QUESTION: -- before a court reporter?

MR. MELLON: Not always -- not always with a court reporter; but he's sworn, when an officer comes into the office. There are certain policies set out in the office that determine as to when a court reporter will be utilized.

But the officer and/or any other witnesses who are there are sworn, in those instances.

QUESTION: Does the State Attorney adhere to, say, the same standards of requiring probable cause that a magistrate would, before issuing a search warrant or an arrest warrant?

MR. MELLON: Your Honor, under the Revised Rule, which was effective on March 1st of this -- this month, the Supreme Court has imposed -- the Supreme Court of Florida has imposed on State Attorneys in Florida an even higher burden.

In the per curiam opinion, which accompanied the Revised Rule, the Supreme Court of Florida said that prosecutors now have 96 hours after the first appearance

hearing to make a determination as to whether or not an information shall be filed against that person in custody.

Now, in making that determination, they must not only look to see if there be probable cause, they must go beyond it and establish if there is proof beyond, to the exclusion of a reasonable doubt. If they are not being proved beyond, to the exclusion of a reasonable doubt, then the defendant should be discharged.

That's the implication in the per curiam opinion, which accompanied the release of the new Rule of Criminal Procedure.

QUESTION: This is not stated expressly in the new rules, is it?

MR. MELLON: It -- Your Honor, in the Appendix to the respondents' brief, the amended rule appears with its accompanying opinion, it's the last exhibit in the respondents' appendix. It was not heretofore brought to this Court's attention, and the petitioner, since the amended rule and the opinion in which it was released occurred in early February.

QUESTION: Could I ask you this: I take it the claim is not that convictions that occur without the preliminary hearing should be automatically reversed?

MR. MELLON: That's not at issue here.

QUESTION: The issue here is pretrial custody.

MR. MELLON: Pretrial detention.

QUESTION: And this is a 1983 action?

MR. MELLON: No, Your Honor, we're up here on --

QUESTION: It was brought in the District Court, was it not?

MR. MELLON: Yes, sir.

QUESTION: As a 1983 action, as a federal, asserting that that was a denial of constitutional rights by pretrial contention -- detention without a preliminary hearing.

MR. MELLON: No -- Your Honor, it was brought as a class action, seeking --

QUESTION: Well, I know, but it's -- but the -- but it is a 1983 action, in the sense of the jurisdiction of the District Court.

MR. MELLON: Yes, sir.

QUESTION: It rested on 1983. But it has only to do with custody, doesn't it?

MR. MELLON: That's right, Your Honor. That's the salient question, Your Honor.

QUESTION: And do you think that Florida -- does Florida have something akin to habeas corpus that permits a person to challenge pretrial custody?

MR. MELLON: Heretofore, at the time this suit was instituted there was -- habeas corpus was a possible remedy, at any time after custody, to question lack of

evidence at all to hold a person.

Florida, by statute, had had a 30-day period which allowed a State Attorney to -- that time in which to file an information.

QUESTION: And, of course, as far as custody is concerned, for persons on bail, he's considered in custody, I suppose, to some extent he's under restraint.

MR.MELLON: We don't reach that question here, Your Honor. Not in the posture in which it came up from the Fifth Circuit.

QUESTION: Yes. But could -- but you think rather than bringing this 1983 action, that the petitioners here could have filed for habeas corpus in Florida, challenging their pretrial detention?

MR. MELLON: That was argued below, Your Honor. I think there is a possibility that they could have filed for habeas corpus.

QUESTION: Well, why --

MR. MELLON: However, the 30-day statute that had existed, which has now been repealed in Florida, had provided they must wait that period of time before he could question it, before the judge who was to try him. However, it's always been felt in this case, certainly by the petitioner, that the other type of habeas corpus which could -- which would lie where there is the absence of any evidence

to hold that man, could have been petitioned for.

QUESTION: Well, how about -- well, which would have encompassed the preliminary hearing issue, I suppose.

How about federal habeas?

MR. MELLON: I think that federal habeas corpus was available in this suit.

QUESTION: And supposing that the incarcerated pretrial detainee initiates a habeas corpus action in the Florida Circuit Court, what's the issue there prior to his trial, whether there's any evidence at all that justifies holding him?

MR. MELLON: Under the old procedure in Florida, yes.

QUESTION: Well, now, is this procedure still available?

MR. MELLON: Habeas corpus is still available in Florida. However, the Supreme Court decided that the speediest way, I think, was by this amended rule, which became effective on March 1st.

If after the lapse of -- in effect it's 96 days plus another 24 hours before there's --

QUESTION: Ninety-six hours.

MR. MELLON: Excuse me, Your Honor; 96 hours plus the additional 24 hours in which the man must be brought in for a first appearance hearing.

If, after the lapse of that time, an information has not been filed, the Supreme Court has directed in its rule that the man be released on his own recognizance.

QUESTION: Is he entitled to challenge on State habeas corpus this lack of any evidence, even after an information has been filed?

MR. MELLON: His remedy there is to move by motion to dismiss, Your Honor. At the time of arraignment, the information is read to him, unless he waives the reading. He can at that time attack the sufficiency of the evidence to hold him.

QUESTION: So you say there is, then, some State remedy available, whether or not an information is filed?

MR. MELLON: Yes, Your Honor.

QUESTION: Well, what is this first appearance, that's not clear to me. I'm looking at the rule as effective from March 1st of 1974, that is this month, the first of this month, which the general rule seems to be: in all cases where the defendant is in custody, except capital offenses, the preliminary hearing shall be held within 96 hours of the time of the defendant's first appearance.

Now, what is the defendant's first appearance?

MR. MELLON; First appearance hearing. The defendant must be brought before a magistrate within 24 hours after his arrest.

QUESTION: And what's the function of that first appearance?

MR. MELLON: He's advised of his constitutional rights at that time, his right to bail, questions of sanity are quite often raised at that first-appearance hearing. He is thereafter advised, generally, of his constitutional rights.

QUESTION: He's advised of his rights, but is any determination at all made by that magistrate as to the reason why he's being confined?

MR. MELLON: Not at that -- not at that time, no.

QUESTION: Not at the first appearance.

MR. MELLON: It's --

QUESTION: And so the -- and that has to occur within 24 hours of his apprehension.

MR. MELLON: That's correct. In --

QUESTION: Excuse me --

MR. MELLON: Excuse me, Your Honor.

QUESTION: -- you go ahead.

MR. MELLON: Dade County has a unique -- I alluded to it earlier, has a system of committing magistrates which sit regularly.

QUESTION: Unh-hunh.

MR. MELLON: And which afford preliminary hearings in an almost overwhelming majority of cases. The courts

were created, as I say, at the time this case was making its way up through the appellate structure. However, in fact in Dade County, at the first-appearance hearing, a man is advised of his constitutional rights and thereafter told the date of his preliminary hearing, which is a matter-of-course thing.

However, candor compels me to indicate to this Court that that's -- that the system of magistrates courts in Dade County are unique, and though other circuits in Florida offer preliminary hearings on a regular basis, Dade County is the unique one that does it as a matter of course.

QUESTION: But in every county there's a first appearance within 24 hours after apprehension, is that right?

MR. MELLON: That's right, Your Honor.

QUESTION: And then the rule provides that the preliminary hearing shall be held within 96 hours -- that's four days -- from the time of his first appearance.

MR. MELLON: Unless --

QUESTION: And then, as I understand it, that is unless an information has, in the meantime, been filed; is that right?

MR. MELLON: Yes. And that rule was modeled after your Rule 5.

QUESTION: Yes. I just want to be sure I understand this system.

MR. MELLON: Yes. That's it, Your Honor.

QUESTION: That's really kind of the guts of the argument, isn't it --

QUESTION: Right.

QUESTION: -- the fact that your rules except from the preliminary hearing requirement the cases in which an information has been filed, and your opposing counsel says you have to have one.

MR. MELLON: That's as succinctly as it could be put. Your Honor. Yes, it is.

QUESTION: Some of the circuits in the federal system have held that there need be no preliminary hearing once an indictment is returned. What's the Fifth -- do you know the Fifth Circuit situation on that score?

MR. MELLON: I'm not clear, Your Honor; I am sure that counsel for the respondents will supply the Court with that information.

We always submitted in Florida -- we also argued Beck vs. Washington below, in which this Court also alluded to the fact that in the State of Washington for almost fifty years -- this Beck was decided in 1962 -- that in Washington for almost fifty years prosecutions were had not by grand jury indictment but by information, without determinations as to probable cause.

Now, clearly, the language of this Court seemed a little to prior determinations. However, we've argued, and

we argue here, that the State of Washington law at that time and at the present time is such that there are no probable-cause hearings given, either prior to the time of an arrest or after an arrest in the State of Washington. And that the prosecutor in Washington proceeds as he does in Florida, and as he does in several other States which we allude to in our brief, Wyoming, Montana, Arkansas, Connecticut, and that the Supreme Court of Connecticut, in discussing this matter in an early case, has said that the State Attorney, when proceeding by information, is vested with the common law power of Attorney General.

And that they cited Hurtado in that case, and Ocampo, and held that the State Attorney really in effect acts as a one-man grand jury, and that's what we submit to this Court: the State Attorney in Florida is capable of acting in a detached neutral manner so that his finding, his certification of probable cause should be entitled to as much weight, certainly as a finding of probable cause by a grand jury.

We submit to this Court respectfully that the decision of the Fifth Circuit Court should thereupon be reversed.

MR. CHIEF JUSTICE BURGER: Mr. Marky.

ORAL ARGUMENT OF RAYMOND L. MARKY, ESQ.,

ON BEHALF OF FLORIDA AS AMICUS CURIAE

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

Three rulings that were decided by the Court of Appeals disturbs Florida in particular.

No. 1 is that they held the rule which exempted misdemeanants from preliminary hearings was a deprivation of equal protection of the law.

The second, they said that the delay in holding a preliminary hearing in a capital case or in what Florida calls a light felony case, on the one hand, with general felonies on the other -- let me back up so the Court understands.

If it's a capital or a light felony, we have seven days within which to inform or indict; if it is a normal felony, we have four days.

The Court of Appeals held there was no rational basis to classify these different crimes and have these different periods, and that it constituted a denial of equal protection.

The third, of course, was that we had --mandatory to have preliminary hearings, notwithstanding the filing of the information.

Now, all of these, of course, is of interest to the

State of Florida, because these are rules of Statewide application.

In so far as the misdemeanants are concerned, the misdemeanant petitioner in this case is charged with first possession of marijuana, carries a penalty of 60 days, $500 fine.

We find that this Court exempts from preliminary hearings petty offenders, six months, $500 fine.

So I would submit to this Court that the Court of Appeals is either wrong, or this Court's rule is unconstitutional. Because you are in fact discriminating between a petty offender and a felon.

That's quite clear, I think it's vivid, and I think the opinion must fall or this Court's rule must fall.

The second one, the delayed hearing, I think really misses the mark. There is a rational basis to classify these two crimes. Under our rule, it's Rule 3.130, first appearance, we've got to show, in a capital case or a light felony, presumption great, proof evident; or he has a right to bail.

QUESTION: Who is the first appearance before?

MR. MARKY: A magistrate, Your Honor. In other words, we're having a bail hearing in 24 hours, and if we can't show proof evident, presumption great, in a capital or light felony, this man is entitled to bail; so he is getting

a hearing.

QUESTION: But supposing that the prosecuting attorney goes in on this first hearing and says, We don't contest the right to bail?

MR. MARKY: In that instance, Your Honor, we still have a rational classification. I'll tell you what it is. In a capital offense, under the Florida Constitution, there must be an indictment.

So the State Attorney, in addition to filtering this evidence before himself sworn, he must of necessity take an additional step, not required in the other felony, by then taking this to a grand jury and presenting it to them.

A duplicitous step which is in addition to the normal felony. And it is that ministerial administrative function that we submit to you justifies the additional three days on this more serious crime.

QUESTION: Well, we're not involved here, as I understand it, with people who are in custody as a result of grand jury indictments, --

MR. MARKY: No, I'm talking about the discrimination, Your Honor, --

QUESTION: Yes.

MR. MARKY: -- of equal protection between the seven days and the three days. The Court ruled, the Court of

Appeals ruled that that statute was -- or that rule was unconstitutional because of equal protection.

QUESTION: You say this is done before a magistrate. That's just in Dade County, is it, or --

MR. MARKY: No, no, that's Statewide, Your Honor.

QUESTION: Statewide, all right.

MR. MARKEY: Which brings me to the third element of the Court's ruling.

Your Honor, under the old system it was no good, and I'll stand here and tell you that. A State Attorney was not required to file an information at any particular time. If the man was in custody, he had to stay there for a period of thirty days before he could do anything, whether an information was brought down or not.

Consequently, we had the gravamen of the complaint in the Court of Appeals and in the District Court, and that is that a man languishes in jail for two weeks, three weeks, months, before an information is even filed.

Now, that's under the old system.

But the Court transposed that historical problem into the present rules, which it doesn't fit, because the State Attorney better be in there with an information in 96 hours, or he's going to a hearing.

QUESTION: Yes, but the claim in this -- the issue in this case is that if he is in there within 96 hours, with

his information, then the man stays in custody if he can't make bail indefinitely without any hearing as to probable cause --

MR. MARKY: Well, that's -- that's not --

QUESTION: That's what the issue is in this case, isn't it?

MR. MARKY: Yes. But I'm going to the problem, Your Honor, of this long detention before anything occurs.

QUESTION: Well, but that's not the issue in this case.

MR. MARKY: But after the information is filed, a whole host of things happen. Including Florida's criminal rules provides -- it's 3.190(b) -- provides for, in the nature of a summary judgment, that can come any time, in the form of a motion to dismiss.

In other words, they come in and say, We admit that these are the facts, and this is the fact, that this man is entitled to release. It's unique to Florida. It's the only law I've ever heard of a criminal summary judgment. But Florida law authorizes that.

Which gets --

QUESTION: It is a one-way summary judgment?

MR. MARKY: Yes.

QUESTION: That makes quite a difference, doesn't it?

MR. MARKY: It is, Your Honor. Which brings me to the point, you can't take the episode here, in ignorance of all of the other Florida rules. Florida has the most comprehensive rule of discovery.

Now, under Coleman vs. Alabama, which tells us why a preliminary hearing is important: to having the man discharged; early pretrial release; the discovering of the State's case; and certain insanity presentations.

Florida provides for your pretrial, your own recognizance, 24 hours you've got to have that hearing, on bail.

Secondly, we have these rules of discovery which are broader than any in the United States.

QUESTION: Yes, but what does that have to do with the issue before us here, Mr. Marky?

MR. MARKY: I think what it has to do with it, Your Honor, is that what a man gets under our comprehensive over-all scheme --

QUESTION: Unh-hunh.

MR. MARKY: -- is much deeper in terms of preparing himself than anything he would get out of a preliminary hearing.

QUESTION: But he's not now talking about any opportunity not to -- lack of opportunity to prepare himself for trial, he's talking about being locked up on the

basis of an information with no preliminary hearing as to any probable cause, but --

MR. MARKY: Well, --

QUESTION: -- but locked up only on the sayso of a prosecutor. That's what the issue here is, isn't it?

MR. MARKY: Yes, it is, Your Honor.

QUESTION: Right.

MR. MARKY: But the point that I'm getting at is the gravamen of the complaint at the District Court and at the Court of oppeals level was this two-month protraction. And Florida has, as I'm trying to illustrate, it is a compendium package of rules designed to stop this long delay, and that's what the first appearance and the immediate information is all about; then your mandatory speedy trial in 60 days on misdemeanors and 90 days on felonies, which I think cannot be ignored in the totality of the --

QUESTION: But he's talking about being locked up for sixty days or ninety days on the sayso of a prosecutor. Now, that's the only issue before us, as I understand it; and maybe I wholly misapprehend this case, but --

MR. MARKY: Well, look, apparently you and I are not communicating, Your Honor, because the very purpose expressed in Coleman by Mr. Justice White was that he was concerned that we would result in a dispensing with preliminary hearings if we require counsel at them.

And this Court cataloged all of the important features that the preliminary hearing serves. And I am merely trying to convince the Court that it's there.

QUESTION: Yes, but surely the preliminary hearing, as Mr. Justice Stewart suggests, would also result in his release if it was held that there was not probable cause. Now, forget that discovery for the moment and --

MR. MARKY: All right.

QUESTION: -- and why don't you address yourself to whether or not it's constitutional to continue to hold the man after the information is filed, even in the absence of a judicial determination.

MR. MARKY: Of course, I understand the point, and you are --

QUESTION: Well, that is the point at issue.

MR. MARKY: -- taking the assumption that bail has been denied and all this. In that context, --

QUESTION: We just want you to talk about this case, that's all.

MR. MARKY: In that context then, Your Honor, we quite agree with the petitioner in the case, that Beck vs. Washington -- Beck vs. Washington very definitely qualifies the State Attorney as a one-man grand jury. And that this is really akin to Morrissey, which was cited by the Court of Appeals. He didn't require a magistrate there, it was just

someone who was not directly involved in what it was that brought about the man's incarceration.

QUESTION: Yes, but there is a little difference in Morrissey, because the man that you're talking about here is going to be the man who prosecutes him, presents the evidence against him.

He's had to make the preliminary determination that it was a prosecutable offense, and in that sense Coolidge has something to do with it, because it might be thought difficult for him to disassociate his decision on the first stage from his responsibilities on the second.

MR. MARKY: I understand the distinction, but then we are presented with this Court's Rule 5, where a man happens to be indicted, he gets no --

QUESTION: But there you had a dozen or more people making the decision, as distinguished from one. And the dozen or more do not have any further obligation with respect to the prosecution.

MR. MARKY: I understand the dichotomy of the lay persons, 12 out of 18 in Florida must return the indictment, but I would submit to Your Honor that if the indictment is that different, then why did this Court say that the States may choose to bring to trial pursuant to an information, as opposed to an indictment, that the federal government has.

If it was --

QUESTION: This Court at that stage wasn't addressing itself to the narrow problem that's before us here today, though.

MR. MARKY: But I think it -- I think it nevertheless follows, Your Honor, in that it is --

QUESTION: Functionally. It's one thing to say that functionally the information charged by the prosecutor is the same as the action of the grand jury, but that doesn't mean it's the same for all purposes.

MR. MARKY: I understand what the Court is saying, but the treating of these two types of bringing to trial as sufficiently alike to not require indictments by the States, linked up with Beck vs. Washington, as counsel has pointed out and as quoted in the brief, makes it clear that I think the State Attorney is sufficiently removed to where he is not directly involved to bring in this charge.

He's certainly competent to decide the question.

QUESTION: Does the State's Attorney in Florida run for office?

MR. MARKY: By the electorate? Yes.

QUESTION: And is he any different from the other State's Attorneys that brag about how many convictions he got? Are they different from others?

MR. MARKY: Well, Your Honor, I'm not prepared to answer that question. I'm not familiar with the State

Attorneys and their political campaigns that closely to even answer the question. I think a State Attorney,and the statistics and his record bear it out, is not likely to file an information in a case where he can't even get by a directed verdict.

I mean, I think a man would have to be somewhat foolish to set about a course of filing an information when he knows he doesn't have the evidence.

QUESTION: And that's what makes him unbiased?

MR. MARKY: I think -- well, I think it makes him reflective --

QUESTION: That's what makes him neutral?

MR. MARKY: It certainly makes him reflective, Your Honor.

QUESTION: That makes him neutral, too, doesn't it?

MR. MARKY: That, I guess the Court --

QUESTION: Neutral and careful.

MR. MARKY: -- will have to dispose of that.

The State's position is that Florida has tried to emulate this Court's Rule 5, the spirit of that Rule 5, notwithstanding the differences between indictments and information, and that it has substantially changed the time within which a man must be picked up, brought to a judge. And in amicus and in the Court of Appeals they constantly refer to McNabb, and they keep saying, Well, what we need is

McNabb.

And I think that this is somewhat amusing, for our rule on the first appearance is McNabb, as I understand McNabb.

MR. CHIEF JUSTICE BURGER: We will resume at this point after lunch.

MR. MARKY: Thank you, Your Honor.

[Whereupon, at 12:00 noon, the Court was recessed, to reconvene at 1:00 p.m., the same day.]

AFTERNOON SESSION

[1:01 p.m.]

MR. CHIEF JUSTICE BURGER: Mr. Rogow, you may proceed when you're ready.

ORAL ARGUMENT OF BRUCE S. ROGOW, ESQ.,

ON BEHALF OF THE RESPONDENTS

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

In Florida, the State Attorney absolutely controls the question of probable cause.

If he files an information, there is no right to be heard on the question of probable cause.

QUESTION: Could I ask you at the outset, was Preiser v. Rodriguez cited at all, or considered in the Court of Appeals?

MR. ROGOW: It was not, Your Honor, but it has no application in this case. It has no application, one, because we have never sought to release from custody in the District Court. All we sought was a pretrial procedural right.

But even if the court felt that Preiser did have some application --

QUESTION: Yes, but the custody was the only thing that was at issue, in the sense that if there had been no pretrial incarceration and just a summons to come to court,

at a certain time, this case wouldn't have arisen, I take it.

MR. ROGOW: It may still have arisen, Your Honor, because the question of whether or not that is custody might still be a valid question.

QUESTION: Well, I know, but if it wasn't.

MR. ROGOW: It is true that this is a pure custody case, but my point is that all we're asking is the District Court to compel there to be a preliminary hearing --

QUESTION: Or release.

MR. ROGOW: No, sir. Never. Never asked for release. The decision on release would have to be that made by the magistrate. If he determined there was no probable cause, then he would release the person. The State magistrate would. We never asked --

QUESTION: You mean your object was never to be released.

MR. ROGOW: Only if there was no probable cause, Your Honor.

QUESTION: I know, but --.

QUESTION: But even if you're there under 1983, certainly the District Court's ruling on your action has got to be in the alternative, doesn't it; say, Either give this man a hearing or release him.

MR. ROGOW: The decision of the District Court in offering the alternative to the State, in saying this is the

sanction was a statement saying, release him. But that would assume, of course, that the State would fail to abide by the constitutional decision.

I don't think we can make that assumption.

But if I may digress --

QUESTION: Anyway, the question I asked was whether Preiser had been considered at all by the Court of Appeals, and you say it was not.

MR. ROGOW: It was not, and let me add one other thing regarding Preiser, is that even if Preiser has application in this case, State remedies were futile, and Preiser makes it quite clear that there is no need to attempt habeas corpus in State court if it would be futile. And it is in Florida.

QUESTION: Well, I know, but the question is the form of your action in the federal court, whether it should be federal habeas corpus or not.

MR. ROGOW: And if it should be federal habeas corpus, if the court felt that this is properly a habeas corpus matter, we think that --

QUESTION: Then we would have -- then you would certainly focus on it and have the District Court's judgment as to whether there was a local remedy.

MR. ROGOW: Yes, sir, but it's quite --

QUESTION: Which we do not have now.

MR. ROGOW: Yes, your do, Your Honor. I think the record is absolutely clear that there is no local remedy throughout this litigation.

QUESTION: Well, I know -- did the District Court say so?

MR. ROGOW: Yes, sir, and the Fifth Circuit said so.

QUESTION: What did they say?

MR. ROGOW: It said that in Florida, once an information is filed, it is quite clear there is no way to test the determination of probable cause. And the Fifth Circuit, in a footnote I think in their decision, said --

QUESTION: How about federal -- local -- how about State habeas?

MR. ROGOW: Futile. Absolutely futile. Because once the information is filed under Florida law, you can't go behind it to determine probable cause. State Ex Rel Hardy vs. Blount makes it quite clear, and the Florida decisions for a long period of time make it quite clear that a State habeas corpus judge will not require --

QUESTION: Well, you disagree with your opponent here, where he suggests that State habeas might be available?

MR. ROGOW: He suggested it, but he did not address the question of whether or not it would be futile. He said you could file a habeas corpus petition; but we are telling the Court that if you did file one it would be a futile act.

An empty act. And the record is quite clear on that point.

QUESTION: There's a footnote, I think, in your brief or one of the briefs, about what's happened to the respondent in this case. What's his posture now?

MR. ROGOW: He is -- he has been convicted, Your Honor, and he is in jail, in Belle Glade, Florida. But we don't see any mootness problem here, if that is what the Court is --

QUESTION: But you're talking about the class action aspect?

MR. ROGOW: It is a class action, but it is also a problem of low visibility in the criminal process, one which is capable of repetition, yet evading review.

QUESTION: Well, but you are not then seeking any relief with respect to the respondent, but only to those who are similarly situated?

MR. ROGOW: Yes, sir, exactly.

QUESTION: And there are no named parties available now?

MR. ROGOW: At the time this suit was filed, all the named parties suffered this exact same deprivation.

QUESTION: I said now, was my question.

MR. ROGOW: No, sir. No, sir.

QUESTION: Well, how can you maintain a class action without a named party?

MR. ROGOW: Because at the time the class action was maintained originally in the District Court, he was a member of the class. And so he had standing at that point. And the class action survives him.

But I hasten to add that this is capable of repetition, yet evading the review.

QUESTION: I think you should hasten, because I don't agree with you at all.

QUESTION: There's a case called Berney v. Indiana?, I think, that rather cuts the other way from what you've just told us.

MR. ROGOW: I'm sorry, I'm not familiar with the Berney case, but I am familiar with the cases that talk about capable of repetition yet evading review.

QUESTION: Yes.

MR. ROGOW: The point is that this issue could never be litigated in the 30 or 60 or 90 days in which that custody is deprived. There would be no way, ever, to successfully litigate the issue.

And the Court, if it felt that this was not a capable of repetition yet evading review case, would relegate people to having no opportunity to raise the issue at all. Because the Florida law is clear, and the only way to maintain such an action would be as a class action and pointing out the capable of repetition yet evading review exception to

mootness.

Within recent -- I should back up and point out that even if a preliminary hearing is held in Florida, because a State Attorney does not file an information, the State Attorney can overrule the discharge at that preliminary hearing. If the magistrate finds no probable cause, and the State Attorney is unhappy with that determination, the State Attorney can file an information and the person is back in jail again.

So I harken back to my original statement that the State Attorney absolutely controls the question of probable cause.

Within recent years this Court has held that before a person's welfare check may be taken, before their wages are garnisheed, before their driver's license is suspended, there must be a prior hearing. This case presents the issue of whether or not after a person's liberty is taken there is a right to a subsequent hearing, and recently, in Morrissey vs. Brewer, and Gagnon vs. Scarpelli, the Court held that persons whose liberty is conditional, people on parole and probation, were entitled to a prompt subsequent preliminary hearing, once it was determined that that conditional liberty should be revoked.

We are talking here in terms of absolute liberty. These people are presumed innocent, and it is their absolute

liberty which is being deprived.

The right which we seek the Court to -- which we ask the Court to accord is not a new or novel right, preliminary hearings are ancient institutions, they were known in the Twelfth Century, codified in the Sixteenth Century, used in the Colonies before and after the Revolution, they have evolved into imprtial determinations of probable cause over the years, historically.

The forerunner of the preliminary hearing which we ask the Court to grant today was granted in the case of Aaron Burr, where Chief Justice John Marshall held a preliminary hearing to determine whether or not there was probable cause to hold Aaron Burr on a charge of treason.

And the extent of that inquiry was whether or not an offense had been committed, and whether or not Burr had committed it.

And that is the kind of preliminary hearing which we are talking about, and it has been known long ago, in England and here, and the Marshall hearing was held in 1807.

Our position is that the information process cannot determine probable cause for two reasons: one, because it provides none of the elements of a due process hearing. There is no right for the defendant to be heard. There is no right to confront and cross-examine witnesses. There is no right to present evidence. So it is solely an ex parte non-

adversary hearing, and that is not consistent with due process.

QUESTION: By definition, hasn't there, in this case, been an arrest on probable cause?

MR. ROGOW: Yes, sir, on Fourth Amendment probable cause.

What we are seeking is a test of that Fourth Amendment determination.

It's interesting, I think, to note that if evidence is seized upon a warrant, stating probable cause, you can test that determination by a motion to suppress. But here in Florida you cannot test the taking of liberty.

QUESTION: Well, you don't get a motion to suppress -- I mean, the procedures in the States vary, but sometimes that doesn't happen until the actual trial, that you're allowed a motion to suppress; isn't that correct?

MR. ROGOW: I'm not sure about most States, but in Florida you can move to suppress certainly before trial. If the evidence has been illegally seized.

It seems that if the evidence has been illegally seized, or if the taking of the body is improper, to have to wait for trial and remain in jail during all that time, only to find out, six months later, that there really is no case at all, serves no useful purpose for the defendant or for the State.

QUESTION: Well, but here there has been, as I

understood you to agree, a taking into custody on probable cause.

MR. ROGOW: Fourth Amendment probable cause --

QUESTION: For arrest of the person.

MR. ROGOW: -- for arrest, yes, sir. And we are seeking to test that probable cause in a due process hearing. Subsequent to the taking.

QUESTION: Of course, the basic, ultimate test comes in the trial of the criminal offense, doesn't it?

MR. ROGOW: Well, the basic element of the test at that point, of course, is of no great --

QUESTION: The ultimate test.

MR. ROGOW: It's the ultimate test, but it is of no benefit to a person who has been incarcerated for sixty days and shouldn't be there in the first place.

And that's what the preliminary hearing is all about, and that's what the preliminary hearing in Morrissey vs. Brewer was all about.

Certainly, ultimately, the taker might decide that there was reason to revoke parole or probation, but there should be a preliminary determination as to whether or not parole or probation should be revoked.

QUESTION: Isn't this procedure very similar to the procedure under Rule 5 of the Federal Rules of Criminal Procedure?

MR. ROGOW: No, it is not. Rule 5 uses informations only in misdemeanor cases. They can only be used in felony cases if a defendant waives his right to indictment.

So Rule 5 involves only misdemeanors to that extent it is similar, because this case also presents the issue of whether or not misdemeanants are entitled to preliminary hearings if they, too, are in custody.

But it is a limited comparison.

QUESTION: Well, when is a defendant in a federal trial first told of his right to be indicted by a grand jury before he can be tried?

The fact is that many felonies in the federal system are commenced by the filing of information.

MR. ROGOW: But the filing --

QUESTION: And a waiver.

MR. ROGOW: And a waiver.

QUESTION: Yes. But when in the federal system if the defendant first given his opportunity to waive?

MR. ROGOW: I think probably at the Commissioner hearing, the first appearance hearing he might be told that, I'm not quite sure.

QUESTION: Well, there's no requirement under Rule 5 that he be told that.

MR. ROGOW: No, sir, there is no requirement that he be told that. But he would obviously have counsel at the

first appearance hearing before the Commissioner. And, seemingly, his counsel would inform him, if he makes a decision that he wants to waive indictment, that he could be proceeded against by information.

QUESTION: Well, what -- he often wouldn't have counsel. It's at that first appearance that he's advised of his right to counsel, isn't it?

MR. ROGOW: And in felony cases, it seems, since they're going to be determining bail and other issues, at least the practice is in Florida and the Southern District of Florida, to appoint counsel at that time.

QUESTION: Unh-hunh.

QUESTION: I understood from prior argument that there were two types of arrest that were involved primarily: arrests made in the field by an officer who may have witnessed the crime, or there were exigent circumstances justifying arrest; in those circumstances there was probable cause for the arrest.

Now I understand you to say that where the State's Attorney issues a warrant for arrest on the basis of testimony of a police officer, sworn testimony, that probable cause is created by that act. That is, the issuance of the warrant by the State's Attorney. Is that correct?

MR. ROGOW: Yes, sir. That is a Fourth Amendment ex parte determination of probable cause. There are

deficiencies in it, because of --

QUESTION: Well, the next question I was going to ask you is that you accept -- or you agree that there is probable cause there, even though the State's Attorney is not an impartial officer?

MR. ROGOW: What we have there is a practical kind of consideration. I cannot concede that there is pure -- absolutely pure -- Fourth Amendment probable cause there, because neither the State Attorney nor the arresting officer is a neutral and detached person.

But in a practical -- as a practical matter, there is -- we are willing to have the State Attorney or a police officer decide that there's probable cause and make an arrest.

Otherwise, what we would be asking for would be a prior-to-arrest determination of probable cause; and we don't ask that. Because that would be a ridiculous request to invite possible defendants in to see if they're going to be arrested some time in the future would work.

So, obviously, when the balancing process takes place, you have to allow the arresting officer to make that quasi-determination of probable cause, or the State Attorney perhaps making a similar determination -- quasi-determination of probable cause.

Neither are neutral and detached. But we're seeking

to test that determination, and so it's a flexible kind of thing we're asking after the taking of liberty: an opportunity to test that determination that was made.

And that is a Fourteenth Amendment request that we're making.

Now, I think it's interesting to note that the State Attorney is not neutral and detached, not only under the Fourth Amendment, but under the Fourteenth Amendment. In Morrissey vs. Brewer, the Court talked about one of the essential elements of a due process hearing is to have that hearing conducted by a neutral and detached person.

And we submit that the State Attorney, the chief prosecuting officer, certainly is not neutral and detached under the Fourteenth Amendment, and of course under the decisions of this Court, in Coolidge vs. New Hampshire and Shadwick vs. City of Tampa, he's certainly not neutral and detached under the Fourth Amendment.

QUESTION: You're talking about Morrissey v. Brewer, do you really think we went that far, to say he must be neautral and detahced, or did we say that it must be a probation officer other than the one who has been supervising his release?

MR. ROGOW: Yes, those were the words in Morrissey vs. Brewer, and we respect those words.

QUESTION: That doesn't necessarily make him

neutral and detached, any more than in Goldberg v. Kelly, you had neutral and detached, it just meant a person who had not had a prior connection with the case.

MR. ROGOW: Or will not have a future connection with the case.

QUESTION: Yes.

MR. ROGOW: In other words, at the time he makes the decision, he is not involved in the case before or after. The prosecuting attorney is the chief prosecutor. He's involved in the case afterwards. There's no way that he can be said to be neutral and detached.

QUESTION: It might not be the same prosecutor, any more than it would be the same probation officer or the same agent in the welfare office.

MR. ROGOW: We were talking about the head of the office, the State Attorney, and everyone working under him are Assistant State Attorneys, so he --

QUESTION: They're his alter-egos, is that your theory?

MR. ROGOW: Yes, sir. He is -- he is the one to whom responsibility finally resides. And he is the one who signs the information. He is the one who charges probable cause.

It's true, his assistant may have made the initial determination, which I think perhaps in some way underscores

the kind of procedure that we have here. And this record, at page 49 of the Appendix, reflects that, that a police officer comes in, talks to an Assistant State Attorney, perhaps a year or two out of law school, and tells him what he thinks is the problem, what the gravamen of the charge is.

And then the assistant prepares the information. He passes it on to another deputy State Attorney, who looks it over, and finally the chief State Attorney signs it. So you've got three people in this process, all of whom are rubber-stamping the original decision made by an assistant who is working under the direction of the State Attorney.

QUESTION: Would you have any reason to suppose that the basic practice is very much different in the federal system with respect to informations?

MR. ROGOW: No, sir; I do not think it's much different. And, to be quite frank with the Court, if we are correct, if a person in custody upon an information is entitled to a preliminary hearing, then, under Rule 5(c) a person who is in custody prior to trial in the federal system would also be entitled to that preliminary hearing. So we --

QUESTION: Right. In the federal system, if there's -- if there has been an arrest with a warrant, and the person is brought before a magistrate whose only function,

if the arrest has been with a warrant, is to advise him of his rights, which is like the first hearing in Florida.

MR. ROGOW: Yes, sir.

QUESTION: And he's then in custody and there has to be a preliminary hearing within ten days, except that the preliminary examination shall not be held if the defendant is indicated, or if an information against the defendant is filed before the date set for the preliminary examination.

MR. ROGOW: Yes, sir.

QUESTION: And then if an information is filed, then he comes up before the District Court, and not until then does he have an opportunity to be told of his right to be indicted rather than be informed against.

MR. ROGOW: Well, he would have no right to be indicted, because it would have to be a misdemeanor, and he could be informed against.

QUESTION: As he --

MR. ROGOW: So that the information would be --

QUESTION: No, I'm talking about a felony now. I'm talking about a felony, in which there is a constitutional right not to be proceeded against except by indictment. But he's not told about that until he appears in open court in the District Court. Under Rule 7.

MR. ROGOW: And the question is, Your Honor, whether or not that person would have a right to a preliminary hearing.

QUESTION: Well, I'm just suggesting that that's the -- that that federal system is basically the same as the Florida system, and it doesn't mean that it's valid, but it does mean that these rules, enunciated by this Court, are unconstitutional if you're correct.

MR. ROGOW: Yes, sir, I would say that would be true, if we are correct.

QUESTION: Unh-hunh.

On the other hand, in the federal system, if the arrest has been without a warrant, if the arrest has been without a warrant, then the magistrate has the duty of finding probable cause. And to that extent the federal system is unlike the State system of Florida. Is that right?

MR. ROGOW: Well, I believe that the Assistant U. S. Attorney could file an information --

QUESTION: No, no, I'm --

MR. ROGOW: -- under the arrest in a misdemeanor case, and then there would be no preliminary hearing conducted by the magistrate.

QUESTION: No, no. No. If he -- when he comes before the magistrate, if the arrest has been without a warrant, it's the magistrate's duty to find probable cause. And if he doesn't find it, the man's released. As I read Rule 5, of the federal system.

MR. ROGOW: Under the federal rule.

QUESTION: Yes.

And that makes it different.

Now, were these arrests with or without warrants?

MR. ROGOW: Without warrants. Without warrants.

QUESTION: So that would differentiate the two systems, then.

MR. ROGOW: There would be a distinction to that extent between the two systems perhaps.

I think there's another distinction that has to be raised, and that is that we're talking about people who are in custody prior to trial. In the federal system --

QUESTION: Well, they're in custody as a result of valid arrests.

MR. ROGOW: Yes, sir, but there --

QUESTION: Are they not?

MR. ROGOW: -- but there needs to be an opportunity to test whether or not that is a valid arrest, and not keep a man, unless he's been indicted, awaiting trial for 60 or 90 days, only to find out that there was no probable cause to hold him, during all that time.

That's what we're getting at in this case, and that's what the issue that's presented in this case is.

QUESTION: You're saying that every time a person is arrested there must be a prompt -- without defining that

now -- a prompt determination of probable cause by a neutral agency.

MR. ROGOW: Yes, sir.

QUESTION: Whether it's in laying aside what the crime is, whether warranted or unwarranted arrest.

MR. ROGOW: If he is in custody, yes, sir. Except for indictments. This case does not involve indictments at all.

QUESTION: But it does involve arrests on a warrant?

MR. ROGOW: Yes, sir, it does involve arrests on a warrant. Even if that warrant is issued, I may add, by a judge.

QUESTION: I understand, that's -- that's my question.

MR. ROGOW: And of course the question that was raised regarding misdemeanors takes us to our misdemeanor argument, which is that in Florida they have a classification which totally excludes misdemeanants from the possibility of ever getting a preliminary hearing, even if the State Attorney was willing to tolerate one.

The classification imposed by the rule is that there is no right to a preliminary hearing, unless you charge a felony, and of course unless the State Attorney does not file an information.

That classification affects a fundamental right,

the right not to have your liberty taken without an opportunity to be heard.

And our position is that there is no compelling reason advanced by the State for that classification. The Court of Appeals agreed, the District Court agreed, in fact the State has really not advanced a compelling reason nor even a rational reason for that distinction between --

QUESTION: Well, perhaps I'm being repetitious, but perhaps I don't understand your point.

But thousands of times every day in this country people's liberty is taken away when they are arrested by law enforcement officers on probable cause.

MR. ROGOW: Yes, sir.

QUESTION: They are taken down to jail and locked up.

MR. ROGOW: Yes, sir.

QUESTION: Now, what is -- are you attacking that, that there cannot be an arrest and a custodial arrest on probable cause?

MR. ROGOW: No, we're saying there can be a custodial arrest on probable cause, but there must be a review, subsequent review.

QUESTION: When? When?

MR. ROGOW: The District -- the Court of Appeals

said in four to seven days.

QUESTION: What do you say?

MR. ROGOW: Frankly, I say within 24 hours, if the sides are prepared. A man's liberty should not be taken away for more than 24 hours, without opportunity to test it. And we look to Argersinger for support.

Because in Argersinger the Court said, You cannot take away a man's liberty for 24 hours without counsel, and now we're talking about taking away his liberty for 24 hours or more without even a hearing.

QUESTION: Well, if it's constitutionally valid for 24 hours, why isn't it valid for 36 hours or 48 hours?

MR. ROGOW: But the line has to be drawn somewhere. The Court of Appeals said four to seven days.

QUESTION: You concede that it's valid for a period of time after a lawful arrest.

MR. ROGOW: I concede that because, as a practical matter, it has to be. Because there is no other way in which the State can carry out its obligation to arrest people who possibly have committed crimes.

QUESTION: Well, this is possibly, by a definition it's their being arrested on probable cause.

MR. ROGOW: Yes, sir. Untested probable cause, but probable cause, which we concede is sufficient, for the arrest.

The question, I believe that Your Honor asked me, was How long afterwards must that probable cause be tested; and my response was: In Argersinger, it was 24 hours, but the Fifth Circuit said four to seven days.

QUESTION: Well, the point of a warrant, of an arrest warrant is to test the probable cause, isn't it?

MR. ROGOW: Not for --

QUESTION: For a neutral and detached magistrate.

MR. ROGOW: But there's no opportunity --

QUESTION: A warrant.

MR. ROGOW: But there's no opportunity to be heard. That's a Fourth Amendment probable cause determination, ex parte, non-adversarial.

We are talking about a due process opportunity to contest, or test that Fourth Amendment non-adversarial determination of probable cause that's made. And we look to the property cases, which are before your property is taken you have a right to contest that taking.

And all we're saying is after your liberty is taken, there ought to be a right to contest that taking.

QUESTION: Well, but for the Florida cases to the contrary, wouldn't this all be handled by writ of habeas corpus in the State court?

MR. ROGOW: Yes, sir. If the State court had permitted us to test probable cause through habeas corpus --

QUESTION: You wouldn't be here?

MR. ROGOW: No, sir. We would not. It would be strictly a State matter.

QUESTION: So that's your real complaint, isn't it?

MR. ROGOW: That Florida law absolutely forbids an inquiry into probable cause when an information is filed; yes, sir, that is our real --

QUESTION: By habeas corpus.

MR. ROGOW: By any means. By any means.

Because information stands for probable cause.

QUESTION: If you could raise it on habeas corpus, you wouldn't be here?

MR. ROGOW: That's right.

If we could raise it successfully in Florida, or be heard on it in Florida, we would not be here.

QUESTION: Well, I'm not talking about successfully.

MR. ROGOW: Well, I say successfully only because the habeas corpus petition would be dismissed in Florida right away, because the issue that would be raised --

QUESTION: My point was, if it could be raised and could be considered, and the judge sitting on a habeas corpus could inquire into it, you would have no complaint.

MR. ROGOW: Absolutely. Yes, sir. We agree.

QUESTION: Then habeas corpus --

QUESTION: Not automatic. You don't need it

automatic, do you?

MR. ROGOW: When you say do you need it automatic, the only difficulty --

QUESTION: Well, according to your rule, every man that's now in jail has to go before somebody within 24 hours, or turn him loose.

My suggestion is you don't get that release unless you, yourself, go for habeas corpus.

MR. ROGOW: I see what --

QUESTION: Now, which do you agree on?

MR. ROGOW: I see the point Your Honor makes, and I may back off a little bit from my point. Because if, in asserting your habeas corpus right it's incumbent upon you to test your probable cause -- to test probable cause, that may not meet due process.

I really -- this case, of course, was raised in the framework of the existing Florida law --

QUESTION: But if you just get rid of habeas corpus, everybody is automatically having a hearing on everything.

MR. ROGOW: Not a hearing on everything, Your Honor.

QUESTION: I;m sure you don't mean that.

MR. ROGOW: But a hearing certainly if your liberty is taken.

QUESTION: Didn't the State say something this morning about the right to move forthwith to dismiss, which would afford a test of the probable cause?

MR. ROGOW: That motion to dismiss, which the State spoke about, can be traversed, merely by filing a traverse by the State Attorney. And so the State Attorney can dispute whatever statements are made and then the trial judge cannot dismiss the case.

So, again, it's certainly within the power of the State Attorney to make all these determinations of probable cause.

That motion to dismiss, in a way, I suppose, is really illusory, because all the State need do is not acquiesce in it, and it's an unsuccessful and futile remedy.

QUESTION: What is your position on the question Justice Marshall asked you a moment ago? Is it essential to the constitutionality of the procedure, in your view, that the probable cause preliminary hearing be initiated by the State, or is it enough that the defendant or accused have a right to initiate if he wants to?

MR. ROGOW: I think that theoretically it ought to be the State's obligation to provide that proceeding in which a person can test whether or not probable cause does exist.

If Florida had a different procedure, if it could have been tested, I don't know that this case would have been

brought.

Frankly, we just had not thought this case through in light of a non-existent situation.

The situation existed, and that's what we were addressing ourselves to.

QUESTION: May I ask you about the Florida practice, where there is an indictment pursuant to a grand jury, what is your position as to an adversary hearing to determine whether there was probable cause for the issuance of the indictment?

MR. ROGOW: We take no position on that question. We do not say that after an indictment there must be an aveersarial hearing.

In order to say that, one would have to assume that the historical protections, which this Court has found in the indictment procedures, no longer exist.

It reminds one of the fact that John Pieter Sanger, when he was sought to be prosecuted by the Crown twice, they sought indictments, and twice they failed. And finally they resorted to an information to prosecute him.

Now, if the protection which Sanger had no longer exists, then perhaps our case might spawn future litigation, but we take no position on that, and this record does not accord the Court an opportunity to get to that question, because there is no showing an indictments do not really

protect the individual.

The cases cited by the State, Hurtado, Lem Woom, Ocampo, Beck, have no application in this case. Those cases -- and Hurtado, as a matter of fact, as an information filed after a preliminary hearing, so Hurtado certainly has no real effect on this case. The other cases talk about the fact that there is no need for a preliminary hearing prior to the issuance of an information.

And we agree with that position. Fine. Let the information issue.

But after the information issues, there must be a subsequent determination of probable cause. There is --

QUESTION: Would you think that -- would your problems be satisfied if Florida procedure provided that upon request a preliminary probable-cause hearing would be held forthwith?

MR. ROGOW: It might. It might. I just -- as a pure due process matter, we think it's incument upon the State. If you can make the request, and it be granted -- notwithstanding the filing of information -- I would certainly say that would lessen our argument somewhat.

QUESTION: But suppose in every cell there was a sign in large letters: Upon request, a preliminary hearing to inquire into the probable cause for your arrest and detention will be granted you with 24 hours?

MR. ROGOW: That approaches the question, really, of waiver. If one fails to assert that right, he would in effect have been waiving his right. And I think --

QUESTION: Wouldn't you think a great many people who are arrested have no interest whatever in a preliminary hearing on probable cause?

MR. ROGOW: I certainly don't think that.

QUESTION: You dont' think so?

MR. ROGOW: I think the people would want inquiry on probable cause.

QUESTION: Every one of them?

MR. ROGOW: No, I wouldn't say every one of them.

QUESTION: Well, wouldn't, on the contrary isn't it ordinary human experience that most of them would recognize that they have committed some crime, and that they're not intested in a hearing.

MR. ROGOW: And of coruse they could waive their right. If the State said, Here's your preliminary hearing and the defendant or his lawyer could say, Yëes, I waive my right.

QUESTION: Then we come back to where I was. Then your answer to my question is that if they are offered a prompt hearing, that would satisfy the due process complaint that you are uring on the Court?

MR. ROGOW: Yes, if they were offered. The only

difficulty I find with your question, Mr. Chief Justice, is that it would require them to initiate that request by seeking out the probable cause hearing.

I think if there is an offer and they say, I waive it; fine. That can be waived.

There's another distinguishing characteristic between Lem Woom, Ocampo and Beck and this case, and that the Court of Appeals cases, which have been cited by the State, all of those cases sought to overturn otherwise valid convictions.

We do not seek to overturn an otherwise valid conviction. We do not say that a man cannot have a fair trial without a preliminary hearing.

What we say is that he cannot be fairly deprived of his liberty without a preliminary hearing.

And that distinction runs through all of the cases cited by the State and the State Attorney and this case.

There is no bar. The State has raised Younger vs. Harris, there is --

QUESTION: You're not really saying that, are you, because you've already conceded, in answer to my question, that thousands of people are deprived of their liberty every day, in the various jurisdictions of this country, upon an ex parte hearing or upon no hearing at all.

MR. ROGOW: Unh-hunh.

QUESTION: On arrest upon probable cause.

MR. ROGOW: Yes, sir. But we're --

QUESTION: So you're not saying that nobody can constitutionally be deprived of his liberty without an adversary hearing?

MR. ROGOW: No, but what we're saying --

QUESTION: Are you?

MR. ROGOW: What we're saying is that if a person is convicted and never has a preliminary hearing, that does not vitiate the conviction.

QUESTION: No, no, no. I know that. But then you say, on the other hand, what your argument really is, you're telling us, is that nobody can be deprived of his liberty except by an adversary hearing.

MR. ROGOW: Yes, sir.

QUESTION: And I'm suggesting you're not really saying that, either.

Because, as you've conceded, people are deprived of their liberties by the thousands every day without prior adversary hearings.

MR. ROGOW: I think that I probably ought to restate my position is that a person cannot be deprived of his liberty for any length of time beyond whatever the Court deems acceptable at the time.

QUESTION: I think your position is pretty clear.

QUESTION: It isn't to me.

QUESTION: You're not arguing for the Russian system.

QUESTION: If it were clear, I wouldn't be asking these questions.

MR. ROGOW: We concede the person can be deprived of his liberty at that initial arrest, yes. But afterwards, there must be a way to test it.

So we're saying that the taking of his liberty without a way to test it is unfair. The question is how long may that liberty be taken?

I think that's really what Your Honor is getting to.

We agree that the liberty can be taken. We don't seek prior preliminary hearings.

QUESTION: You say it must be done within a reasonable time, that is 24, 48, 96, some --

MR. ROGOW: Certainly.

QUESTION: -- relatively short time, much like Rule 5 of the Federal, without unnecessary delay, is the language of the federal rule.

MR. ROGOW: But in Florida already we have a period of from five to eight days, I believe, under the rules, and we think that even is too long, but we think it ought to be framed out in a time period.

QUESTION: What did the Fifth Circuit say?

MR. ROGOW: The Fifth Circuit said it would not reach the question, and so --

QUESTION: They said four to seven days, didn't they?

MR. ROGOW: Yes, sir, four to seven.

QUESTION: That's too long, for your standard, isn't it?

MR. ROGOW: For us, it is, Your Honor.

I should point out that the Florida rule has not changed, to make it five to eight days. It was four to seven when the Fifth Circuit decided it. The amendment to the rule has now increased the time that the State Attorney has in which to file information to obviate the preliminary hearing.

So they have permitted even greater tolerance for a State Attorney to obviate that determination of probable cuase.

We think that a preliminary --

QUESTION: Well, you're not asking us, are you, to fix the time?

MR. ROGOW: We think that the question of time is a valid question, when one addresses a due process issue. When must the hearing be held?

QUESTION: Well, I gather you'd be content with an

affirmance of the Fifth Circuit.

MR. ROGOW: Yes, certainly I would. And I should --

QUESTION: To the extent that that seems to suggest that at least four to seven days satisfies due process requirements --

MR. ROGOW: Yes, sir.

QUESTION: -- you would not complain?

MR. ROGOW: No; no, sir. In fact, I -- we would be happy with an affirmance. Yes, sir.

QUESTION: Unh-hunh.

MR. ROGOW: We think that the preliminary hearing will promote the efficient administration of criminal justice, because what it does is offer an opportunity for both sides to get together at an early point, perhaps to enter a plea, perhaps to have a release on bail decision made, once the facts are in; and the record in this case reflects that there has been a reduction in the felony court case load in Florida, in Dade County, of 20 to 25 percent, once preliminary hearings were initiated when the State Attorney didn't file informations.

That is a direct result of the litigation below and of the order of the District Court below, which then prompted the local judges to set up magistrate hearings, unless there was an information filed.

And I should also point out, I think, that at that time the Attorney General of Florida sought to become a plaintiff in the case, and sought to join with us and effect preliminary hearings,because his clients, the judges, requested that.

Today he argues that there is no right to such a hearing.

The --

QUESTION: In the federal system it's ten days?

MR. ROGOW: Ten days --

QUESTION: Unless an information has been filed.

MR. ROGOW: Then it is --

QUESTION: Then there is none?

MR. ROGOW: -- open-ended. Yes, sir.

QUESTION: Right.

MR. ROGOW: Yes, sir.

The State has also raised the question of Younger vs. Harris, which in some ways runs along with the Preiser vs. Rodriquez issue, and I think I should address that very briefly.

Both the District Court and the Fifth Circuit agree that Younger vs. Harris was not applicable, because what we were seeking here was a pretrial procedural right, and no interference with the State court proceedings at all. Any decision which would be made would be made by State

judges. There was great respect for comity. But even if Younger vs. Harris had some application in this case, we have an exception to it, because there is irreparable injury, the taking of liberty without a hearing, and there is absolutely no way to test that taking of liberty in the Florida courts.

QUESTION: Well, I wonder about that. I understand the courts, the District Court and the Court of Appeals, addressed themselves to the Younger problem, and said it was not applicable, or at least didn't control here for the reasons, at least one of the reasons you give.

But the Court of Appeals said something which I am not sure would be an answer to the exhaustion requirement of the federal habeas corpus case, which is considerably different.

The Court of Appeals said: While the plaintiffs might have filed suit in State court for a declaratory judgment and other equitable relief, based upon the same grounds as in this suit.

Now, it may be true there wouldn't be a remedy in the criminal case. That doesn't mean that in an independent action there would be not be relief available in the State courts.

MR. ROGOW: I believe it does, because the State law is clear, the case would be dismissed.

QUESTION: Well, it may be, but this is what the Court of Appeals said.

MR. ROGOW: I understand that.

QUESTION: And who are we supposed to believe? The Court of Appeals says that there is a -- that they could have sought these same grounds -- that this remedy was open to them.

Now, it may be that the answer on the merits has been foreclosed in the State courts. Maybe that's true. Because that's what you're talking about, isn't it?

MR. ROGOW: It is true. I think --

QUESTION: But it isn't that there is -- that the remedy -- that there isn't a procedural remedy available?

MR. ROGOW: Certainly, there is a procedural remedy.

QUESTION: Well, that's what -- all right, that's what I -- you go ahead, then.

MR. ROGOW: Which is wholly futile.

Justice Frankfurter wrote that due process is compounded of history and fairness and reason. And our position is that history and fairness and reason all compel the conclusion that preliminary hearings for a person incarcerated, in custody, deprived of his liberty, must be given, under the due process clause.

Thank you.

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

Thank you, gentlemen.

The case is submitted.

[Whereupon, at 1:38 o'clock, p.m., the case in the above-entitled matter was submitted.]

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