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In the

Supreme Court of the United States

LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Petitioner,

v.

LEON NEWSOME,

Respondent.

No. 73-1627

Washington, D. C.
December 11, 1974

Pages 1 thru 42

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

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v. : 73-1627

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Respondent.

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Wednesday, December 11, 1974

The above-entitled matter came on for argument at 1:49 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:

ROBERT S. HAMMER, ESQ., Assistant Attorney General of New York, Two World Trade Center, New York, New York 10047, for the Petitioner.

STANLEY NEUSTADTER, ESQ., The Legal Aid Society, Criminal Appeals Bureau, 119 Fifth Avenue, New York, New York 10003, for the Respondent.

I N D E X

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear argument next in 73-1627, Lefkowitz against Newsome.

Mr. Hammer, you may proceed whenever you are ready.

ORAL ARGUMENT OF ROBERT S. HAMMER

ON BEHALF OF THE PETITIONER

MR. HAMMER: Mr. Chief Justice, and may it please the Court: The issue presented by this case is the exact same issue which the Court reserved to itself in the case of McMann v. Richardson, 397 U.S. at footnote 13 of the opinion. That question is whether the Federal habeas corpus remedy is available to a defendant who pleads guilty but is permitted under State law to appeal the denial of a pretrial motion to suppress evidence.

In February of 1970 Mr. Newsome was arrested for loitering. Loitering is a violation carrying a maximum of 15 days imprisonment sentence. Incidental to this loitering arrest, Mr. Newsome was searched, and it appears that on his person were concealed narcotics and narcotic implements. So that he was also charged with the crime of possession of a dangerous drug. This was a class A misdemeanor carrying a maximum one year's imprisonment.

A trial on the loitering charge was combined with a pretrial motion to suppress the evidence. The defendant contended that the loitering arrest which predicated the

incidental search was invalid, that the loitering statute was unconstitutionally vague.

The lower criminal court denied this motion and convicted him of loitering. At that point, in May of 1970, the defendant pleaded guilty to a reduced charge of attempted possession of a dangerous drug and he was sentenced to three months imprisonment which was the maximum on so-called class B misdemeanors.

At that point, under what was then section 813(c) of the New York Code of Criminal Procedure, he appealed. He was at larged on bail and has remained free ever since.

QUESTION: And what do you appeal from -- the loitering conviction as well as the other one?

MR. HAMMER: He appealed from both the loitering conviction and the conviction of attempted possession of a dangerous drug.

QUESTION: Is that a -- at least it's novel to me -- is that what you --

MR. HAMMER: It's perhaps a theoretical offense. I should point out, your Honor, that the New York Court of Appeals has allowed this as a plea bargaining device in a case of so-called attempted manslaughter so that while there are certain theoretical problems with such a charge, for purposes of pleading to a reduced charge, the New York courts uphold such an arrangement.

QUESTION: We have seen it quite frequently in New York. I never see it anywhere else, attempted possession and attempted manslaughter when indeed there is conceded that there was a killing and so on.

MR. HAMMER: This was, as I pointed out, a vehicle for allowing a plea for a reduced charge.

QUESTION: Right.

MR. HAMMER: I should point out, your Honor, that there are analogous provisions of the now criminal procedural laws to permit the review of convictions where there has been a pretrial motion to suppress a confession or to invalidate an identification under the Wade rules.

QUESTION: What's open on that appeal so far as the Appellate Division of the Court of Appeals is concerned?

MR. HAMMER: The appellate court may review the denial of the suppression motion, notwithstanding the plea of guilty. This is the only issue before the Court on such an appeal.

QUESTION: What does it do if it decides that the decision on the suppression motion was erroneous? Does it reverse the denial of the motion or does it reverse the conviction?

MR. HAMMER: The appellate court reverses the conviction, Mr. Justice Rehnquist.

QUESTION: Is this procedure open if the defendant

made no motion to suppress?

MR. HAMMER: The statute requires that a motion to suppress be made. Otherwise --

QUESTION: And overrule.

MR. HAMMER: And overrule. Otherwise, there is no right to take an appeal and the matter is waived even at a trial should the defendant plead not guilty.

QUESTION: I gather in this case when that went up to the Appellate Division --

MR. HAMMER: Appellate Term, your Honor.

QUESTION: Appellate Term, the decision turned on the issue of constitutionality of a loitering statute did it?

MR. HAMMER: The Appellate Term never reached that issue. It decided the loitering conviction was bad on non-constitutional grounds, that there was insufficient evidence to convict and that the information itself charging the offense was defective.

QUESTION: And did it also decide the motion to suppress was improperly overruled?

MR. HAMMER: No, your Honor. It held that the arrest was made on probable cause so that the incidental search was upheld. And for this reason the conviction was affirmed. At that point a certificate for leave to appeal to the Court of Appeals was sought and denied, and this Court itself in February 1972 denied a petition for certiorari.

QUESTION: Let me ask you one other question. Suppose he made his motion to suppress and it was denied but he didn't appeal in the State system. Is it your position that this is still open on Federal habeas?

MR. HAMMER: If the defendant had then gone on to trial and was convicted after a trial, we would have a totally different situation. Our contention is that it's the plea of guilty which forms the barrier to Federal collateral review.

QUESTION: But it doesn't form a barrier to State review.

MR. HAMMER: No, your Honor. It's our contention --

QUESTION: It's a created State review, created by the State.

MR. HAMMER: Exactly.

QUESTION: Now the State says that because of that he can't use the Federal courts.

MR. HAMMER: Your Honor, under Lego v. Twomey the States are always free to be more generous than the Federal Constitution requires. And this, we suggest, is what happened. The State legislature enacted a statute designed exclusively for the internal management of the State criminal law procedure. They have permitted an appeal under the circumstances of this case. But we insist with all respect, your Honor, that such a statute cannot under any circumstances enlarge the jurisdiction of the United States District Court, only Congress can.

QUESTION: Do you think there is any validity in your opponent's argument about this being a trap for the unwary?

MR. HAMMER: No, your Honor. I suggest that their point is not well taken. At the outset it should be emphasized that the State Attorney General's office, at least, has never conceded the issue that section 813 appeal automatically gives a defendant the right, if he is unsuccessful, to go into the Federal district court. We have resisted it in Rogers, we have petitioned for certiorari before, if I am not mistaken. We have insisted that all 813-c does is promise a State appeal, and, of course, the State delivered on that promise.

QUESTION: I presume if we reverse the judgment of the Court of Appeals, at least it will thereafter be no trap for the unwary.

MR. HAMMER: Absolutely.

I should add, Mr. Justice Rehnquist, that what is involved here is no different than when good, competent counsel may miscalculate upon the effect of, or mispredict what a higher court will do. From the outset, as I mentioned before, our office has always insisted that the Federal habeas corpus remedy may not be maintained where a defendant enters a provident, voluntary plea of guilty. And this is precisely what we have here. There is no dispute that the plea was voluntary, and I submit that it was quite provident in view of the fact that this defendant when charged with an offense

carrying a possible one-year sentence was able to bargain it down to three months. So regardless of the legal point raised on the motion to suppress, we have here a plea of guilty which stands independently.

The district court originally dismissed the Federal proceeding. The case was remanded to it under the authority of this Court's decision in Hensly. As we pointed out, the district court granted the writ on the theory that the loitering statute was unconstitutionally vague, citing the New York Court of Appeals decision in People v. Berck. They did not, the district court did not, discuss our defense that it lacked jurisdiction because of the guilty plea.

In January of this year we argued the matter before the Second Circuit and that court was urged to reconsider its line of cases in Rogers on the authority of McMann and Tollet. We pointed out to the Second Circuit that in the case of Mann v. Smith, decided a few months previously by the Ninth Circuit, that court had conformed its decision to the Tollet ruling and we urgedthat Rogers had been overruled in essence by Tollet. However, that court, in our view, erroneously adhered to its own rule and permitted the habeas corpus remedy to be maintained.

We submit, your Honors, that the decisions of this Court in McMann, in Tollet, and more recently in Blackledge v. Perry, have set forth a firm rule that the conviction based

upon a voluntary provident plea of guilty is immune from Federal collateral attack on all Federal constitutional claims except those relating to the right of the State to bring the defendant to trial.

QUESTION: Can you read McMann as relying on the fact that under the State procedure this was final, the guilty plea?

MR. HAMMER: We submit, your Honor --

QUESTION: Was that true (inaudible)

MR. HAMMER: As I understand the McMann plea, your Honor, McMann's plea --

QUESTION: Waived everything in the State court.

MR. HAMMER: That's correct.

QUESTION: And that's not true here. He didn't waive his attack on the suppression.

MR. HAMMER: In McMann, of course --

QUESTION: But isn't that a different --

MR. HAMMER: Of course, in McMann the Court reserved the precise question that we have at bar today. Nevertheless, towards the end of the opinion, the Court set forth, and I would submit in fairly sweeping and absolute terms, that the plea of guilty is final whether there be a right to appeal the suppression motion or not. If there were any doubt, I submit it's been resolved by Tollet and by Blackledge.

QUESTION: That even where the State changes its

whole procedure, the State could not by any means create a situation where you couldn't get habeas corpus.

MR. HAMMER: Of course, your Honor, the State --

QUESTION: Didn't go that far.

MR. HAMMER: The State's procedure, I would submit, is not relevant. This is not a waiver case. The defendant didn't waive -- we don't say the defendant waived his right to Federal habeas corpus in the sense of he knowingly gave it up. He never had a right to Federal habeas corpus once he pleaded guilty. We are not speaking of knowing waiver.

QUESTION: What case do you have for that?

MR. HAMMER: Well, we have Tollet. Tollet points out that there is the break in the chain of events.

QUESTION: Tollet didn't have this type of statute.

MR. HAMMER: That may be so, your Honor.

QUESTION: That's my only point, did this statute create a different --

MR. HAMMER: All the statute created, your Honor, was a right to a State appeal. It did not, in our submission, extend and could not possibly extend a Federal remedy.

QUESTION: Couldn't you therefore say that this conviction is not in and of itself nonappealable? It said just the opposite. It said it was appealable.

MR. HAMMER: That's correct, your Honor, notwithstanding the plea of guilty, appealable in the State courts.

QUESTION: I take it your point is that McMann and Tollet didn't turn on anybody voluntarily giving up a claim to habeas corpus but rather on the fact that after you pleaded guilty and admitted the substantive elements of the offense, as a matter of Federal law you're not entitled to raise afterwards certain claims on habeas.

MR. HAMMER: That is precisely our contention, Mr. Justice Rehnquist.

QUESTION: So it has nothing to do with whether New York grants an appeal by statute.

MR. HAMMER: Precisely. The State legislature never considered the problem and, indeed, they could not by its own legislative action possibly affect it. This is the province of Congress and this Court in interpreting the mandates of Congress.

QUESTION: I take it you are saying that the State position is that sustaining the position you urge today would not subvert the legislative aims of New York in providing this appeal of suppression motion.

MR. HAMMER: Absolutely. The legislative aims of New York are merely to grant a State appeal, no more, no less. This is precisely what the State gives.

QUESTION: And I suppose the policy underlying the matt at least one of them is to eliminate a lot of not guilty pleas that are unnecessary in a lot of trials that are

unnecessary.

MR. HAMMER: That's correct.

QUESTION: A person's only defense, in other words, his basic only defense, is the fourth amendment claim that can be put to one side and he can plead guilty to everything else, is that it?

MR. HAMMER: That's correct, Mr. Justice Stewart.

QUESTION: And your view is, I know, that our agreeing with you in this case wouldn't subvert that policy, although it's arguable that it would, wouldn't it, because it would cause more,arguably, would cause more not guilty pleas in the State system.

MR. HAMMER: I suggest, your Honor, that there is absolutely no evidence in the record that this would be the case.

QUESTION: Well, it's not a matter of evidence and you don't know the answer and I don't either, but all we can do is guess and speculate.

MR. HAMMER: I think, your Honor, if we have to speculate, the answer has to be in the negative. I don't think that most defendants speculate about the possibility of a Federal habeas corpus proceeding several years hence. I think it can be shown statistically, although I don't have the studies at my fingertips, that there are more, much more, State defendants who appeal through the State system whether

they plead guilty or not guilty than those seeking Federal habeas corpus.

QUESTION: It wasn't the real reason for the plea bargaining, was it?

MR. HAMMER: Precisely.

QUESTION: That's what you said, I think.

MR. HAMMER: In this instance, I think it can be --

QUESTION: No, I mean the statute itself.

MR. HAMMER: -- it can be demonstrated that it was provident, the plea was provident because the man reduced his exposure to imprisonment from one year to three months.

QUESTION: And the State would save the expense and trouble of a trial.

MR. HAMMER: Precisely.

QUESTION: Whose view are we supposed to take as to the legislative purpose or expectation -- yours or the Court of Appeals for the Second Circuit? The Court of Appeals for the Second Circuit, as I understand it, believes that to snuff out Federal habeas in these situations would subvert the legislative aim of the statute. Wouldn't it? Isn't that his position?

MR. HAMMER: That is essentially the gist of the opinion below. I would submit, however, that --

QUESTION: Well, now, it certainly happens that the Federal court has to decide what it believes the statute means and it isn't necessarily bound by the views of the Attorney

General of New York.

MR. HAMMER: No, your Honor, we don't --

QUESTION: How about us? What you are really asking us to review here, in a part of it anyway, is what does the State statute mean or what is behind it.

MR. HAMMER: The legislative intent, of course, we contend will not affect the jurisdiction of the district court, and the legislature couldn't do it. But I would suggest, your Honor, that the whole purpose of these statutes was to provide a statutory remedy to enforce the mandate of this Court in cases such as Jackson v. Denno with respect to confessions, Mapp v. Ohio with respect to suppression of physical evidence, and Wade, Gilbert, and Stovall with respect to identifications.

Under the circumstances, the legislature had no concern with either extending or constricting the Federal habeas corpus remedy. It was none of their business. Just with all respect, I --

QUESTION: Is that to say the inquiry as to what their purpose was is irrelevant to the issue here.

MR. HAMMER: Absolutely, Mr. Justice Rehnquist.

QUESTION: That the issue here is if Tollet is to be read as you suggested, the plea of guilty foreclosed on the search and seizure issue any resort to Federal habeas, whatever may have been the case and whatever reason the New

York legislation wanted to do it, that if the one who pled guilty wants to do it, he may take the suppression issue on appeal to the appellate court.

MR. HAMMER: Precisely, your Honor.

QUESTION: Did you want to answer Justice Brennan first?

MR. HAMMER: I answered him, Mr. Chief Justice.

QUESTION: Is there, so far as New York is concerned and the prosecution problem,a policy question that this statute gives the prosecutor greater flexibility to deal, for example, with first offenders or less offensive cases by this device of attempted possession?

MR. HAMMER: I think in practical terms this is the net effect.

QUESTION: You wouldn't be likely to do this with a man who had had three prior convictions for possession of heroin as much as you would a 20-year-old fellow who was up on a first offense.

MR. HAMMER: I should think not, your Honor. But then, this would be in the particular discretion of the individual district attorney. There might be other mitigating factors.

QUESTION: My point is there is a policy factor possibly lurking here to give the prosecutor this greater discretion.

MR. HAMMER: Such a view, I think, is perfectly consistent with the statute. We submit, your Honors --

QUESTION: I gather -- am I right? -- that after this case, I guess it was then Judge Breitel denied leave to appeal, wasn't it, from --

MR. HAMMER: That's correct.

QUESTION: And after that the Berck case was cited, wasn't it, which declared the loitering statute unconstitutional on Federal constitutional grounds, wasn't it?

MR. HAMMER: That's correct, your Honor.

QUESTION: By that time he was out of luck, he couldn't, he had no way of getting -- or is coram nobis available?

MR. HAMMER: No, your Honor, coram nobis would not be available because, although --

QUESTION: He has no resort to take advantage of Berck at all, does he?

MR. HAMMER: I should think so, because had he been convicted of loitering, the State Court of Appeals decision in People v. Tannenbaum would have required a retroactive application of the substantive law. However, in this instance we are dealing not with a substantive law but with an issue of suppression of evidence and the effect of --

QUESTION: Well, anyway, the loitering conviction on a different ground was satisfied.

MR. HAMMER: That is correct, your Honor.

QUESTION: What about this: Suppose there is an appeal of a suppression motion that's been denied and a plea of guilty and then an appeal on the suppression issue, in the State system, as the New York law permits, and it's decided one way or another in the Court of Appeals of New York. Let's assume that. Does petition for cert lie here?

MR. HAMMER: Of course. It's under section 1257.

QUESTION: Assume a denial of the suppression issue is affirmed, and you think the defendant at that point can petition for cert here.

MR. HAMMER: Of course, because of this Court's jurisdiction to review the decisions of the highest State court in which the issue could revert.

QUESTION: We would take jurisdiction of that case although we would say a district court would not.

MR. HAMMER: That's correct, because the statute gives this Court the right to hear the case, whereas it is our submission that the statute denies the district court the right to hear it on collateral attack simply because the plea of guilty eliminates any case or controversy within the jurisdiction of that court.

I don't know if I have any time remaining, Mr. Chief Justice.

MR. CHIEF JUSTICE BURGER: You have a few minutes

if you wish to reserve it.

MR. HAMMER: With the permission of the Court, I should.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Hammer.

Mr. Neustadter.

ORAL ARGUMENT OF STANLEY NEUSTADTER

ON BEHALF OF THE RESPONDENT

MR. NEUSTADTER: Mr. Chief Justice, and may it please the Court: I hope you won't think it overly blunt for me to state something rather firmly at the outset. I think a reversal here would require this Court to put a revolutionary gloss on a very stodgy concept of waiver. The petitioner, although he hasn't used the magic word "waiver" is essentially asking you to find waiver in an unprecedented context, a context unlike all other cases where there has been some sort of default, some sort of lapse, some sort of relinquishment. Petitioner is asking you to find waiver of a constitutional claim in this case and the opportunity to vindicate that claim under the habeas corpus statute, even though he has fully litigated that claim in perfect and timely accord with every inch and paragraph of State statute, and it seems to me rather anomalous that it could achieve that result. Then the petitioner attributes this waiver of habeas corpus vinciation to a guilty plea, automatically,saying the guilty plea dispatches Federal habeas remedies. And this is

the same guilty plea that there is not waived under State law State appellate review of the pre-plea order denying the motion to suppress. It is the same guilty plea which petitioner conceded at page 13 of his brief and just reiterated the concession to Mr. Justice White it does not waive certiorari prerogative, yet we are told that the same plea waives the mandatory statutory relief provided by Congress in the habeas corpus statute.

QUESTION: You don't agree with Mr. Hammer, then, that the States may be more generous without suffering any penalty for it.

MR. NEUSTADTER: No, the States can always be more generous in terms of defining the parameters of constitutional rights as, I'd say, under the aegis of State constitutions.

The Second Circuit and Federal court in the Second Circuit jurisdiction has not extended or enlarged Federal jurisdiction on the ambit of habeas corpus solely for New York petitioners. That's the suggestion in petitioner's brief and reiterated again here. The constant for habeas corpus relief is simply that the constitutional finding be presented to State court by whatever procedures the State court has erected for that purpose. Having done so, if he is unsuccessful and if he finds himself in custody claiming a violation of a constitutional right which led to the conviction, he has met the threshold jurisdictional requirement to habeas corpus.

Such is the posture of my client when he came into Federal court.

QUESTION: ... McMann, there had been a pretrial suppression motion that had been denied, the present New York statute not being in existence, and then a guilty plea.

MR. NEUSTADTER: Well, that would have put it in exactly the posture of this case. If the defendants in Richardson had appealed, in other words, had 813-c existed for the defendants in Richardson at the time that they entered their plea, had they litigated their confession issue in the pretrial procedure under 813-c, had they then pleaded guilty, pursued their appellate remedies as allowed by 813-c --

QUESTION: My question is, prior to 813-c, what if they litigated it in a trial court, lost, and then pleaded guilty?

MR. NEUSTADTER: And pleaded during the trial? Under State law at that time, State appellate review of that confession claim would have been lost.

QUESTION: No. The question is would Federal habeas have been --

MR. NEUSTADTER: Yes.

QUESTION: Then that .. would be contrary to McMann.

MR. NEUSTADTER: No, no. Perhaps I misunderstood your question.

QUESTION: Let me repeat the question, if I may.

Prior to the enactment of 813-c, New York State court defendant moved to suppress evidence in the trial court, motion denied, plead guilty, that's the end of the proceedings in the State court. Does he have access to Federal habeas?

MR. NEUSTADTER: No, he does not. He does not, because in order to preserve the issue in pre-813-c cases, such as McMann, he would have to litigate that issue at trial. If he pleads, he's foregoing the possible remedy of that constitutional claim, because trial in a non-813-c concept, trial is the only way to litigate that issue, and if you forego the trial, you haven't preserved it as a threshold issue, you therefore can't seek to vindicate it on appeal within State court, and you therefore bypass the orderly procedures which the State has erected for the vindication of that claim, and you no longer -- you have dispensed with your prerogative to invoke habeas corpus vindication.

QUESTION: You see McMann and Tollet, then, as turning on a notion of waiver within the State system.

MR.NEUSTADTER: That is correct, within the context of State procedural rules which set up the requirements for litigating constitutional claims. There is nothing in the habeas corpus statute that requires a particular format of procedures, whatever procedures the State erects. As a matter of fact in McMann, it was the hardest case possible

because under Jackson v. Denno, the procedures that were allowed were held to be unconstitutional, and yet in McMann it was still required that they pursue whatever procedures were available at the time for vindicating that confession claim.

QUESTION: I suppose that if Congress now passed a statute and said Federal habeas will not be available in circumstances which it describes that would fit the New York statute. There is no question that Federal habeas wouldn't be available.

MR. NEUSTADTER: No, of course not.

QUESTION: So what you really are saying is that in this particular case this person didn't think he was waiving his Federal habeas right.

MR. NEUSTADTER: Not only that, but there is nothing in the habeas corpus statute that suggests that a trial as opposed to a plea is the only way of preserving the issue for subsequent habeas corpus review.

QUESTION: Well, I suppose habeas corpus still turns on whether there has been denial of some Federal right.

MR. NEUSTADTER: Yes, but what I am saying is --

QUESTION: There may not have been some denial of State rights, but there --

MR. NEUSTADTER: No, no. That's perfectly true, that would be the sine qua non of any habeas petition, is an allegation the constitutional violation had resulted in

conviction.

The only point I am making with respect to the habeas corpus statute this time is that the other basic of habeas corpus is that you present the issue to State court for possible remedy there. That's a matter of comity.

QUESTION: I suppose you are saying, Mr. Neustadter, that pre-813, the only way under State procedure you could preserve this constitutional fourth amendment language is by going to trial.

MR. NEUSTADTER: Correct.

QUESTION: And then you go all the way as far as you could go --

MR. NEUSTADTER: So you appeal.

QUESTION: Then you come into Federal habeas.

MR. NEUSTADTER: That is correct.

QUESTION: Now, New York has said, no, there is another way you can preserve it. You can plead guilty and take it by appellate route.

MR. NEUSTADTER: That's precisely the point.

QUESTION: But is that entirely true as to the pre-813-c practice in New York? You certainly had a motion to suppress in the trial court before 813-c was enacted.

MR. NEUSTADTER: Oh, yes. Well, it wasn't done at a pretrial. In other words, it was done within the trial itself with the jury sitting there. That was precisely the

defect that was noted in Jackson v. Denno. You had to do it in the corpus of the trial itself. And you would litigate the voluntariness of the confession right within the body of the trial, which is why, if you pleaded and did not go to trial, you obviously are abandoning your claim of coerced confession because that was the only way to litigate it without a trial.

QUESTION: Was that true as to fourth amendment claims, too, there was no --

MR. NEUSTADTER: There was never really that bind with fourth amendment claims for the simple reason that almost immediately after Mapp came down, the State enacted 813-c. So you never had a time lag. However, there was --

QUESTION: Was 813-c in existence at the time that McMann was decided?

MR. NEUSTADTER: Yes, but it did not extend to confessions, it only extended to physical evidence sought to be suppressed on fourth amendment grounds.

QUESTION: Of course, McMann didn't say the result would be different under the New York procedure.

MR. NEUSTADTER: No, of course not. I mean, I presume that's why we are all here today, to resolve that footnote in McMann saying we do not pass upon that issue. I rely on it, and I suppose it's somewhat peculiar to have both petitioner and respondent here invoking as support the

identical cases. We are both relying on McMann and Tollet, although for rather different propositions. I read McMann and Tollet as basing habeas corpus availability upon the preceding context of State procedures and whether or not the claim, which must be presented in the first instance to State court as a matter of comity, whether that claim has been presented in accord with State statutory procedures. In McMann the only way to do it was a trial. The plea obviously eliminated the trial. The defendants in McMann did not present their claim in accord with State statutory procedures in McMann, and they could not thereafter seek to overturn the tables on the State by way of habeas corpus. They did not give the State the opportunity to correct their own errors, and habeas corpus will not lie.

I think that a few other things really bear mention here.

QUESTION: Mr. Neustadter.

MR. NEUSTADTER: Yes.

QUESTION: I should have asked Mr. Hammer. How did the Attorney General get .. Where? At what stage?

MR. NEUSTADTER: He got in at the Appellate Term level in this case, Appellate Term being on of the intermediate appellate courts which determines misdemeanor appeals.

Under, I forget the precise statutory section. I

think it's 71 of the Executive Law, any time the constitutionality of a State statute is involved in a case, the Attorney General must be served with the papers and at his election may intervene. Of course, at no point in the State proceedings although he was intervening, were we given the slightest wisp of a signal that we would have the trap door slammed shut on us if we marched then to Federal court, not the slightest hint, which, by the way, is another theme that I would like to pursue on this case, because there is really a basic unfairness here, parallel to the unfairness that I think annoyed this Court in cases like Tollet and McMann. Here you have, in Tollet and McMann you had a defendant in both cases who pleaded guilty who thereby bypassed State remedies for raising various constitutional claims. In Tollet, of course, it was a grand jury selection, and in McMann it was the voluntariness of the confession. And they were perfectly delighted with their pleas at the time and presumably these were knowing and counseled pleas, voluntary in all respects, with counsel at their side, advising them presumably as to the fact that if they plead they cannot litigate anything further because of State procedures in Tennessee and in New York at the time. And then, 20 years after the event they come marching into Federal court, after the State has a justifiable expectation that the book has been closed on the case, the defendants having failed to litigate the claim at all in State

court.

QUESTION: Do you think it was clear in those cases that they ever were advised they would be giving up habeas as well as State remedies?

MR. NEUSTADTER: Neither opinion addresses itself to that.

QUESTION: You shouldn't suggest that they did, then, because maybe the odds are quite the opposite.

MR. NEUSTADTER: No. Of course, it was also, as I recall one of the closing portions of Mr. Justice Rehnquist's opinion in Tollet was that if the defendant was -- oh, as a matter of fact, in your opinion as well in McMann, if the defendant was somehow misadvised as to the form which he should first present the claim, he might have another habeasable petition, to wit, competence of counsel.

QUESTION: Yes, counsel.

MR. NEUSTADTER: But it strikes me as rather unfair in this case for the State to sit by and allow the defendant to litigate under the aegis of this statute and the variable as it is, not only for the benefit of the defendant but for the benefit of the State. They avoid, it's an additional inducement to avoid unnecessary trials, and I certainly don't have to explain to you what the trial backlog situation is in New York. To allow under the aegis of this statute a guilty plea under the promise essentially that the

plea does not terminate litigation of the fourth amendment claim without specifying when it does or when it doesn't. It simply leaves it open. Go ahead and plead, we don't care, we're not going to stop you from litigating the fourth amendment claim which you have litigated in accordance with our statute before the plea. Go ahead and plead, and we don't consider litigation of this claim terminated by your plea. That is the suggestion of 813-c.

And then when things get tough --

QUESTION: ... if you want to go on waiver, the defendant in this case, what expectation does he ever have getting into Federal habeas corpus?

MR. NEUSTADTER: Well, the record doesn't demonstrate a particular defined or articulated expectation.

QUESTION: Let's assume you had one. Give me some Federal basis for his expectation.

MR. NEUSTADTER: Well, of course, the Second Circuit, the extant Second Circuit law at the time.

QUESTION: Well, by the time he pleaded McMann had been decided.

MR. NEUSTADTER: No. No. At the time he pleaded McMann had been decided. I think it had just been decided.

QUESTION: Well, if he read the case, the question was open, he had no legitimate expectations about this issue. And there has never been anything else indicated here.

MR. NEUSTADTER: No. Well, I think --

QUESTION: Well, isn't that so? You just agreed that McMann said the question was open.

MR. NEUSTADTER: Yes, that is true.

QUESTION: What legitimate expectation did he have about Federal habeas?

MR. NEUSTADTER: That the State would not say it's foreclosed to him.

QUESTION: All right, that the State wouldn't, but how about the ultimate Federal law.

QUESTION: All the State promised him in 813-c was did he have the right to take the thing to whether it's the Appellate Term or the Court of Appeals, they certainly didn't promise him that they would not oppose a Federal habeas --

MR. NEUSTADTER: No, but isn't that statute rather pregnant with the suggestion that we have no expectation that your plea has terminated the litigation --

QUESTION: That's a State law question.

QUESTION: That's a Federal law question, and if you read McMann, you would know that the question is open.

MR. NEUSTADTER: Well, I would like to get into that then. The question of whether Federal law controls a waiver and so forth, really, there are two things, two aspects of that problem.

QUESTION: You aren't suggesting that it doesn't

do it?

MR. NEUSTADTER: No, not for a minute. I'm suggesting that the -- let's put it this way: Assume there has been some default, because that's generally what we are talking about, we are talking about a waiver, there has been some lapse, some failure to pursue a remedy, some kind of default in State court, some failure to raise or preserve the constitutional claim in accord with State procedure. Now, it's a matter of Federal law as to whether that defect, or that default, I should say, is going to be binding on the defendant, to wit, is it voluntary, knowing, and so forth.

What the default waives is a matter of State procedural preferences. That's the distinction to be drawn.

QUESTION: Well, within the State system. But it certainly doesn't determine what Federal ...

MR. NEUSTADTER: This is true, but the entire Federal habeas corpus statute is tied into State procedure.

QUESTION: I take it you would concede that if the McMann footnote had said, "And furthermore, even in New York, the plea of guilty waives any resort here," you wouldn't be here.

MR. NEUSTADTER: Absolutely not.

QUESTION: Well, McMann didn't say that; it said it's open.

MR. NEUSTADTER: Yes. Yes.

QUESTION: But the law of your circuit was clear, it wasn't open.

MR. NEUSTADTER: It was very clear in the law of the Second Circuit, certainly.

QUESTION: How many other States have this 813-c --

MR. NEUSTADTER: Well, right now, Wisconsin has an identical statute. There is a proposed code of Indiana that has adopted that section. Both of those States, by the way specifically refine the New York procedure. The New York procedure has also been recommended by the ABA standards, and very recently, just last August, by the Uniform Code of Criminal Procedure.

QUESTION: Washington, too.

MR. NEUSTADTER: Excuse me?

QUESTION: Washington, the State of Washington?

MR. NEUSTADTER: Yes, I believe also Washington.

QUESTION: California has.

MR. NEUSTADTER: California has something like this. That's a slightly different arrangement there

QUESTION: And what have the Federal habeas corpus courts held with respect to those State statutes, do you know?

MR. NEUSTADTER: Well, there is a case right now, I believe, pending in the Seventh Circuit with respect to a Wisconsin defendant.

QUESTION: And you say that's --

MR. NEUSTADTER: That's been held in abeyance pending the outcome of this case.

QUESTION: Any other litigations?

MR. NEUSTADTER: Well, there was a Ninth Circuit case --

QUESTION: I mean, are there any other circuits, is really what I am asking.

MR. NEUSTADTER: In the Ninth Circuit, Bann v. Smith? about, I guess it's a year ago now, held the other way, although there is quite a distinction in the State procedure. It's not really the same.

QUESTION: That involved the California one.

MR. NEUSTADTER: That is correct.

QUESTION: The procedure, Mr. Neustadter, of this being an alluring matter for the defendants that the State -- the implication I got at least was that the State is luring and then springs the trap, I think you used that term. But as one of the Justices has pointed out, this is a very alluring sort of thing for him to get off on three months instead of a year which is what he might have got.

MR. NEUSTADTER: The same would hold true in non-813-c context. Any plea bargaining concept, there's a deal for both sides; the State avoids the trial, the defendant avoids presumably longer sentence.

QUESTION: Well, with ordinary plea negotiations

you don't have the element of this statute intervening.

MR. NEUSTADTER: I know, but what that suggests is that the State wants that plea so badly that they are going to give another little goody to the defendant. Not only does he get a break in terms of the length of the sentence, but we are going to allow you to appeal any pre-plea motions you litigated. That's how badly New York wants those guilty pleas.

QUESTION: Well, you see it, I suppose, in that view naturally. The State sees it from other views.

MR. NEUSTADTER: I haven't heard the other view expressed. Presumably Mr. Hammer has something to say in rebuttal.

QUESTION: Mr. Neustadter, You haven't commented, maybe -- I just was interested that the State's Attorney General says that this plea of guilty in the face of that statute forecloses your ever getting to Federal habeas corpus but doesn't foreclose your coming here.

MR. NEUSTADTER: On certiorari.

QUESTION: On certiorari.

MR. NEUSTADTER: I know. That seems to me --

QUESTION: You can get into a Federal forum -- I don't understand that.

MR. NEUSTADTER: Neither do I.

QUESTION: If it keeps you out of a Federal court --

MR. NEUSTADTER: I can't explain that anomalous position. It seems to me that if you concede, as the petitioner has, that that certiorari review remains open notwithstanding the plea. And by the way, the New York procedure on a cert case here, on a motion to suppress in Sibron commended itself to a footnote in Sibron. I mean, the Court was perfectly aware that they were taking a case on cert notwithstanding the plea. And I can't explain the anomaly as to why one aspect of Federal jurisdiction, to wit, this Court under direct review should have the power to vindicate the constitutional claim, but for some magical reason, another Federal court, to wit, the district court is somehow divested of that power. This I simply can't understand and I have heard nothing from petitioner to explain it.

QUESTION: On the contrary, he doesn't try to. He just says 1257 allows us to review constitutional decisions of higher State courts.

MR. NEUSTADTER: And 2254 says the same thing with respect to habeas corpus.

But I don't think we can ignore the fact that the touchstone of habeas corpus in 2254-d are State procedures. After all, what are we talking about when we are talking about exhaustion? We are talking about presenting an issue to State court under whatever State procedures are available to present that claim. That is what is required of a defendant

before he can come in and invoke Federal habeas protection.

Now, what has happened in this case? The State has set forth a series of procedures which the defendant has followed chapter and verse. He presented his claim precisely the way the State court has allowed him to do. The claim is certainly of constitutional dimensions, there is no custody problem, he has exhausted his State remedies, he has not bypassed any of them. He has ostensibly met every requirement of the habeas corpus statute, and for some magical reason, we are told that the plea simply erases the print on the habeas statute books.

QUESTION: Going back to this alluring prospect again. If you prevail, the prospect certainly will not any longer be so alluring because it will mean that the State must, having made this bargain, as you put it, then the defendant having had his cake now, can go into the Federal district court and then the Court of Appeals and then come up here. That's not much of an inducement for any State to avoid a lot of litigation, is it?

MR. NEUSTADTER: I think New York State has found to the contrary, because in 1970 813-c, when the whole Criminal Code of New York was redrafted, re-enacted 813-c in the face of those three Second Circuit decisions, which had already allowed habeas relief. In other words, when the legislature re-enacted 813-c, the new Code of Criminal

Procedure, they did it right in the teeth of those three Second Circuit opinions, and I can't believe that they would have done that had they thought that those decisions somehow affected their plea bargaining process.

QUESTION: You have 813-c and then you have an analog to test the voluntariness of the confession.

MR. NEUSTADTER: That is correct.

QUESTION: Anything else?

MR. NEUSTADTER: I.D., identification cases, the Wade-Gilbert problems.

QUESTION: Also, you can plead guilty ...

MR. NEUSTADTER: .. pretrial plea, appeal, and so on. That is correct. Wire tap problems also.

QUESTION: And were all of those re-enacted in 1970 in light of the Second Circuit law?

MR. NEUSTADTER: Yes. As a matter of fact, I think before 1970, before this new statute,you could not plead -- you could not litigate a Wade-Gilbert issue plead in that field. That, you had to go to trial for.

QUESTION: That was added in 1970?

MR. NEUSTADTER: That was added. That's a new one.

QUESTION: McMann itself wasn't decided until May 4, 1970. So whatever the New York legislature may have had in mind in 1970 in view of Second Circuit cases, it wouldn't be Second Circuit cases that had been considered in

the light of McMann, would it?

MR. NEUSTADTER: Four years have passed since McMann and not a creature is stirring in the legislature with respect to changing the statute.

QUESTION: Well, you said a moment ago that the New York legislature in the teeth of these three Second Circuit cases, nonetheless chose to reaffirm or re-enact it. But if they didn't know about McMann at the time, that isn't quite the same thing.

MR. NEUSTADTER: But in the four years that have elapsed since McMann they could have modified their view accordingly.

QUESTION: Well, true, but the consideration they gave it in 1970, it sound to me to be a little bit different factually than you intimated a moment ago.

MR. NEUSTADTER: Well, I can't point to legislative documents to say what they considered and what they don't. I could be drawing an inference from the existence of very clear pronouncements by the Second Circuit with respect to New York statutes, and I'm drawing the further inference that State legislatures, that are made up 60 percent of lawyers, at least a few of them were aware of these decisions.

QUESTION: And they have re-enacted them. Maybe not because of the Second Circuit law, but in spite of the Second Circuit law. That's the point.

MR. NEUSTADTER: Yes, that's precisely the point.

QUESTION: So McMann wouldn't have made much difference.

MR. NEUSTADTER: I really have said just about everything I want to say, with really two small exceptions, which I am going to close with. I would like to repeat two things, and really that's all I hope you will remember when you go into conference this case. That is that the consequences of a plea of guilty or waiver or call it what you may within the context of habeas corpus problems, simply cannot be determined in an abstract vacuum. You have to take a look at the entire State procedural context, and that's because the entire habeas corpus statute is geared in toward State procedures. What did the State give him, what would the State in terms of remedies allow him to use? Did he avail himself of the remedies the State gave him? Everything is keyed into what the State remedial context is, and does not proscribe that only State trials preserve an issue for habeas corpus review, whatever State procedures are available.

And, finally, if there is a waiver in this case, it is the petitioner's waiver, it is the State's waiver. By enacting section 813-c, essentially, which I presume was a voluntary counseled, knowing, and intelligent act, the State has abandoned its expectation that the plea of guilty terminated litigation of this constitutional claim.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Neustadter. You have about six minutes left, Mr. Hammer.

REBUTTAL ARGUMENT OF ROBERT S. HAMMER

ON BEHALF OF THE PETITIONER

MR. HAMMER: Yes, Mr. Justice Powell.

QUESTION: I was interested in the fact that counsel for respondent spent a good deal of his time arguing the benefits to the State of New York of this statute in that it encourages guilty pleaers. You are here representing the Attorney General of New York. What do you have to say to that?

MR. HAMMER: I would submit, your Honor, that while the statute does confer reciprocal benefits upon both the people and the defendant, however, the considerations underlying the enactment of such a statute are in our view completely immaterial to the legal question at bar, and that is what is the jurisdiction of the Federal district court? And it's our contention that the State legislature, regardless of the considerations, has absolutely nothing to do with establishing or amending or creating jurisdiction in the district court. It can't. Only Congress and with this Court interpreting the statutes of Congress can affect the district court's jurisdiction.

I would like to re-emphasize that waiver is not an issue in this case. The plea of guilty forms the independent basis for the conviction. In fact, McMann itself is not a

waiver case since it dealt with the substantive law on when a guilty plea may be impeached. The decision of this Court in Boykin has nothing to say about that a guilty plea will be overturned if the defendant isn't advised that he has or has not the right to go into the district court for Federal habeas corpus ultimately.

In the case of Mann v. Smith, although the procedure in California is slightly different than that in New York, the operative fact here is the guilty plea. The respondent's attorney made much of the fact that the alleged anomaly in this Court's certiorari jurisdiction direct from the State courts and our contention that the district court lacks jurisdiction. The statutes are clear. 2254(b) has nothing to do with this case. The question is whether there is a violation of a Federal right under 2241(c)(3). Of course, since this Court on certiorari considers only cases of national significance, the overall intrusive effect onto State criminal law process will be much less than if there is original jurisdiction in the district courts.

Counsel spoke of springing the trap because we never talked about the Second Circuit's ruling in Rogers in the State court. The simple answer is we had no occasion to. It was not known at the time and couldn't possibly be known what the defendant's intentions were in the event his State appeals went against him.

As for the expectation of the State, the expectation was very simple, to give the defendant a State appeal. That's all the State intended. That's all the defendant could possibly expect, reasonably expect in the light of the State statute. Of course, the re-enactment of the statutes in the alleged light of the Second Circuit rulings we would regard as being not material. It's our view, your Honors, that the logic of the McMann case, of Tollet, of Blackledge requires a reversal in this action, and we respectfully so submit.

Thank you, your Honors.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

[Whereupon, at 2:44 p.m., the argument in the above-entitled matter was concluded.]