In the

Supreme Court of the United States

RICHARD E. GERSTEIN, STATE ATTORNEY FOR ELEVENTH JUDICIAL CIRCUIT OF FLORIDA,
Petitioner,

v.

ROBERT PUGH, et al.,

No. 73-477

Washington, D.C.
October 21, 1974

Pages 1 thru 74

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

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v.	:	No. 73-477
ROBERT PUGH ET AL	:	

Washington, D. C.

Monday, October 21, 1974

The above-entitled matter came on for argument at 10:05 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:

PAUL L. FRIEDMAN, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C. 20530 For the United States, as Amicus Curiae

LEONARD MELLON, ESQ., Assistant State Attorney for the Eleventh Judicial Circuit of Florida, Metropolitan Dade County Justice Building, 1351 N. W. 12th Street, Miami, Florida 33125 For the Petitioner

[Continued]

APPEARANCES: [Continued]

RAYMOND L. MARKY, ESQ., Assistant Attorney General, The Capitol Building, Tallahassee, Florida
For the State of Florida as Amicus Curiae

BRUCE S. ROGOW, ESQ., Nova University Center for the Study of Law, 3301 College Avenue, Fort Lauderdale, Florida 33314 For the Respondents

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in 73-477, Gerstein against Pugh.

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

ORAL ARGUMENT OF PAUL L. FRIEDMAN, ESQ.,

ON BEHALF OF THE PETITIONER

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

The issue in this case is whether the due process clause of the 14th Amendment requires that every state and every county, as well as the federal courts, establish a system of preliminary hearings before a judicial officer after the filing of an information by a prosecutor.

Now, while many jurisdictions require such hearings before the filing of an information, the procedures in many of the states are patterned after the federal rules of criminal procedure and the Federal Magistrate's Act, which say that, after an information is filed, just as after an indictment is filed, there is no longer a right to a preliminary hearing.

The United States has filed a brief in this case at the request of the Court because of our interest in sustaining the constitutionality of the federal rule, which would be unconstitutional if the court of appeals'

decision were upheld in this case and our particular interest is on the impact it would have in the District of Columbia, where about 6,500 misdemeanors are filed each year by way of information.

Q Are you speaking now of the local court or of the federal district court?

MR. FRIEDMAN: I am speaking of the Superior Court of the District of Columbia, but of course, there the United States Attorney acts as the local prosecutor.

This case was argued last term and the Court is familiar with the facts, but, briefly, what happened in this case is that two prisoners originally, who had been charged by information in Dade County, Florida, by way of information -- one with a felony, which is permissible in many, many of the states and the other with a misdemeanor, they filed a class action suit in the United States District Court and they sought and obtained an injunction and a declaration at a preliminary hearing before a committee magistrate was required by due process, prior to trial and after the filing of the information.

During the course of the litigation, there was a tremendous change in Florida procedures, which Mr. Mellon and Mr. Marky may speak to and the Florida rules were amended to provide that a preliminary hearing is required in felony cases, but that if an information or

indictment was filed, that there is no longer such a right, so it is very similar to the federal rules and nearly identical to the Superior Court of the District of Columbia rules, which only requires preliminary hearings prior to indictment in felony cases but not at all in misdemeanor cases.

The district court held that there was a 14th Amendment violation of due process violation and that by excluding misdemeanants, there was a due process and equal protection violation.

The court of appeals affirmed in substantial part, but held that the requirement of preliminary hearing after information was limited to those people in custody, which is why we argue that really what is involved in this case is bail, if the question is detention.

We think it is important at the beginning to understand something which the district court and the court of appeals did not appear to understand and that is the difference between an initial appearance, a preliminary hearing and an arraignment and the difference between a complaint and indictment and an information.

Q Now, are you talking about Florida or the federal system?

MR. FRIEDMAN: Well, I think the systems are quite similar.

Q Similar, but as I have been able to study this, I think really you have variations -- 51 separate variations.

MR. FRIEDMAN: And that is one of the real problems in this case.

Q I know it is. So that is the reason I was asking you, what system are you talking about?

MR. FRIEDMAN: Well, we were talking about the federal system as a model in the Superior Court of the District of Columbia, which is virtually identical to that. But we think that some of the principles, of course, apply across the board, but the distinctions between the systems would be the real problem in saying that the Constitution requires preliminary hearings regardless of the way that system works.

Q Well, at least one should be very careful of his nomenclature, I would say, because a phrase that means one thing in one state means something quite different in another state.

MR. FRIEDMAN: You are absolutely correct, Mr. Justice Stewart and one of the problems in the court below was that they seemed to be concerned with the fact that they said there was a statute on the books for years which required preliminary hearing but the statute they cited in their opinion did not require preliminary

hearings at all, but required an initial appearance without undue delay and the purpose of an initial appearance in that system, it seems, and in the federal system, is solely to make sure that a man is brought before a magistrate shortly after arrest without unnessary delay.

Q There is no probable cause determination there at all.

MR. FRIEDMAN: No probable cause determination at all.

Q And of course, opinions in both McNabb and Mallory were quite inaccurate, were they not?

MR. FRIEDMAN: I believe so, your Honor, because there is no probable cause determination. All that occurs at that point -- it is very important --

Q Right.

MR. FRIEDMAN: -- but all that occurs at that point is that a man is advised of his rights --

Q Right.

MR. FRIEDMAN: -- he is appointed counsel if he is entitled to one, if he is an indigent, bail is set, which is most important, and he is also advised of his right to a preliminary hearing and the preliminary hearing is the proceeding at which probable cause is determined.

But under the federal rules, if an information or indictment is filed before the date set for the

preliminary hearing, there is no longer that right.

Now, the reason for that, we think historically, and even today in many jurisdictions, is that because the document that is filed in court initially is a complaint and a complaint is an informal charging document and some jurisdictions still -- and I understand even in some counties in Maryland, a citizen can come in and file a complaint. That causes the Sheriff to issue an arrest warrant or cause an arrest to be made and the man is brought in, bail is set and, that being only a citizen or being only a police officer -- as it is in many circumstances -- properly, the rules of many states and the federal rules say, "That is not enough to hold a man for a lengthy period of time. Someone whould determine if there is enough evidence to support that complaint" and it is our view that that someone can be any one of three people, but not two of three, and those three people or institutions are --

Q Under the system of authority, can he be held for 30 days without bail?

MR. FRIEDMAN: My understanding is, not any longer, your Honor.

Q What do you mean, "Your understanding"?

MR. FRIEDMAN: My understanding of the federal rules, Florida rules, is that they were amended during the

course of this very litigation and there is now a period of 48 or 96 hours on that and I think that Mr. Mellon, who is from the State of Florida, will tell you precisely and I cannot, I'm afraid, what it is.

He must be brought before a magistrate. Bail must be set and a preliminary hearing must be set, I believe within seven days, which is in a shorter period of time within the federal rules, in which is 10 days.

Q The case before us, they did 30 days. They had 30 days.

MR. FRIEDMAN: At that time, yes, before the amendment to the Florida rules.

Q Then you just shifted the rules now.

MR. FRIEDMAN: Well, they've accorded people substantial rights that did not exist before by shifting the rules.

Q Could they shift them back tomorrow?

MR. FRIEDMAN: Could they? I suppose that there would be a tremendous constitutional problem if there wasn't at least a bail hearing shortly afterwards and if there wasn't an initial appearance where one was advised of his rights. So I don't think that they could shift them back to the way they were before.

One has to be brought before a magistrate without undue delay and one reason for that is so bail can be set.

Q You seem to be agreeing that it was unconstitutional to hold this man in this case.

MR. FRIEDMAN: I think if no bail determination was made within 30 days, yes, and if no deter --

Q Is that true in this case?

MR. FRIEDMAN: My understanding is that there was no determination made. But our point in this -- in terms of a constitutional rule, is that the federal rules comply with the Constitution, if they comply with due process, because, under the federal rules, bail is set and if you are concerned about detention, bail is the answer, not a preliminary hearing and under the federal rules, within 10 days if a man is in custody, he has the preliminary hearing.

The purpose of that preliminary hearing, though, no longer exists after an information is filed because some appropriate institution has determined that there is enough evidence to file a formal charge and make the man stand trial on that formal charge.

Q You were about to say that there were three who could make it and would you enlarge on that a little?

MR. FRIEDMAN: Yes, Mr. Chief Justice. There are three possible institutions. The prosecutor is one of those institutions. The grand jury is another of those institutions and the magistrate is yet a third. Someone

looks at the evidence behind that informal charge, behind that complaint, and the reason for saying that a magistrate comes into the system at all, we think -- and we think history supports us in this, is because a man ought not to, Mr. Justice Marshall, sit in jail on an informal complaint by a police officer or a citizen without somebody looking at the evidence. It is the magistrate unless either the prosecutor or the grand jury acts in the interim.

A formal charge is very different, though. That prosecutor has an oath of office which he must uphold. He looks at the evidence. He must obtain a conviction later on. He has certain duties as an officer of the court. His very function is to make that decision.

Indeed, when a grand jury is interposed, we submit, the prosecutor performs a very, very important role even there. He is advisor to the grand jury and, realistically, he directs the activities of the grand jury and he must sign the indictment, at least under the Fifth Circuit's view in Cox.

Q So the three institutions are prosecutor, magistrate and what was the third?

MR. FRIEDMAN: Or grand jury.

Q Or grand jury.

MR. FRIEDMAN: One of those three has to look at what stands behind an informal complaint.

Q Do you see this as a Fourth Amendment problem or as a due process problem?

MR. FRIEDMAN: We see it as a due process problem. We see it only as a due process problem because the issuance of warrants, whether they be arrest warrants or search warrants, is really a different situation from the filing of an information.

The tradition has been that the magistrate makes that judgment to cause an arrest to be made and to evaluate probable cause for that purpose but an information is itself a determination of probable cause which may result in arrest, it is true. But the man must stand trial on the basis of that information and under decisions of this court, even if there be an illegal arrest, if someone is brought before the court improperly, that still does not mean that he doesn't have to stand trial on the charge.

If the court has jurisdiction and if the proper authority has filed the charging document, he has got to stand trial. His only real remedy is if some evidence was seized in the course of that illegal arrest or that illegal seizure and then it is suppressed under the exclusionary rule.

It has nothing to do with whether the court has jurisdiction of trial.

Q Well, it does have something to do with whether or

not a person who is presumptively innocent -- and we begin with that --

MR. FRIEDMAN: We certainly do.

Q -- can be held in custody without any determination of probable cause to hold him in custody.

MR. FRIEDMAN: Well, our view on that is that the prosecutor, in effect, makes that determination that there is probable cause.

Q Well, that certainly is quite contrary to all Fourth Amendment law, isn't it?

MR. FRIEDMAN: It is contrary to Fourth Amendment law which says that in cases where warrant is required, the magistrate is the one that issues it but there is no Fourth Amendment law that I know of that says that warrants are required in all circumstances, that arrest warrants are required in all circumstances.

Q That is, you are speaking now of the ordinary street arrest in an emergency where the policeman makes the first determination?

MR. FRIEDMAN: Either in an emergency or by statute in most states and in the federal system of any felony arrest can be made without a warrant. And a misdemeanor arrest can be made without a warrant if it occurs within the officer's presence.

It is only in those circumstances where statute

or common law, as it is developed, has said a warrant is required that then the court has said that it is the magistrate who determines whether there is enough for the issuance of a warrant and so our view is that cases like Shadwick -- well, first of all,our view is that that the arrest and the search situation are somewhat different under the cases of this Court and, second, the cases like Shadwick and Coolidge go to those situations where a warrant is required. Then a magistrate makes a judgment.

But the filing of an information, although it may result in a man being brought before a court, is not an arrest and whether or not he is detained is not decided by that prosecutor. It is really decided by the magistrate, who looks at the strength of the evidence although he does not make a probable cause determination, looks at the likelihood of flight and then, under the 8th Amendment and under the statute, certainly the federal statute, the presumption is release, personal recognizance or conditional release unless there are no valid conditions which will reasonably assure his appearance at court.

Q But that is not probable cause determination, nor is it the equivalent of any kind of a due process hearing, is it?

MR. FRIEDMAN: I think it is the equivalent of a due process hearing. It is a probable cause hearing.

Q Well, to determine -- not probable cause --

MR. FRIEDMAN: To determine likelihood of flight.

Q Right. Quite a different purpose.

Q Mr. FRiedman, who issued the complaint formally? Before you had this procedure you say you had a complaint procedure. Who made the complaint in Florida?

MR. FRIEDMAN: In Florida, I frankly am not positive of the answer to that question. In many jurisdictions --

Q Well, could the prosecutor do it?

MR. FRIEDMAN: The prosecutor could authorize a police officer to file a complaint.

Q That is usually what is done, isn't it?

MR. FRIEDMAN: That is often what is done, although there are many, many jurisdictions --

Q Only now instead of issuing a complaint, he issues an information.

MR. FRIEDMAN: They are very different.

Q And that changes the whole ball game.

MR. FRIEDMAN: It does change the whole ball game.

Q But it is the same man doing it.

MR. FRIEDMAN: The same man doing it in some jurisdictions.

Q It is the same detached man doing it.

MR. FRIEDMAN: It is the same --

Q Is the prosecutor any more detached now than he was then?

MR. FRIEDMAN: Much more so.

Q How?

MR. FRIEDMAN: Because --

Q Assume it is the same man. How is he more detached now?

MR. FRIEDMAN: Because when he authorizes a police officer to file a complaint, and in many jurisdictions he doesn't even know that the police officer has filed a complaint, but in those where he does, it is a quick, perhaps hurried decision. A man is brought in. You got to get him before a magistrate without undue delay and he says, okay, file the complaint and we'll look at it later.

But the information is different and this Court has said that the information is different in Ocampo and in Lem Woon, in Hurtado and all of those cases --

Q Well, we are talking about Florida.

MR. FRIEDMAN: Well, the point that we, the United States, as Amicus Curiae, are trying to make is that any decision of this Court in this case, unless very narrowly confined, is going to have implications throughout the country in situations and in systems which are very

different, even from county to county within a particular state and that is our primary concern.

In terms of Florida, if I am not as well-versed in terms of Florida procedure as -- as you would like to have me, I apologize, but Mr. Mellon and Mr. Markey --

Q Well, you are the first one arguing. That is why --

MR. FRIEDMAN: I understand.

Q I'll wait, then, if that is the way you want it.

MR. FRIEDMAN: Yes, sir.

In terms of your question, Mr. Justice Stewart, about whether the bail hearing itself comports with due process, we think -- first of all, you really have to look at the whole criminal justice system from start to finish. You shouldn't really focus in on one phase of it, that being the charging decision and so long as there is prompt appearance before a magistrate, so long as there is a bail determination -- at which the defendant has a right to be heard, certainly, and a right to present whatever indication he can that he is likely to appear, that he has community ties and so on, that you have an information which gives them notice and the information like the indictment is sufficient to give them notice and I need not dwell, I don't think, on all of the rights that attend a criminal trial with the ultimate determination of guilt or innocence that

is made and so the prosecutor is not much different from the grand jury in this kind of a situation and there is no review of that grand jury decision.

Q Well, in a few states, there is a preliminary hearing after a grand jury indictment. Are you familiar with that? Michigan and Oklahoma.

MR. FRIEDMAN: I know that that does exist in some places. But the question is, does the Constitution require it?

Q Of course it is. Neither one of these hearings, either the prompt appearance before the magistrate nor the bail hearing is directed to the question of probable cause to hold this person in custody.

MR. FRIEDMAN: That is true.

Q That is correct, is it not?

MR. FRIEDMAN: That is true.

It is not -- let me rephrase that just a little bit. It is not directed to the question of probable cause to hold the person for the action of the grand jury or the prosecutor and for trial in a court of competent jurisdiction.

It is directed to whether or not he ought to be held in custody. On those --

Q Yes. Well, on the bail. That is, the possibility or the risk of flight.

MR. FRIEDMAN: Yes, that is correct.

Q Plus the gravity of the charge --

MR. FRIEDMAN: And the weight of the evidence.

Q And all the various other factors.

MR. FRIEDMAN: Insofar as relates to flight.

Q Right.

MR. FRIEDMAN: Now, we submit that that is -- that is enough in terms of what the Constitution says to consider all those factors, to consider in an informal way. It is no less formal, certainly, than the procedures that normally apply at the time of sentencing when a man's liberty is maybe permanently deprived. This is a --

Q Well, that is after a determination of guilt --

MR. FRIEDMAN: Correct.

Q -- beyond a reasonable doubt by a jury or by a trial judge.

MR. FRIEDMAN: It is. That is correct and that is an obvious distinction which does make a difference. But the procedures that are involved are very, very similar.

We do think, though, that the bail hearing is important because it is not the prosecutor's judgment that forces the man to be held in custody. The prosecutor's judgment that there is enough evidence to make the man stand trial, yes. That brings him before the court. But whether he stays in custody is a judgment made by a neutral,

detached, independent magistrate.

Q But it is not made on the basis of whether or not there is probable cause. Correct?

MR. FRIEDMAN: I certainly -- you know, I certainly agree with you on that point.

Q Okay.

MR. FRIEDMAN: The question is whether it need be made on that basis -- on that basis. And we don't think it does unless one is to go so far as to say that information is no longer a permissible way to charge because, historically --

Q There can be no question that unless Hurtado and its successors are going to be overruled that information is constitutionally permissible except in the federal system to initiate a criminal proceeding. But that is not the question here. The question here is holding in custody a presumptively innocent man without a determination of probable cause to hold him in custody.

That is our question.

MR. FRIEDMAN: On the basis of that information that has been filed.

Q Right.

MR. FRIEDMAN: That is the question. Whether he is to be -- if -- but if you look at -- if you look at what is involved in the charging decision. If you want to

focus on the charging decision alone, we think that there are a number of reasons why it comports with due process and why the bail hearing comports with due process and the combination of those two makes it sufficient that a man be required to stand trial on the charge against him.

The charging decision of the prosecutor has traditionally been an executive function. It has traditionally not been reviewed by the courts and by the magistrates and, in fact, many courts have said that it is not the kind of a decision that is really amenable to judicial review.

The prosecutor is very much like the grand jury and we emphasize this because the prosecutor is not adjudicating guilt or innocence. He is only, by his action, saying that a man has to stand trial and he has traditionally been permitted to do that, just as the grand jury has, unimpeded by any procedural requirements such as those the respondents seek here.

Secondly, while the charging decision may be made Ex Parte, due process doesn't always say you can't make a decision Ex Parte. The arrest and search warrant situation, which may never be reviewed, as I said before; the determination to wiretap someone which may never be reviewed, unless there is evidence seized which is sought to be introduced; and the decision of the grand jury to

charge.

We also think, if we focus on the due process cases that the prosecutor is at least as independent, probably more so, than the person permitted to make that initial, preliminary decision in Morrissey versus Brewer and in Gagnon versus Scarpelli. He is not the person that has made the recommendation that there be a charge filed. That is the police officer or the citizen. He reviews it independently. He is the one that has got to try it in court, which is not a reason why he doesn't make a fair decision, but a reason why he is very, very cautious as to what he does.

He is the one with the limited resources that he has got to use very sparingly and he is also the one who has an oath of office to uphold and legal training, which the people in Morrissey and Gagnon presumably did not have.

Another very important point that we would like to make is that one has to consider what happens if you have preliminary hearings and that is something that REspondents and the courts below really never, in the final analysis, addressed. Is the result release on bail or is the result release on charges?

If the result is only release on bail -- if there were a finding of no probable cause, that -- in order to

put them in a position with those that are already out on bond, then we still maintain that the bail hearing is sufficient but if the result would be the dismissal of the charges, that is a very anomalous result and it is very anomalous because the only one that has the right to have his charges dismissed is the man in custody.

Whereas, the man who made bond has to stand trial and no one is ever going to judge the sufficiency of the evidence against him until the day of trial.

It also raises the question as to whether the prosecutor can rebring charges if the dismissal is entered by the magistrate. Under the federal system he can. Traditionally, he can. Under all of those cases that we just discussed he can. And that is as it should be because that is an executive function. But if the preliminary hearing results in dismissal of charges, that raises a question as to whether he can rebring the charges.

Or may he only do so by seeking grand jury indictment, as the district court originally said? May he appeal the magistrate's decision of no probable cause? Or mandamus the magistrate? Or have double jeopardy and collateral estoppel problems?

These are questions whichneither the Respondent nor the courts below addressed and we think they didn't address them because logically, when one analyzes what

would be the result of a no probable cause finding, the whole system of filing information falls by the wayside and the whole system of the prosecutor having the responsibility to make the charging decision, which Respondents say they are not attacking in this case, falls by the wayside.

Q So it is not the whole system of the information system in the 50 states because many, many states do provide hearings for post information, do they not?

MR. FRIEDMAN: Many states provide --

Q You are talking about the federal system and your understanding of the Florida system.

MR. FRIEDMAN: Yes. And there are about 9 or 10 other states.

Q And a minority of the other states.

MR. FRIEDMAN: That is correct.

Q Are these adversary hearings?

MR. FRIEDMAN: The hearings that Respondents are seeking would be adversary hearings.

Q I understand that. I am asking about the other states that you mentioned.

MR. FRIEDMAN: I think that in some states there are nominal adversary hearings but, like the federal system, the evidence may be based on hearsay, so it may be that the police officer gets on the stand and says, "I have talked

to a witness and this is what he told me," and the magistrate, on that basis, after cross-examination of that police officer, determines probable cause. A portion of our brief, of course, goes to what the court -- what kinds of procedures we suggest the Court ought to impose, if the Court were to require a preliminary determination.

And we think it should be no more than what is required in the warrant situation and no more than what is required pre-information in the federal system, which is hearsay. But there are problems with reports.

Q Then you are back -- then you, I gather you do analogize this into a Fourth Amendment problem rather than a due process hearing problem.

MR. FRIEDMAN: Only if you don't agree with our due process hearing analysis and conclude that there is some requirement over probable cause.

Q Then you say it is not a due process requirement.

MR. FRIEDMAN: It --

Q Of the kind of hearing -- of a Goldberg against Kelly kind of thing.

MR. FRIEDMAN: Yes. We don't think that that kind of a hearing is required regardless, because, for a number of reasons.

One, it is a decision that can be made Ex Parte, unlike some of the decisions in the other cases, that is,

easily amenable to Ex Parte determination and that is clear from the fact that a magistrate makes that kind of a judgment when he looks at a warrant. He looks at a piece of paper. He says, on the basis of what the prosecutor has told me, is there enough here? Is there probable cause? He could do that here, too. And the consequences are really no greater here than they are there.

Or it could be incorporated into the bail proceedings which is generally informal, like the sentencing proceeding is and -- because the kind of information that you might need to determine detention is not the kind that necessarily requires cross-examination and adversary --

Q You haven't mentioned Morrissey against Brewer, have you?

MR. FRIEDMAN: I believe I did, your Honor.

Q I'm sorry, I missed it.

MR. FRIEDMAN: I said that, in our view, the prosecutor is even more independent and more well-equipped to make the decision -- which is a preliminary decision -- which he makes in filing an information, than was the second probation and parole officer in Morrissey and Gagnon.

He is better trained. He has an oath of office to uphold. He has got to try the case eventually and he

is more detached from the police officer to the private citizen than the second probation officer is from the first probation officer.

And that is our response on those cases.

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

Mr. Mellon.

ORAL ARGUMENT OF LEONARD R. MELLON, ESQ.,

ON BEHALF OF THE PETITIONER

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

Whatever the practice was at the time this litigation commenced, that is, the holding for an inordinate amount of time a suspect in jail prior to bringing him -- the question was raised earlier to the Solicitor General -- before a magistrate could not recur in Florida under the present rules.

The counsel for the Respondent in his main brief, as part of his Appendix, attached Florida's current rule concerning the filing of informations and the so-called "96 hour requirement."

In Florida at the present time a person is arrested and within 24 hours after arrest must be brought before a magistrate for a so-called "first appearance hearing." This is true throughout Florida by Florida's

rules.

Q What is the purpose of that hearing?

MR. MELLON: That is to advise him of his constitutional rights , his right ot counsel, the right to be provided with counsel, be he indigent and to determine his bail.

Q So that is very close to being equivalent with the federal first appearance, is it?

MR. MELLON: It is -- it is modeled after the federal rule, in effect.

Q Right.

MR. MELLON: In Dade County, which was the specific area of Florida with which we are concerned since the litigation arose out of there where the Respondents were incarcerated, presently there are, during weekdays, as many as four sittings of the magistrate courts on the -- for initial appearance purposes.

On Saturdays, Sundays and holidays, the magistrate sits so that there is not any inordinate delay. The rule is followed very strictly as to that first appearance.

The rule, the 96 hour rule governing the filing of informations in Florida provides that in the effect of the 96 hours is to run after the first appearance hearing, in the event an information is not filed within that 96 hour period, by operation of the rule, the suspect must be

released on his own recognizance. This would not, of course, allow the situation to, as I indicated earlier, to recur in connection with the Respondents in this case where they, to be charged with a -- arrested and incarcerated in a Florida jail today. The information would be filed within 96 hours. And they would be given their liberty on their own recognizance, pending the filing of that information should it not be filed within that period.

We subscribe completely to the Solicitor General's position that the charging function belongs to the executive, that is, to the prosecutor.

We subscribe to the position that was taken by the American Bar Foundation in this connection.

In Frank Miller's work on prosecution, the decision to charge a suspect with the crime, it was found that in their survey of the states, and the specific states that they used as laboratories for their total purpose, that the prosecutor in most instances need not be given the sanction of a rule to look for -- in Florida, my point is that in Florida, the court, the Supreme Court of Florida has indicated that in filing an information a prosecutor should look, not to see if there would be probable cause, but to determine if there is proof beyond a reasonable doubt.

In the Frank Miller-edited study, supervised study

by the American Bar Foundation, this was found, in fact, to be the case generally in the United States. The prosecutor will not file a case generally, based on mere probable cause.

He does this for a variety of reasons. He has got limited resources. He has a tremendously large caseload, many crimes more serious than other crimes, obviously.

He cannot, based on probable cause, merely file informations in all cases so that he is looking to see if there will be proof beyond a reasonable doubt and operating, it is possible for a prosecutor to, in effect, compartmentalize. That is, to make a very objective determination in a given case as to whether or not the charge and thereafter, once the charging decision has been made and an information to file, to become an advocate in the case.

We submit that this has been the historical American practice and it continues to date in the States.

Q Your argument wouldn't take you so far as to conclude that it would be constitutional to let a prosecutor determine whether a man is guilty and then just have the judge decide how long he is going to spend in prison, would it?

MR. MELLON: I think that would be flying in the face of the system, Mr. Justice Stewart.

Q But your argument is that the prosecutor determines that there is sufficient evidence to find him guilty.

MR. MELLON: Well --

Q And, therefore, he can be held in custody without any further determination.

MR. MELLON: The thrust of my argument is, Mr. Justice Stewart, is that he looks to see what kind of a case he has. He doesn't make the determination of guilt. He hopes to see if he can get past the directed verdict or the motion for the judgment of acquittal. But it is not he, the prosecutor, who is making that guilt determination. He is not usurping the function of the petit jury in that case.

Q It is your position, however, that that determination is constitutionally sufficient to hold the person in jail.

MR. MELLON: I am saying, Mr. Justice Stewart, that there is great pains taken by the average American prosecutor. He does not cavalierly file informations and looking toward the merest probable cause in making the determination as to whether or not to charge, not -- so that he is -- when a case is filed by a prosecutor, he stands a -- he feels, after having made that determination, a reasonable chance that the case will go to a jury for a

verdict. That is the thrust of my argument, sir.

The entire spectre of the rules in Florida have changed since this litigation commenced. The system of courts in Florida has changed. The provision for first appearance hearings and speedy bail question determinations has changed, so that --

Q Not since the court of appeals decision?

MR. MELLON: The judicial article of the Florida Constitution was amended, not as a result of this particular litigation, your Honor.

Q My question was, was it done after, before or after the court of appeals decision?

MR. MELLON: The litigation was pending while the constitutional amendment was effected in Florida. The rules, in direct answer to your question, the rules and their relevance to this litigation were amended during the time this lawsuit was pending, yes, sir.

Q Was it argued before the court of appeals?

Well, the question is, was the court of appeals given an opportunity to consider it before this case?

MR. MELLON: Mr. Justice Marshall, there was a remand by the Fifth Circuit to the district court for findings of fact in view of the new rules.

Q That's right.

MR. MELLON: Yes.

Q That is what I was trying to get to.

MR. MELLON: Yes, sir.

Q And so, as it stands now, you want us to say that the prosecutor is a detached person?

MR. MELLON: I argued that back in March, your Honor and I got the same response from you at that time and I apparently have not been any more persuasive this morning.

However, I do submit to this Court that it is possible for the prosecutor in America, not only in Florida, to act in an objective fashion prior to the commencing of a proceeding.

Q I assumed that was a build-up for what you argued before.

MR. MELLON: I have attempted to buttress it since then, your Honor.

There is a speedy bail determination made in Florida and, of course, Florida is certainly among the leading states as far as speedy trials are concerned. So that we do have an enterely different situation than existed at the time this litigation was commenced and we believe this Court should make its determination in view of the --

Q Who are the Plaintiffs in this action?

MR. MELLON: Who are the --

Q Who were or --

MR. MELLON: They were a group of four who were incarcerated in the Dade County jail awaiting trial on informations which had been filed.

Q Are any of them still held in jail?

MR. MELLON: Your Honor, to the best of my recollection, they have all been tried and convicted and are either -- served their time or are serving time in the state correctional system in Florida.

Q Well, have there been any substitutions of any other named plaintiffs in the case?

MR. MELLON: No. The action was commenced as a class action, your Honor.

Q But do any of the named plaintiffs still have any case or controversy with --

MR. MELLON: Not to my knowledge, no,your Honor. All that litigation has been concluded.

Q Would you suggest there is still a case or controversy that we must decide in this?

MR. MELLON: We've taken -- we took the position at oral argument that there wasn't, your Honor.

Q Well, do you still --

MR. MELLON: We still adhere to that position.

Q That it was not?

MR. MELLON: That there was none.

Q Relying on what decisions?

MR. MELLON: Your Honor, may I defer to Mr. Marky --

Q Surely.

MR. MELLON: -- who will cover that area?

Q Surely.

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:

In response to the last question, we feel that Preiser versus Rodriguez was, in fact, violated in this case in that it was a declaratory decree rather than one of habeas and that this has not really been answered by counsel.

They say that this could have been treated as a habeas by district court and it would have complied with Preiser to which my response is, they did not request discharge from custody and that be the end of the matter.

They went beyond. They sought declaratory relief, injunctive relief which raises the problem that Florida is most concerned with and that is, the evil that brought about this lawsuit was the delay in filing informations and the

failure to bring before a magistrate without unnecessary delay.

In Florida, it was under one statute, Section 901, one of the Florida statutes. We -- our office, the Attorney General's office, kept getting complaints from our supreme court as to why don't you bring these people before a magistrate? To which we responded that it all had to be done at one time and we couldn't do it all at one time, at that initial appearance.

Q But that initial appearance was not to determine probable cause to hold in custody.

MR. MARKY: No. Your Honor, not Section 90101. Contemplated bringing him before the magistrate and holding a preliminary hearing at once.

Q To determine what?

MR. MARKY: The preliminary hearing would be to determine this probable cause situation.

Now, because we couldn't do it at once, we weren't doing it at all and getting away with it to the detriment of the criminal justice system. It was at that point that I presented to my state supreme court the option of separating them to where there would be a time gap and they, in fact, did this, your Honor, copying, essentially, Rule 5 with the exception that because we can charge by informations, we exempted it, our theory being that an

information is as an indictment.

Q Tantamount to an indictment.

MR. MARKY: Yes, your Honor and when we look at the complaints lodged by the Respondents in this case, it becomes clear what they are after, and it is not just information. Their complaint is not the good faith of the prosecutor, not the reliability of the prosecutor. Indeed, their complaint is that it is secret, that they are denied cross-examination, confrontation, the right to bring evidence and the right to have a judicial determination.

Well, I insist that if that is the evil of which they complain, it exists as to grand jury indictments also and I would say, I don't agree with the Solicitor General and I do agree with the Respondents that if you have to have a preliminary hearing, under due process or Fourth Amendment, I don't know which one it would come from, but if either, then Rule 5 would be unconstitutional as it pertains to misdemeanors.

I can't believe that we can say, well, on misdemeanors, who have committed no major faction against the public good, must sit in a jail without a hearing but, somehow, if it is a felony, he -- he gets it. That shocks me because the inside of the jail looks like to all people regardless of the charge.

So I think where we have challenge before this

Court today is whether there must be a hearing -- and I mean more than a probable cause hearing in the sense of a warrant -- but a full-fledged hearing much as the final hearing in a parole revocation.

Q Well, but you don't even have a probable cause hearing in the sense of a warrant.

MR. MARKY: No, we don't, your Honor.

Q You don't even have that.

MR. MARKY: Because, again --

Q So let's take one step at a time.

MR. MARKY: I do understand that and I -- and your Honor is absolutely correct and I do it on the premise the same reason this Court found that an indictment return satisfies Fourth Amendment. And I find that uniquely interesting to our prosecutorial scheme.

Now, if we say that we must have it across the board, I understand. I understand. I'll go home and lick my wounds and somehow we'll have to fashion a criminal justice system designed to accommodate it, but --

Q Many, many states have.

MR. MARKY: Yes, your Honor. I understand. And I understand that there is a proposed constitutional amendment to do away with indictments in the federal system which would bring about informations and they would be back into the same boat and I see there is very little

advantage to be gained.

In my main brief, I took the position that the total system should be looked at and I still think that. I would not be adverse, for example, your Honor, if you said, we must, if the man is in custody, at that bail hearing, open it up broad enough to encompass a somewhat ex parte or very, very brief hearing on that issue.

In other words, we think of bail tradition as not including the weight of the evidence. Well, if we are going to changethe whole system, perhaps we ought not be so quick to think of the black or the white, but perhaps, some intermediate position of saying, okay, you are not going to have that requirement, but you must open your bail to take in this inquiry.

In relationship to this, your Honor, counsel says they are concerned with pretrial liberty. If they are concerned with pretrial liberty, why do they continue to now insist -- and they do it on page 11 of their supplemental brief -- that it pertains whether you are in bail, out on bail or not.

The court of appeals reversed that portion of the district court's order that this preliminary hearing existed as to a bail indicti and they insist again here, your Honor.

I tell you, they are after something akin to Ash versus Swenson, full hearing, judicial magistrate,

finding, no probable cause and they come to us and say, well, if there is not even probable cause, how can you pretend to put this man on trial?

Q Well, if you are out on bail, you have been deprived of your property.

MR. MARKY: Yes, your Honor.

Q You have either had to put up your own money or get somebody to put it up for you and paid him money to do it.

MR. MARKY: But then, your Honor, it's a different level of --

Q Well, if we are talking about due process, we are on the same level.

MR. MARKEY: I think --

Q Liberty or property.

MR. MARK: Well, Argersinger made the distinction of property because if the man is only fined, merely fined, as opposed to being denied his liberty, counsel is not required, so, your Honor, there is a difference. If we are talking about perhaps the loss of his income as opposed to the loss of his custody and I insist, I don't know what counsel's next step will be, but I know that he says, as an alternative we can indict. Whether that procedure would meet the demands of their due process will have to wait another day. Well, it is going to be

tomorrow if you give it to the misdemeanants and the felons under an information, but you defer as to an indictment.

I say it is all here today. It is all now.

Q Well, you started out, when you got up to talk about the question that was asked about --

MR. MARKY: I'm sorry.

Q And you have never gotten back to it. Well, how about that? Is there anybody here who has an existing controversy with the State of Florida?

MR. MARKY: I don't think so.

Q Any of the named Plaintiffs?

MR. MARKY: I do not believe so because these individuals were pursued through the system under the old rules that don't even exist any more and there are none that continued. In fact, the remand should have not even gotten into the declaratory relief because there was no person who could complain of their injury that was in the Plaintiffs' class.

Q Then these named plaintiffs have been convicted, is that it?

MR. MARKY: Yes. Yes.

Q And they either have served or they are serving their time?

MR. MARKY: Yes, you see, I am disturbed because the Florida's new rules, which was an experiment, before

they were even put into operation, were cut up and decided. Counsel cites statistics about his preliminary hearing produced a great result. His preliminary hearing, that order was stayed. The new results, the new statistical information, comes from our new rules, patterned after the trial. So the enhancement of the criminal justice system in Florida is not the product of the due process hearing.

Q I take it also that, at least before the State of Florida took the position, that the federal court should not have intervened at all, that pending criminal prosecutions, that the federal court shouldn't --

MR. MARKY: Younger versus Harris, and --

Q And you still press that?

MR. MARKY: Well, your Honor, I would like a ruling on the merits because Florida is concerned about where we go from here.

Q So you are waiving your Younger against Harris, are you not?

MR. MARKY: I can't waive Younger versus Harris, your Honor.

Q Well, you can't have it both ways.

MR. MARKY: Then I would insist that -- that there is no case or controversy. If I can't --

Q Well, this was a class action and under cases

like Moore against Ogilvie and Roe and Dull and Wayne.

MR. MARKY: Well, we still had a criminal proceeding. That is Younger versus Harris and those companion cases.

Q Yes, but this --

MR. MARKY: Now, on your standing issues --

Q Now you are talking about something else.

MR. MARKY: On your standing issue, I think, in Doe, there was standing. She had standing at that time.

These people did not have standing.

Q The members of the class had standing because --

MR. MARKY: Right, members of the class had standing.

Q Even though she had her baby or had her abortion --

MR. MARKY: We don't have anybody in any class represented by --

Q You mean to tell me, there is nobody in jail in the whole State of Florida?

MR. MARKY: I said, no members of that class are with the plaintiffs also.

Q You mean, there is nobody in jail in the whole State of Florida against whom only an information has been filed?

MR. MARKY: None of the named Plaintiffs that include -- No, I don't know what I mean, your Honor. I beg

your pardon.

Excuse me. My time has expired.

MR. CHIEF JUSTICE BURGER: Mr. Rogow.

ORAL ARGUMENT OF BRUCE S. ROGOW, ESQ.,

ON BEHALF OF RESPONDENTS

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

I think I should begin with the question of mootness suggested by Mr. Justice White. Our position here is that --

Q I didn't suggest it. I just asked about it.

MR. ROGOW: Yes, sir.

This is a capable-of-repetition-yet-evading-review situation.

Q That is your only answer to it, isn't it?

MR. ROGOW: Yes, sir, it is.

This case must be viewed --

Q What about the case of Indiana Employment Commission against Burney?

MR. ROGOW: Burney versus Indiana, your Honor, dealt with a situation which we think really was not a capable-of-repetition-yet-evading-review case.

We have a class action here, as there was in Burney, but we are not hinging our argument upon the class action aspect.

In Burney, there might very well have been an opportunity for a woman who is denied unemployment security to come to this Court seeking those benefits because she had been denied them without a prior hearing. So it would not be capable-of-repetition-yet-evading-review. It could reoccur. There could be a person who would have been injured. So Burney does not bar us in any way.

But I think another point regarding Burney is that in Burney, the person could be made whole. If unemployment benefits were taken, they could be given back, if it was finally determined that she was entitled to them.

But when liberty is taken, there is no way to make a person whole except to return that liberty and this is a much more compelling kind of example of a person who is being deprived in the ability of the criminal process and unless this Court finds that it is capable-of-repetition-yet-evading-review -- which, of course, we suggest it is, there would be no way ever to challenge that taking because we do not seek to overturn otherwise valid convictions. We are not saying he can't have a fair trial without a preliminary hearing. Only in that short period of time between arrest and trial, there must be some determination of probable cause made.

Q Would you say that Florida could meet all here problems if -- I take it they couldn't -- if Florida said

unless there is a preliminary hearing, a person will be automatically granted bail pending trial?

MR. ROGOW: That would not meet all our problems. It might meet the problem in this case because this case focuses on people in custody. There might be a question then raised, though, whether or not the person who was released and whose custody is then conditional might, too, have an argument that he needs a due process hearing. But that is another case.

Q Authority to be put on trial?

MR. ROGOW: Yes, sir, but that is just another case.

Q Before his property can be taken away from him.

MR. ROGOW: Yes, sir.

Q Well, I take it that Florida, then, would solve the entire problem if they proceeded against persons just by summons, if an information is filed, they just issued a summons and said we are going to put you on trial on a certain date. Now you can either show up or you don't want to, but we are going to put you on trial.

MR. ROGOW: In the context of this case, there would not be the same due process kind of --

Q There would be no bail. There would be no property and anything else, if they just proceeded in that way.

MR. ROGOW: I think there still would be a bit of custody flowing from the fact that they did not appear for trial. They then would lose their liberty and be in violation of a court order. That is one step removed from -

Q On that basis, you could never try anybody.

Q That's right.

Q Except twice.

MR. ROGOW: No, sir. No, sir. I am not saying, by the way, that there must be a hearing in that summons case or that there must be hearings for the person who is released on bail. That is just another question. The balancing, the due process balancing test to be used then would be different than that which is used here.

Here we are dealing with the taking of absolute liberty from people who are presumed to be innocent and our cases focuses only upon that taking and we think that the recent due process decisions of this Court must be viewed as a background for deciding this case.

Q What relief did you want when you filed your case?

MR. ROGOW: A preliminary hearing in state court. That is all.

Q Or what?

MR. ROGOW: Or nothing. A preliminary hearing is state court.

Q Well, you wanted release unless they did, didn't you?

MR. ROGOW: We did not ask to release in no way, your Honor. We -- if they did not provide the preliminary hearing in state court, perhaps then you are getting into a contempt situation with the state judges not following the federal court order, but we never sought release from the federal courts. We asked the federal court to order that preliminary hearings be provided in the state process. If they were provided and if there were no probable cause, and a state judge discharged the person, that would be the end of the prosecution.

But the federal courts are not interfering in any way, neither to release a person from custody nor to interfere with pending state court prosecutions.

Q And you think the new rule does not take care of you?

MR. ROGOW: It does nothing, your Honor. The situation in Florida is exactly the same. The state attorney can obviate the right to a preliminary hearing by filing an information. If there is a preliminary hearing held, he can overturn the preliminary hearing by filing an information.

The information process operates only at the tolerance of the state attorney. The state attorney is the

key to this case. He has the unfettered discretion to determine if a person is going to be held in custody pending trial.

Q What is -- it's a limited time. How about the 92 hours?

MR. ROGOW: He must file an information within 96 hours. Actually, it is five days, because 96 hours runs after the initial appearance, which is 24 hours.

Q Well, how about bail? He has to have a hearing on bail, I was told.

MR. ROGOW: Yes, sir. There would be a bail hearing. But the bail hearing, if a person is not released from custody on bail, as were not the Plaintiffs in this case, the bail hearing is meaningless. Certainly, there is an opportunity to test probable cause.

The real question, I think, may even be asked --

Q You lost me some place. If in 92 hours he gets a bail hearing and he is let out on bail, that is different. Or is it?

MR. ROGOW: It is different. It does not present the question that is presented in this case.

Q Well, is that what is going on?

MR. ROGOW: No. What goes on is, there is initial appearance. A person, within 24 hours, is brought before a magistrate for the initial appearance. Bail can be set then.

If the person can make bail, he will be released from custody. He would not have the situation that we present to the Court today.

If the person cannot make bail, then we do come into the situation we have in the Court today and also I may add that Pugh, for instance --

Q Wouldn't that be the same with an indictment?

MR. ROGOW: Yes, sir, it would be the same with an indictment. But this case does not focus at all upon indictment.

I should add, regarding the bail situation, Mr. Justice Marshall, Pugh, and the class he represents, not only are denied preliminary hearings by an information, they are denied bail because in the Florida system, when a person is charged with an offense which carries with it the punishment of life imprisonment, the information denies him a preliminary hearing and it denies him the right to bail. He is not entitled to bail unless he shows that the proof of guilt is not evident nor the presumption great.

So the burden shifts to him, in effect, to have to show no probable cause. It is certainly a radical reversal of what we usually assume the burden to be.

Q That is a very common provision.

MR. ROGOW: Yes, I think it is, but it just underlines the fact that the bail hearing is no answer at

all for a person charged with this kind of offense.

Q Well, when you say a radical reversal, from what my understanding is, it is certainly not a radical departure from the almost literal statutory language in many states when you do have what is formerly a capital offense and is now a life imprisonment offense.

MR. ROGOW: No, sir. It is only a radical departure from the arguments advanced that due process is met in any way by the bail hearing. The burden is completely shifted in those capital offense bail hearings.

When one looks at the recent due process decisions --

Q Mr. Rogow?

MR. ROGOW: Yes, Mr. Justice Powell?

Q Before you go on, Mr. Rogow, you asked for a judicial hearing. Will you describe exactly what you contemplate by judicial hearing?

Your brief refers to the right to counsel, to the right to cross-examination. Would it also include the right to call witnesses by the party being held?

MR. ROGOW: Yes, sir, it would. The Florida rule already provides for that in its preliminary hearing rule.

Q Right. I am speaking now as to what you consider the Constitution requires.

MR. ROGOW: We would look to a case like

Morrissey versus Brewer, talking about the preliminary probable cause hearing in the parole revocation situation, the opportunity to present evidence, the opportunity to have the decision made by a neutral, detached person which would be a judge, we submit in this case and the opportunity to confront and cross-examine.

The question of the right to counsel has been decided in Coleman versus Alabama, 399 U.S. 1 and there would be a right to counsel.

Q But in Morrissey there was no right to counsel.

MR. ROGOW: No, sir, there was no right to counsel. But Morrissey was dealing with someone already adjudicated to be guilty and sentenced by a court. Here we are dealing with presumably innocent people and their liberty being taken for the very first time and being placed in jail.

Q Well, there are at least two areas where you don't get anything like this before your liberty is taken away. One is before a grand jury. You don't even have a right to appear and you don't have a right to counsel. You don't have a right to cross-examine. You don't have a right to anything. And yet, on indictment by a grand jury a person is held in custody subject to making bail prior to trial.

Also, upon an arrest, under an arrest warrant

issued by a magistrate, upon probable cause, you stay in jail without any such rights as you are talking about of counsel or of adversary hearing of any kind or to present evidence. That is all Ex Parte.

Now, how many have distinguished those situations, which are very well-settled in our law, at least historically.

MR. ROGOW: The indictment situation was distinguished by saying that in order to make the argument we are making towards indictments, one would have to do away with the historic respect which exists for the indictment process and the fact that independent people from the community are making the determination.

Now, that respect may no longer be proper today but I can't say that. That can't be said unless it is said upon a proper record that proves that point. This case certainly may spawn litigation directed to that question, but this case does not come anywhere near presenting that question.

As to the person who is --

Q Well, I suggest that it does come quite near presenting that question.

MR. ROGOW: To the extent that a decision of this Court may have a future impact upon a factual situation making that same argument towards indictment, it would

come close but I don't think the Court can accept, nor do we accept the characterization made by the government -- made by the attorney for the State of Florida that this Court should accept the invitation to now say that indictments require preliminary hearings afterwards. It just doesn't focus upon that issue.

Q But -- excuse me. I don't think he had finished answering.

MR. ROGOW: But as to the person held upon the arrest warrant. We, of course, are not saying that a person must be granted a hearing prior to the issuance of the arrest warrant. To say that would be to say that you should invite a person in for his preliminary hearing to say if he is going to be arrested. That, of course, would not be very workable.

Once jurisdiction has been asserted and the court may then try the person because they have the body of the person before it, there is nothing being lost by providing a preliminary hearing after the arrest warrant has been issued and a person has been taken into custody.

So we submit that in that situation we are asking for a due process --

Q Even after there has been a determination by a neutral magistrate of probable cause to arrest and hold somebody in custody under a warrant that he has issued?

MR. ROGOW: Yes, sir, because it is an Ex Parte, non-adversary --

Q I know and so is a grand jury indictment an Ex Parte proceedings.

MR. ROGOW: I understand that.

Q They both are and they both have been accepted historically as sufficient grounds for holding people in jail prior to trial. You would agree with that?

MR. ROGOW: I would. I would.

Q So your response to Justice Stewart's question about the grand jury says it is distinguishable because there you have 23 presumably representatives of the community and then not people who are prosecuted. I can see how that would satisfy the neutral magistrate requirement, but you ar asking not just for a neutral magistrate, but for the right to counsel, the right to be present, the right to present evidence.

None of those are distinguishable in a grand jury situation.

MR. ROGOW: They are not and all I can say is, that the historical respect given to the grand jury process makes it a much different situation.

As I say, I am not disagreeing with you, Mr. Justice Rehnquist, that there is not a similarity, an argument that could be made based upon ours attacking the

grand jury process too, but I am reminded historically of the fact that when John Peter Zenger was sought to be prosecuted by the Crown, I think I mentioned this last time in my original argument, twice the Crown sought to indict him and twice the grand jury refused to indict him and finally the Crown proceeded against him by information and prosecuted him.

All I am saying is, is that if that historical respect is no longer here, then perhaps what I say here today may have equal application to a grand jury case but it is not -- it is just not the case before the Court today.

Q Mr. Rogow, does Florida allow pretrial discovery by defendants of the state's evidence?

MR. ROGOW: Yes, sir, it does.

Q Full pretrial discovery?

MR. ROGOW: Full pretrial discovery by depositions. But, of course, our position is not -- and that would then ensure a fair trial with good, adequate discovery. But our position is not that one cannot have a fair trial. It is that one cannot fairly be deprived of liberty and the question of liberty presents a much different kind of an issue that only a probable cause hearing is really going to resolve at a speedy time. It is little benefit to a person sitting in jail 60 or 90 days if his lawyer is out there taking depositions, only to find out

that he should not have been in there in the first place.

When one views this case against the conditionally-held property and conditionally-held liberty which was at issue in Morrissey, Gagnon, Fuentes, Mitchell versus W. T. Grant and Sniadach, and one recognizes that in those cases the court held that there must be a preliminary hearing before or shortly after a conditionally-held liberty or property was taken, then we submit that dealing here with absolute liberty, it must be clear that there must be a preliminary hearing shortly after the absolute right to liberty is being taken and that hearing includes the right to be heard, to confront and cross-examine and have a neutral and detached person make the decision.

It is against that background, the absolute right to liberty of a presumably innocent person and the prior due process decions of the Court, that I think we then have to judge the government's arguments, the information process, the prosecutorial screening process.

Even if a prosecutor is disinclined to file a bad charge, assuming that to be true, he can only file what he gets from the police officer or the complaining party and all he gets is one side of the case. He hears what the police officer tells him and the record in this case reflects that exactly, at page 45, I believe, in the Appendix, an assistant state attorney evaluates the

evidence given to him by a prosecutor and then determines whether or not he is going to file an information. It is not even due process --

Q Aren't there instances where the prosecutor and the police investigate independently the information that is given to them?

MR. ROGOW: Yes, sir, they do and there are situations --

Q Well, I thought you said it was just what the police said.

MR. ROGOW: In most cases. In most mine-run offenses, it is that.

Q You assume that.

MR. ROGOW: Yes, a police officer coming in, having seen it on the street.

Q You assume that.

MR. ROGOW: Yes, sir, I assume it from my experience. But I think that what you have said, Mr. Justice Marshall, there are situations in which a prosecutor investigates without police officers and begins a whole inquiry which then results in his filing of the charge. There is no way one can say a prosecutor --

Q Well, aren't there cases where he investigates and decides not to file a charge?

MR. ROGOW: Yes, sir, there are.

Q And your point, then, is what?

MR. ROGOW: My point then is that he still, under our argument, may do that. If he decides not to prosecute a charge, that is fine. If he hears a police officer's story or goes and checks it with another person, say, and says, this case is so weak and he decides not to prosecute, we would not interfere with that at all, nor would the decision that we seek interfere with that at all.

But when he hears both of those stories, it is still a one-sided story.

Q You've got to upset a whole lot of law to say you can make a prosecutor prosecute when he doesn't want to.

MR. ROGOW: We are not seeking that, Mr. Justice.

Q You could wreck all of it.

MR. ROGOW: We are not seeking that in any way, Mr. Justice Marshall. We are not saying that he cannot prosecute or that he must prosecute. We are saying that when he decides that he is going to charge and files that information, he has done it in an Ex Parte, nonadversarial, one-sided kind of a fashion and all we are saying is, is that this undermines this whole argument.

Q You do contemplate a hearing that would require the weighing of evidence, then, from decisions on credibility?

MR. ROGOW: Certainly.

Q And it just isn't enough if the state presents sworn testimony which, taken alone, would be sufficient to amount to probable cause?

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

Q You do -- you insist that before the person can be held that the judge must be exposed to any contrary evidence and decide and weigh the evidence and, perhaps, decide who might be lying or who might not be lying.

MR. ROGOW: The only difficulty I have with that question is, when you say, "Before the person can be held." We are saying he can be held for a short time because --

Q Well, I understand that but he can't be held very long.

MR. ROGOW: Yes, sir. And then shortly after that, there must be that kind of adversarial hearing.

Q So it is a sort of a mini -- it is a mini trial of some kind.

MR. ROGOW: I -- I --

Q Because it is going to be contrary, opposing witnesses and credibility questions.

MR. ROGOW: Not necessarily. In fact, in most --

Q Well, otherwise, if there isn't going to be, there is no use of your asking for anything more.

MR. ROGOW: If the defendant wishes to present that evidence, he may. But, generally, what may happen

in a preliminary hearing is the state will present its evidence and it would have to show that there has been a crime committed and that this person committed it. That would be the general situation.

Q That would be done Ex Parte.

MR. ROGOW: No, it could not be done Ex Parte.

Q But it would be just as reliable, wouldn't it, one way or the other?

MR. ROGOW: It certainly would not be as reliable Ex Parte because that is the very -- it would be a one-sided thing. What if, for instance, a person tells a police officer, I saw X commit a crime and describes X and the police officer gives the person a photograph or several photographs. X is arrested. It is reasonable cause to arrest him. He is brought in. He is held in jail. They come to a preliminary hearing. If it is the kind of hearing that you suggest or discuss, then the police officer says, this person told me X committed the crime.

If he had the person there, he might say, this is not X. I can see now that I was wrong. And that is why it is not sufficient to have --

Q That wouldn't go to putting on contrary witnesses.

MR. ROGOW: No. IN that case, there would be no need for contrary witnesses.

Q I know, but in other cases, there would. And you think he should have a right to that?

MR. ROGOW: If he wishes. Under the Florida rule, he has that right, if he wishes.

Q One type of contrary evidence might be a third-party witness who would at least testify that the man was in Detroit at the time of this alleged incident when they were charging him in Florida. Would you permit that kind of adversary process?

MR. ROGOW: Certainly. Certainly. I think we are talking here about a very crucial time. Here is a person who is being taken away. His liberty is being taken. He is presumed to be innocent. And to say that we can put that person in jail for 60 or 90 or more days without any opportunity to even tell what he would like to tell if he chooses to, is really asking too much and giving too much kind of power and authority, unreviewed, to a prosecutor and that is exactly the way the system works when the prosecutor files --

Q Can he be held 60 or 90 days under the new rule?

MR. ROGOW: Yes, in Florida he can be held 90 days or 180 days unless he demands a speedy trial and then it is a 60-day limit for both felonies and misdemeanors.

Q Mr. Rogow, if the defendant is out on bail, I judge from what you have said, that you would not think such

a hearing is required?

MR. ROGOW: I did not say that. Or I did not intend to leave that impression. I am saying the argument could be made. We don't make it here. This is a strong argument to be made, that a person whose liberty is conditional is, too, entitled to a due process hearing.

But as I say, the due process balancing test would be a little different in that situation and I really will not say firmly that he must be given a hearing.

Q Could a defendant simply defer requesting bail if he had had this preliminary hearing, which would give him an opportunity to discover the state's evidence and then request bail?

MR. ROGOW: Well, of course, in the Florida system, discovery of state's evidence is meaningless because he could get that anyway, but in terms of --

Q Does he get it as fully under Florida discovery as he could get it if he were in court with lawyer, the right to confront?

MR. ROGOW: More fully.

Q More fully.

MR. ROGOW: More fully. The discovery would be fuller. But the question that you are raising, Mr. Justice Powell, is whether or not -- a person may very well decide, I should not even have to put up my money because

there is no charge against me. So I will waive my right to post bail and I'll have my preliminary hearing where it will be shown that I shouldn't have to be called upon for bail or trial.

In fact, one really raises the question of whether or not the question of probable cause should not come even before bail. Because why should you have to post bail if, indeed, there is no probable cause to hold you for trial?

But as a practical matter, bail hearings do come first. People do secure their release from custody. This case only focuses upon those who have been unfortunate enough not to be able to secure their release from custody.

Q Mr. Rogow, I think you just said that under the present rules one may be confined 90 or 180 days? How is that?

MR. ROGOW: 90 days for misdemeanors -- under the Florida speedy trial rule, Mr. Justice Brennan, one must be tried within 90 days of arrest in a misdemeanor case or 180 days of arrest in a felony case. If a demand is made, then the time is shortened to 60 days from the date of the demand.

Q But the 96-hour rule, I gather, goes only to whether he shall be released on bail and if he is not, then he may be confined up to 90 days?

MR. ROGOW: No, the 24-hour rule deals with the

initial appearance, which would be a determination of bail; 96 hours after the 24 hours would be his right to a preliminary hearing, which could be done away with if the information is filed. In other words, even if --

Q I see. I see. And then, if the information is filed, then he is confined up to 90 days or 180, unless he demands a speedy trial?

MR. ROGOW: Yes, sir.

Q And then he must be tried within 60 days.

MR. ROGOW: Yes, sir, from the date of the demand.

I think that one other thing that must be considered is this argument regarding Morrissey versus Brewer and the fact that the state attorney is playing the same role as the other parole officer.

The state attorney, in his office, after they determine probable cause, are an integral part of the prosecutorial scheme. They are then committed to transposing that probable cause into guilt beyond a reasonable doubt. There is no way that one can equate them to the other parole officer who does not then become an advocate after he determines there is probable cause to hold this person for final parole revocation proceedings.

The other parole officer nor the one who initiated the process are in the same kind of situation as a state

attorney is, who is an advocate and whose job is to convince this person.

The government has said, in its brief, that misdemeanants should be excluded from any preliminary hearing requirements.

The State of Florida seems to agree with us that if there is a right to a preliminary hearing, a person held in jail, be he held upon a misdemeanor or a felony, is using the same right to absolute liberty and both should be provided preliminary hearings.

And I think it is interesting to note that in the District of Columbia, people are held in jail for over 90 days, about 14 percent, according to the Solicitor General's brief, about 14 percent of the incarcerated misdemeanants who are unable to make bail, don't get tried until sometime after 90 days of their arrest and the Solicitor General is saying that there is no need for those people to have a preliminary hearing, that the information process is sufficient.

Our position, of course, is that it is constitutionally incongruous to permit those people to remain incarcerated for 90 days but say that a felony defendant sitting in the same jail cell would be provided a preliminary hearing and Argersinger, we think, is instructive on this and Argersinger, the court said, you can't take away

a misdemeanant's liberty for one day absent a lawyer or proper waiver of a lawyer after trial.

The government is suggesting you can take away that liberty for more than 90 days without even a hearing.

Q The use throughout the briefs and oral argument in this case of the phrase "preliminary hearing" throws me off a little bit because I think you are not contending that there must be a hearing preliminary to any custody whatsoever. Are you?

MR. ROGOW: No, we are not. We are not.

I think those cases, Hurtado, Lem Woon, Ocampo, which you alluded to before, do not need to be overruled to come to the conclusion we ask for.

Q Yes. So you are asking for a hearing not preliminary to any custody whatsoever? Are you?

MR. ROGOW: No.

Q But a hearing when?

MR. ROGOW: Shortly after custody has been taken.

Q And by shortly you mean?

MR. ROGOW: Well, the Fifth Circuit seemed to tolerate a four to seven day time period which was the Florida provision then --

Q And all this time you were objecting to 96 hours.

MR. ROGOW: No, it was four to seven days where the question was posed. I am contending that affirmance --

Mr. Justice Brennan asked me that and I am contending affirmance, although I think there is a strong argument to be made that four to seven days is an awful long time to have a person's liberty being taken away, cut off from wife, family, perhaps losing a job, whatever may flow from it and, again, Argersinger is instructive there, that if you can't take it away for a day after trial, how can you --

Q Let me be clear, Mr. Rogow, if within 96 hours you must either get a preliminary hearing or --

MR. ROGOW: A hearing.

Q A hearing within 96 hours. Is that it?

MR. ROGOW: Yes.

Q Unless that is made unnecessary because information is filed within that period.

MR. ROGOW: Yes.

Q Is that it?

MR. ROGOW: Yes, sir.

Q Now, what is the nature of the hearing if one is given within the 96 hours?

MR. ROGOW: A preliminary hearing with the right to confrontation and cross-examination and the right to present evidence.

Q Is there any disagreement between you and Florida counsel?

MR. ROGOW: I don't think there can be there

because the rule provides that.

Q I see.

MR. ROGOW: But let me add that if the --

Q But then the information can be filed thereafter, can it not?

MR. ROGOW: Yes, sir. Even if the person is discharged at that preliminary hearing, the information can then be filed, which then puts the person back in custody and overrules the magisterial determination.

Q And in that event, the preliminary hearing will have had no effect.

MR. ROGOW: None at all. None at all. The prosecutor absolutely controls the process.

Q Well, what is happening in practice, under that rule?

MR. ROGOW: In practice, the prosecuting attorney generally regards the determination made by the magistrate as a final binding one and --

Q And doesn't, in fact, later file an information?

MR. ROGOW: Well, sir, in some cases he does, but generally , he does not.

Q Well, does he often short-circuit the preliminary hearing or most of the time?

MR. ROGOW: In Dade County, as I understand it, about 15 percent of the time he short-circuits the

preliminary hearing. Throughout the state, it is done much more often.

What happened, of course, in this case is after the district court decision, the local judiciary responded by providing a preliminary hearing system with the same defect that the state attorney could obviate it, but because it does work so well, because we do have a reduction in the felony court caseload, it has been found that it is an efficient way to administer criminal justice in Dade County.

Q And what is your argument that Younger against Harris has no application here or is no problem to you?

MR. ROGOW: Our answer is this. First of all, this case did not seek to interfere in any way with the pending state court prosecutions. It did not stifle the pending state court prosecutions.

Now, all it means to say is that you must have a preliminary hearing. If a state judge decided there was no probable cause, that would then end the case, but it would be a state judge's determination. So there is no interference, as is witnessed in this case because the people were obviously tried in this case.

Our fallback argument is that even if Younger is applicable -- and we strongly submit it is not -- this is an exception to the Younger doctrine. You have irreparable

injury, the loss of liberty. You have no way of raising this in the Florida courts because the Florida law is adamant, there is no right to a preliminary hearing, and there is no way to effectively combat the loss of liberty after conviction.

So, in those two ways, we submit that Younger is no barrier.

Over a long period of time, the preliminary hearing in the role of the judiciary in determining whether or not a person should be held for trial has grown and it has been recognized that this is a very important kind of procedure and we submit that history, reason, fairness, which are the things that Justice Frankfurter said due process is compounded of, we submit that history, reason and fairness require that there be an opportunity for a hearing subsequent to the taking of liberty by a person held in jail upon a prosecutor's information.

MR. CHIEF JUSTICE BURGER: Thank you.

Mr. Friedman, you have a few minutes left there.

REBUTTAL ARGUMENT OF PAUL L. FRIEDMAN, ESQ.

AS AMICUS CURIAE

MR. FRIEDMAN: Thank you, Mr. Chief Justice.

Just very briefly, I want to point out again that in the Superior Court of the District of Columbia, where we have these 6,500 misdemeanors, there are no preliminary

hearings on misdemeanors at all by virtue of the rules and, in fact, most cases have begun by information. The police office comes in. There is no -- there is a complaint filed, yes and the information is filed the morning after arrest at the initial appearance, so there is a sort of a combination of procedures.

Q The complaint is generally filed by a police officer but sometimes by a citizen.

MR. FRIEDMAN: In the District of Columbia, not by a citizen.

Q It is usually by the victim to the police officer.

MR. FRIEDMAN: Right. And in those cases where the police don't want to deal with the case or don't feel it is appropriate, no formal complaint as we know it is filed. Instead, the citizen comes down to a citizens complaint center and it is dealt with usually in a noncriminal setting.

The kind of hearing that he is talking about with from four to seven days, we suggest, first of all, one question that has to be addressed is whether or not hearsay is permitted, as it is in the federal rules and we suggest that the kinds of hearings, maybe 25 or 30 a day before a single magistrate, really may not give as much protection as does the determination made by the prosecutor.

We also want to suggest that one ought to consider --

Q Well, you are not talking about alternatives, either/or, are you? You are talking about both.

MR. FRIEDMAN: I'm talking about both. That's true.

Q So maybe it wouldn't give as much protection as if you just had to take one or the other, but --

MR. FRIEDMAN: The combination --

Q -- presumably if you take the combination it will give you a little more than if you had only one, wouldn't it?

MR. FRIEDMAN: Well, again, in the District of Columbia at that initial judgment stage, the prosecutor declines prosecution in 23 percent of the cases brought to him by the police and just from my own experience, for whatever it is worth, the amount of hours that I spent as a prosecutor in conferences debating whether to charge or not to charge or is it a close case or not, I have great faith, which I don't expect everyone to share, in the decision-making processes of the prosecutor and I think it is entitled to equal dignity with the grand jury as a matter of judgment.

Two implications that I think the -- two things that I think the Court ought to consider if it rules against us: One, tell us what the result of the preliminary hearing is. Is it dismissal or is it release on

bond? Can the prosecutor rebring that charge and under what circumstances?

Two, the analogy to the Fourth Amendment cases wins out. We suggest that the answer ought to be, and nothing more, the filing of an affidavit with the information, and that should satisfy the problem raised by this case.

Thank you.

Q By filing an affidavit where and with whom?

MR. FRIEDMAN: With the court or the magistrate at the time that the information is filed. He would then look at that affidavit, determine if there is probable cause to support the information. There would be no hearing, as Mr. Rogow urges.

Q It would be the equivalent of an application for an arrest warrant?

MR. FRIEDMAN: Exactly. And we think that if the Court disagrees with us on our other points, that by analogy to the Fourth Amendment cases, that should be enough to satisfy the Fourth Amendment and due process, given what the implications of the information are.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 11:24 o'clock a.m., the case was submitted.]