OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: COUNTY OF RIVERSIDE AND COIS BYRD,

SHERIFF OF RIVERSIDE COUNTY, Petitioners

V. DONALD LEE McLAUGHLIN, ET AL

CASE NO: 89-1817

PLACE: Washington, D.C.

DATE: January 7, 1991

PAGES: 1 - 46

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IN THE SUPREME COURT OF THE UNITED STATES

- X

COUNTY OF RIVERSIDE AND COIS BYRD, :

SHERIFF OF RIVERSIDE COUNTY, :

Petitioners :

v. : No. 89-1817

DONALD LEE McLAUGHLIN, ET AL. :

- X

Washington, D.C.

Monday, January 7, 1991

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:51 a.m.

APPEARANCES:

TIMOTHY T. COATES, ESQ., Beverly Hills, California; on behalf of the Petitioners.

DAN STORMER, ESQ., Los Angeles, California; on behalf of the Respondents.

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PROCEEDINGS

(11:51 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 89-1817, County of Riverside and Cois Byrd, Sheriff of Riverside County v. Donald Lee McLaughlin, et al.

Mr. Coates, you may proceed.

ORAL ARGUMENT OF TIMOTHY T. COATES

ON BEHALF OF THE PETITIONERS

MR. COATES: Thank you. Mr. Chief Justice, and may it please the Court:

This case arises from a class action lawsuit filed by prisoners in the Riverside County Jail against the County of Riverside and its Sheriff, Cois Byrd, seeking a determination that the County of Riverside fails to provide warrantless arrestees with a probable cause determination promptly after arrest, as required by the Fourth Amendment as interpreted by this Court in Gerstein v. Pugh.

The case essentially raises two issues. First a threshold question of standing under Article III of the named plaintiffs to maintain this suit for injunctive relief. The second issue is one of substantive criminal procedure of great importance to the States at large, namely whether a State can incorporate a probable cause determination into an existing pretrial procedure, that by its nature may accomplish additional purposes, provide

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additional protections, and as a result take additional time to perform.

The case originally was filed as a complaint by Plaintiff Donald Lee McLaughlin on behalf of himself and others similarly situated. A first amended complaint was also filed, again with Mr. McLaughlin alone as the named class representative. It alleged that he had been held 5 days in the Riverside County Jail, had been released, during that time had never seen a judge, had not received a prompt arraignment, probable cause, or bail hearing. The county moved to dismiss the first amended complaint based on Mr. McLaughlin's lack of standing to maintain an action for injunctive relief, since he was no longer in custody and hence no longer suffering the constitutional violation which formed the basis of the complaint.

Plaintiffs then filed a second amended complaint, adding three additional plaintiffs for purposes of the probable cause dispute. As to these three plaintiffs it was alleged that they had been arrested without warrants, were presently in custody, did not and have not received a prompt probable cause determination, bail, or arraignment hearing. The county answered the second amended complaint, the class was certified, and then the plaintiffs moved for a preliminary injunction.

QUESTION: As to those three plaintiffs, were they

in custody at the time they were added to the complaint?

MR. COATES: They were in -- the allegations of the complaint said yes, they were in custody as of the filing of the second amended complaint.

QUESTION: And no hearing had -- no probable cause hearing had been held as of the time they were added to the complaint?

MR. COATES: Not no hearing. All it says is no prompt hearing had been held. Did not receive and have not received a prompt hearing. Nothing was said about not receiving a hearing at all. The plaintiffs --

QUESTION: Well, had any hearing been -- had any probable cause hearing been conducted as of that time?

MR. COATES: We do not know as to those three plaintiffs. We've not made a factual showing on that. We did not move for summary judgment on that issue. We're going simply on the four-square of the pleadings. Our position is --

QUESTION: Well, assuming they had had no probable cause hearing, what's the standing problem?

MR. COATES: The standing problem is still that if it is one that is temporally bound, something is either prompt or it is not prompt. Once they didn't get a prompt hearing, they would not be cured by the injunction that was sought in this case. The prayer of the complaint simply

requested that the County of Riverside be directed to provide individuals with a prompt probable cause determination.

QUESTION: But even if you don't get a prompt --

QUESTION: But the assumption that you --

QUESTION: Even if you don't get a prompt hearing, you ought to get some hearing.

MR. COATES: Yes, but again, looking at the nature of the injunctive relief sought and the ability of these plaintiffs to obtain that relief, you can't, once -- if you're saying you didn't get a prompt hearing and you're asking to be given a prompt hearing, you simply can't benefit from that injunction. I would again stress, though, this complaint doesn't set that out.

QUESTION: I don't understand that. They're not saying we want a hearing in 36 hours or no hearing at all. They're saying we want a prompt hearing. And if you want to know what a prompt hearing is, it's one which will be held within 36 hours. And if at any point after that we haven't had a hearing, we claim that we are entitled to one. And it seems to me that that's what these people are saying.

MR. COATES: Well, I think the difficulty is, is that the allegations of the complaint do not say that they have not received a hearing. Again, it simply says that they did not receive a prompt hearing.

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QUESTION: You're right there. I was proceeding --

MR. COATES: Yes.

QUESTION: -- I guess I should have said, on Justice O'Connor's assumption. If they had not had a hearing at that point, it seems to me the only reasonable way to construe their claim is that they want one.

MR. COATES: That they want a hearing.

QUESTION: They want a hearing, and if you want to know when they should have had it, they will tell you they should have had it after 36 hours.

MR. COATES: Yes, but again, I think the position that we have taken in the case is there is simply no allegation that these particular people didn't have a hearing, but they didn't have a prompt hearing.

QUESTION: Well, that's pretty picky, isn't it? I mean, it doesn't -- the complaint is absolutely idiotic if they had had a hearing. They've had a hearing, and you think that that is what the complaint means? That somebody who has had a hearing wants not damages for not having had a prompt hearing, but he is asking for the Court to require a prompt hearing? Even though he has already had a hearing, it's too late for a prompt -- are you going to read the complaint that way?

MR. COATES: I read the complaint --

QUESTION: That's just a ridiculous way to read the complaint.

MR. COATES: I'll tell you, I believe that the language of the complaint does support that interpretation, and I find it no more ridiculous in many respects than the fact that when they filed the initial complaint it was extremely clear that the named plaintiff was no longer in custody and would not benefit from the injunctive relief sought. We're holding them essentially to the language that was in the complaint. At no time have they offered to amend to say anything else. So, again, for purposes of looking at the standing of the named plaintiffs as of the complaint as filed, which is the standard the Court has --

QUESTION: Well, I think the Gerstein case sort of answers that and says there's standing. I mean, you're asking us to take a very strict and rather peculiar reading of the complaint, and I wonder if you shouldn't move on to the merits.

MR. COATES: I can only, as I mentioned, reiterate the argument that we have made below, that if -- I think if you hold them to the four-square language of the complaint, there is then no offer to amend at any time, that it shows that these people not necessarily suffer the deprivation of which they are complaining.

And as to the Gerstein question, again, I think

the Court, looking at Gerstein, was talking of the question of mootness of that point. There is no extended discussion of standing. But --

QUESTION: Well, just so I understand your point, suppose a person has been held for 10 days and files a complaint and says I have not been given a prompt hearing. Is it your position is that, well, a prompt hearing would be 4 or 5 days, so there is nothing we can do for you?

MR. COATES: He would be able to --

QUESTION: I mean, is that your reading of the complaint?

MR. COATES: Gerstein requires a hearing. And if you haven't given him a hearing, at the very least he has the right to request a hearing, if he is still in custody. At some point he is entitled to a hearing. But again that's not what this is about. It's something with a temporal limitation on it. And again, I don't believe the allegations of the complaint --

QUESTION: But in that facts, I put your position is no standing.

MR. COATES: No. If you haven't received a hearing at all, you can say I deserve a hearing under Gerstein, you must give me one, period. That is not a question of a temporal hearing. That's what I'm saying, the allegations of the complaint here are not clear on that

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fact, and that is what our argument there turns upon.

But turning to the merits of the argument, as mentioned, the preliminary injunction, the thrust of it was that the County of Riverside was not providing warrantless arrestees with a probable cause determination promptly after arrest. The period used by the plaintiffs to define this was 36 hours, which is a period applied in an Orange County case also brought by the plaintiffs' counsel, also decided by that district court judge, which was settled prior to resolution of the preliminary injunction.

In moving for the preliminary injunction, the evidence presented by plaintiffs was that people in Riverside County, warrantless arrestees, would not receive a probable cause determination until the time of arraignment. The chief evidence presented on this were booking sheets for the Riverside County Jail which showed the arrestees' process through the system. The district court found that providing probable cause determinations within the time frame of arraignment in California, which is 2 days, excluding weekends and holidays, was too long under Gerstein, holding that per se once the time in which to complete the administrative steps instant -- incident to arrest had passed, that was the time that you had to have the hearing, even if it was on an ex parte basis, even if it was on a weekend, within 36 consecutive hours of arrest.

The county contended in the district court and again in the Ninth Circuit that California has essentially taken up this Court's invitation in Gerstein to incorporate probable cause determinations into existing pretrial procedures that may afford an arrestee additional benefits than would be available in a straight ex parte hearing devoted solely to determining the issue of probable cause. Indeed, following this Court's decision in Gerstein, the supreme court, California Supreme Court, in In re Walters expressly held that misdemeanants were to receive this at the time of arraignment. Prior to that time, in fact --

QUESTION: Mr. Coates, we'll resume there at 1:00.

MR. COATES: Thank you, Your Honor.

(Whereupon, at 12:00 noon, oral argument in the above-entitled matter was recessed, to reconvene at 1:00 p.m., this same day.)

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AFTERNOON SESSION

(1:00 p.m.)

CHIEF JUSTICE REHNQUIST: Mr. Coates, you may resume.

MR. COATES: Thank you, Mr. Chief Justice, and may it please the Court:

As I noted before the break, in Gerstein v. Pugh this Court expressly declined to set forth a specific period of time in which probable cause determinations were to be provided to warrantless arrests. Instead the Court recognized that there was no uniform State criminal procedure, and in fact invited the States to incorporate these hearings into existing pretrial procedures such as arraignment or even preliminary hearing. In so doing the Court even noted that several model codes of criminal procedure already provide for this, and one of them, the ALI model code, allowed this probable cause determination to be done as much as 72 hours after arrest.

The State of California took the Court up on its invitation in Gerstein, and essentially has incorporated these hearings into arraignment, which, under California law, specifically Penal Code Section 825, must be held no later than 2 days after arrest, but excluding Saturdays, Sundays, and holidays.

QUESTION: Is there a California statute that

provides for when the probable cause hearing must be conducted in felony cases?

MR. COATES: There's no statute as to arrest, but as to an overall probable cause determination, yes, it must be done by preliminary hearing. Yet by case law, People v. Powell, the California Supreme Court has said that a defendant has a right at first appearance to challenge probable cause for arrest. The County of Riverside --

QUESTION: So what's the county policy that we're dealing with here exactly for felony cases? Precisely what is it that the county has been doing?

MR. COATES: The position we have taken, it was our argument throughout the preliminary injunction hearing that we would be willing to live with, would be to do the probable cause determination for felons at the time of arraignment. And I submit, the district court in fact took us at its word.

QUESTION: If the felon requests it, if the person arrested requests it.

MR. COATES: Yes. He is advised of his right to that hearing. He can waive that right, as he can waive other substantive rights that are bestowed by the Constitution.

QUESTION: And if requested, it is conducted then and there at the arraignment?

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MR. COATES: Yes, it is. Yes, it is.

QUESTION: Not at the preliminary hearing?

MR. COATES: An additional hearing -- there will -- he will still get a preliminary hearing, because California law requires it.

QUESTION: Yes, but the probable cause determination is what we're talking about, I thought.

MR. COATES: He will get a probable cause determination at arraignment based upon, at that point, probably just the arrest report and the like. Preliminary hearing ends up being more extensive, because at that point witnesses are called, there is a right to cross-examination in felony cases, and --

QUESTION: Well, that's a determination of whether he should be held to answer --

MR. COATES: That's right.

QUESTION: -- which might be different.

MR. COATES: That's right. But if you're going to be held to answer, you're per se going to have had probable cause to that point.

QUESTION: You're saying it recognizes that kind of a hearing is different from what it is requiring for the Constitution?

MR. COATES: It may be more protective; more may occur at that hearing. But a finding of going forward and

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being held to answer would certainly satisfy something more than just probable cause. But again, a felon in Riverside has the right, and he is advised so, of a hearing on probable cause at the time of arraignment. And indeed the district court --

QUESTION: Excuse me, it's not really more protective in the sense that it may well -- what's the maximum length of time? Is it 7 days, the maximum length of time that this can work out to?

MR. COATES: On arraignment?

QUESTION: Yeah.

MR. COATES: On arraignment, with the Thanksgiving holiday, that's essentially what you could get.

QUESTION: You could be held for 7 days?

MR. COATES: Yeah.

QUESTION: And what happens is you can continue to be held if after 7 days this higher standard is met? But it may well be that at the time you were arrested there was no colorable basis for probable cause, and maybe for the first 3 days there was no colorable basis, or even the first 6 days, but then the State digs up enough evidence by the seventh day to establish that you could continue to be held. I don't consider that an additional protection. It means -- it means in effect you never do get a -- it's too late. You have been held for 6 days without any justification.

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MR. COATES: Well, in -- there's an assumption there that there is no probable cause arrest to begin with. 7 days is the outside time period.

QUESTION: I know, that is the assumption, but that's -- that's the person I'm worried about, the person who is arrested without any probable cause.

MR. COATES: Well, the -- when you get the hearing, I mean, the hearing can be on the evidence that was before the officers. There may sometimes be additional evidence; typically there is not. But reading Gerstein, Gerstein is talking about continued detention, not necessarily an ex post facto determination of which -- whether the initial arrest was per se legal or illegal. It may have ramifications in a case, I mean, California certainly would exclude evidence if produced by the illegal arrest itself.

QUESTION: Did any of the courts make findings as to what the average length of time was between -- under your county's, Riverside County's, practice, between the time of arrest and the time of the arraignment?

MR. COATES: The district court in granting the preliminary injunction said as much as 5 days. I believe it was using a holiday scenario, albeit maybe not the Thanksgiving holiday scenario. But it said it might be 5 days. That is including the weekend when the courts are not

in session.

QUESTION: So you're not talking about 5 business days, you're talking about 3 business days plus 2 weekend days?

MR. COATES: That's essentially what it is, yes, because if the 2-day period expires when courts are not in session, you don't have the hearing until the following court day. That is what 825 provides.

QUESTION: Or 4 weekend days on the long holiday, such as Thanksgiving.

MR. COATES: Yes. Because California courts are not open --

QUESTION: So it would be three plus four.

MR. COATES: -- during that time period.

The arraignment hearing itself is a more protective hearing and provides significant benefits, similar to those that the Court approved in Schall v. Martin in upholding the juvenile detention statute against a due process attack, and it even mentioned Gerstein and the probable cause time frame. Because at arraignment you get a much better hearing than this ex parte procedure envisioned by the district court and the Ninth Circuit. If you have the counsel present, counsel can review the evidence that is before the magistrate for the probable cause determination, and can speak to the issues in there.

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And that is simply not available to the plaintiffs in the ex parte proceedings. And we submit that the ability of counsel to assist you in and of itself is a significant procedural protection.

QUESTION: Do you think -- who started this case? McLaughlin?

MR. COATES: Mr. McLaughlin filed it originally, yes.

QUESTION: And he was in custody at the time?

MR. COATES: At the time he filed the complaint he had been released from custody.

QUESTION: What business does -- what business has a Federal court got entertaining a suit like this which really is -- aren't there some Younger considerations in this case?

MR. COATES: Well, no one is -- no one was arguing as to custody or to interfere with their pending proceedings, but yes, the problem is it's a direct injection --

QUESTION: This issue could have been raised in the State courts as part of the criminal proceeding.

MR. COATES: Yes. In California if you are being held without a probable cause determination, you could apply for a habeas corpus if you believe you were illegally arrested and that they are using evidence obtained from that

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improperly. That is an issue that is raised in the underlying criminal proceeding. It is, we submit, a fairly significant invasion of the State process to --

QUESTION: You didn't -- you didn't argue that, though --

MR. COATES: Not argued extensively --

QUESTION: You never raised Younger or anything close to it.

MR. COATES: No, no. We interpret them as not really arguing for a change of the conditions of confinement, or to alter the sentences, but solely a challenge as to the procedures itself. Although we note that they do have a remedy under State law for habeas corpus and the right, if they are being held without probable cause, and I think that is somewhat different even than in Gerstein, where there was no habeas corpus available in the State court system to review the lack of probable cause.

California has taken extreme steps to make sure that individuals do in fact get a Gerstein hearing. But again, it's the type of hearing that this Court envisioned States might in fact use at the time it decided Gerstein. That is to say, a hearing where something much more than just probable cause determination is going to take place. And as a result, because additional things are done at this hearing, per se it is going to take additional time. And

essentially to have the clock tick solely based upon your ability to complete arrest reports, without taking into consideration that someone may get a better hearing with the right to counsel and the like, or that additional things may be accomplished, it really essentially precludes States from providing these more extensive protective proceedings.

Because there is just inherent delay within the system. You have to have a court open. If your courts are not open on weekends, because it must be done in an open court. You have to be able to muster not simply a public defender or a defense attorney to represent the person in custody, but a district attorney. Also in California, arraignment has the benefit that you might get, with a misdemeanor, a disposition as to the entire case. You may get a dismissal of charges. And we note that the Second Circuit in Williams v. Ward found this a significant factor in upholding a probable cause scheme which took place at the time of arraignment within 72 hours of arrest.

And we submit that that is also a concrete benefit to a defendant. I think --

QUESTION: If it is, why not just give the defendants the option? I mean, you know, just tell them that. You can have your hearing right away and it'll, you'll be out in -- right away if there is no probable cause, or we will give you even greater protections, just

wait 7 days. If it's really in their interest, I presume they'll take it.

MR. COATES: Well, the difficulty -- first of all, at the time you're making that offer to them, they generally are not represented by counsel, and they may not -- it may not be in their interest to have the immediate hearing. Because again, and I think this is borne out -- we have an amicus brief filed that notes most people waive this hearing when they are advised of it, even at the time of arraignment, particularly felons, and then they are represented by counsel. And you can understand why, because they would want the most extensive fact-finding proceeding, or the most extensive proceeding possible to vindicate, to vindicate their --

QUESTION: So then it's not -- it's not much of a burden on the State's system, if most of the people waive it, to give it to those few individuals who feel that there indeed was no probable cause for their arrest, and they think they can get out right away instead of waiting 7 days.

MR. COATES: Well, they waive it at the time of arraignment, knowing that there is another procedure down the line, if they are a felon. If they are a misdemeanant, it's up to their counsel. I mean, they get the hearing if they ask for it.

QUESTION: I see.

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MR. COATES: If their counsel looks at it and thinks, gee, there is no probable cause, he is entitled at that time to raise it significantly. If you just make it available and then give them the option, then you are essentially are creating a separate tier of pretrial proceedings that really don't serve that significant of a benefit. They don't benefit the vast number of arrestees, and in fact they really operate to the detriment of the majority of arrestees, because you'll end up getting a slowing of the entire process.

Obviously, fiscal concerns are not the be all and end all when it comes to constitutional rights. We're not saying they are, but there is a reality that criminal justice systems are operating within very strict budgetary parameters at times. And pulling a judge to sit in an ex parte proceeding to hear a handful or more of people who want these hearings is just not efficient, when you look that it will end up delaying arraignment, could delay preliminary hearings, and with resources, could even delay trials. It just doesn't benefit the arrestee class as a whole to have a less protective hearing.

And again, I note that there is no finding by the district court, and certainly plaintiffs have not argued that the County of Riverside unnecessarily delays arraignment, that we're dragging our feet within the

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California period. There's simply an assumption that arraignment automatically is going to be too late, because it's going to take place sometime after these administrative steps incident to arrest take place.

The State has and a very significant interest in having some sort of uniform time period within certain parameters that can be applied on a case-by-case basis, and indeed it is. California uses 2 days as an outside time period. But the California Supreme Court held in People v. Powell that -- just that you get them to arraignment within 2 days isn't necessarily reasonable if they can show that there has been some pernicious delay through the system. And plaintiffs have at no point attempted to show that, and the district court doesn't indicate it. It goes solely by the standard that once the time you complete those arrest reports ends, you must have that ex parte -- essentially an ex parte proceeding.

And we submit, again, that the States have a considerable interest in uniformity. We literally have --

QUESTION: They don't contend it must be an ex parte proceeding, do they?

MR. COATES: Well, the Ninth Circuit found it -- yeah, that it could be an ex parte proceeding.

QUESTION: But I mean the defendants or the plaintiffs in this action aren't asking for an ex parte

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proceeding, are they?

MR. COATES: No, that is true, but that would add still another layer of complexity to transport them to the hearing officer, and at that time they don't have counsel. They would in a sense be in pro per at that point. But we refer to it as an ex parte hearing because that's essentially what -- the Ninth Circuit reversed on that ground. The County of Riverside did not debate personal appearance or raise that issue, but the County of San Bernardino, in a consolidated case with us, did. And that is why the Ninth Circuit reached that.

QUESTION: Did -- do you think Gerstein contemplated any representation by the defendant at this probable cause hearing?

MR. COATES: No. The Court was careful to say that it wasn't absolutely required. In fact, my recollection is that the circuit court in Gerstein had basically imposed a fairly substantial procedural protections at this hearing, and the Court said well, that goes too far, you don't need those. But I think certainly the Court did not rule out the possibility that a State could provide those protections.

QUESTION: What do you think is the minimum required by Gerstein? Simply an appearance of a police officer before a committing magistrate to show cause for

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detention?

MR. COATES: Or the evidence submitted by the police, the police officer. That is probably the minimum, because it parrots, basically, the warrant procedure, if you could get an advance warrant.

QUESTION: So that -- so there would just be the submission of a warrant, or --

MR. COATES: Evidence that would support a warrant for arrest.

QUESTION: To a committing magistrate.

MR. COATES: To a committing magistrate. That is essentially the Ninth Circuit's rationale for not requiring a personal appearance. But again, that may be the minimum you can get at that hearing. I think the Court made it clear it was not precluding the States from providing additional protections that may afford the arrestee additional benefits, and also recognize that the States themselves had an interest in not having an entire separate tier of proceedings.

And again, that is essentially what we have mandated in California now. There is no uniformity. In fact, attorneys are basically going on a county-by-county, city-by-city basis to have a determination made within each jurisdiction as to what the reasonable probable cause time period is in that jurisdiction.

For example, in our case you can see there are a trio of lawsuits involving Orange County, Riverside County, and San Bernardino County, all before the same district court judge. All of those have a 36-hour requirement. On the other hand, the Ninth Circuit, in the case of Bernard v. City of Palo Alto, said it was 24 hours. Indeed even, -- indeed even in the context of our own case the district court has left open the question as to what the time frame might be for the outlying jails in Riverside County.

And the result is that we end up having a real patchwork in California of the time frame in which these hearings must be conducted, and they are determined solely by the intervention of the Federal courts. We submit that that is an improper injection into the State's own administration of its criminal justice system.

If -- I would like at this time to reserve the rest of my time for rebuttal.

QUESTION: Very well, Mr. Coates.

Mr. Stormer.

ORAL ARGUMENT OF DAN STORMER

ON BEHALF OF THE RESPONDENTS

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

I would submit in this action that the facts of this case are the guiding touchstone, that is, one merely

needs to look at Gerstein v. Pugh and apply the facts of this case. And I think that in order to understand the case, one needs to go very quickly through the facts concerning the arraignment process and the arrest process in Riverside County, because I think that there have been some significant misstatements of facts as it relates to the record in this case and what is in fact provided.

When a person is arrested, without a warrant and with a warrant, in Riverside County and they fall within the jurisdiction --

QUESTION: Mr. Stormer, what are you relying on now? Facts or evidence in the record, or --

MR. STORMER: Evidence --

QUESTION: -- statutes, or -- evidence in the record?

MR. STORMER: Evidence in the record, Your Honor.

QUESTION: Of a typical case?

MR. STORMER: Yes. Well, it is a combination of what is stated within the record, within particularly those components between the record at pages 120 through 126, pages 276 and 277, and the amicus brief.

QUESTION: That's not -- you know, that's not helpful right now. I'm not going to thumb through that.

MR. STORMER: Okay, I'm sorry, but -- I'm relying upon the record and upon the statements made by Grover

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Trask, District Attorney, in the amicus brief as well.

QUESTION: Just as a preface to that, can you tell us as to these class plaintiffs, had they had a hearing as of the time they were added to the complaint?

MR. STORMER: It was pled that they had not. I would have to go outside the record to answer that. And if I may, the answer is that they had not.

QUESTION: They had not had any hearing?

MR. STORMER: They had not had any hearing at all. And in fact, for Johnny A -- Johnny E. James, he never got a hearing at all, and was released as a part of that group of prisoners which I will describe, who the district attorney makes a determination after 3 to 5 days and lets that person go, but he is maintained without arraignment, without hearing, and without any determination or appearance before court for anywhere from 2 to 5 days, and then is released.

QUESTION: Now, are these matters in the record?

MR. STORMER: These matters are in the record. They are contained in the study conducted by the county and submitted in the lower court. Sixteen of the 46 felony arrestees were released under what is called PC-825, and that is explained in the declarations of, I believe, Lieutenant Kiyasu. What that means is they are held -- they are arrested, they are brought to they jail, they are

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maintained within the jail. During that time period, a determination is made by the prosecutor as to whether to file felony charges. They -- and it is stipulated by the defendants at page 82 of the record that they will be released at or about 5:00 on the last possible day of arraignment without ever having been arraigned, or without ever appearing before court, and with no probable cause determination.

For that group of people, that is exactly what this Court condemned in Gerstein v. Pugh. That is the determination as to probable cause is being made by the prosecutor, rather than by an independent magistrate. And not only is it being made by a prosecutor, it's being made by a prosecutor at approximately 5 to 7 days, and it's being made solely for the purpose of upholding prosecutorial discretion. That's by their own statement.

QUESTION: Mr. Stormer, you can't prevent that, no matter -- no matter what we say in this case. Even if we say that you need a probable cause hearing within 36 hours, the prosecutor can still say after 35 hours, well, you know, the door is open, go home.

MR. STORMER: Nor do I seek --

QUESTION: He can't avoid that.

MR. STORMER: I don't seek to hold that, either. In fact, I think that that has a salutary effect on the

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judicial process. What we're saying is that the record indicates that 24 hours is the appropriate time period within which this entire booking process and administrative steps incident to arrest can be completed.

QUESTION: I thought the record showed 36 hours was appropriate in this particular county?

MR. STORMER: I'm sorry, Your Honor, but the, the defendants have conceded that the process can be completed in 24 hours. The judge ruled that 36 hours was appropriate, essentially he gave a 12-hour cushion.

QUESTION: Do you take issue with that?

MR. STORMER: We do not.

QUESTION: No.

MR. STORMER: This booking process that I have discussed takes, as I said, approximately 12 -- excuse me, approximately 24 hours to complete in full. Thereafter, there are basically three groups of people that come within the -- this process that they have described. The first group is the one I've just described. That's those 16 of 46 felony arrestees who are released without ever having any probable cause hearing and are released by their own stipulation on -- at 5:00 on the last possible day for arraignment.

QUESTION: And why does that happen?

MR. STORMER: That happens --

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QUESTION: Because the prosecutor determines that they haven't got enough evidence?

MR. STORMER: The prosecutor determines that -- basically they decline to prosecute, whether it's because of not enough evidence or whatever other reasons they might decline to prosecute on.

QUESTION: And some of these had been held, at the time the complaint was filed, were still in custody?

MR. STORMER: Yes. In fact Mr. James fell within that category.

The second group are felony arrestees, those persons charged with felonies. And I take significant issue with the description give by -- given by my opposing counsel. The record indicates the following. A felony arrestee is arraigned at 1:30 on the last possible day for arraignment. That's anywhere from 2 to 7 days after arrest. At 1:30 the felony arrestee is taken to the --

QUESTION: Well, what's the policy? It's arraignment within 2 days, not counting holidays and weekends?

MR. STORMER: That's correct, Your Honor. In 2 days --

QUESTION: So when you say 7 days, could that only occur on Thanksgiving?

MR. STORMER: 7 days will only occur during

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Thanksgiving week or in certain times at Christmas, and the rest of the time the maximum would be 5 and sometimes 6 days.

QUESTION: Counting weekends.

MR. STORMER: Counting weekends, Your Honor, yes.

For felony arrestees, they are taken in, at 1:30 they are brought into the jail chapel and they see a videotape. On the videotape they are told of their rights, some of their rights. More comes later in the arraignment. At the very end of the videotape they are told that you have a right to a probable cause hearing if you request one at this time, and it will be held at a later date. In -- that's absolutely clear in the record, and Mr. Trask, the District Attorney, in his deposition, which is also in the record, testified that this would be held up to 10 days after the arraignment process. That's because the arraignment process is not set up to handle it.

At the arraignment process there is, for felonies, an attorney present, but it only concerns the arraignment, because they are told specifically it will be held at a later date, and Mr. Trask concurs in that. It will be held up to 10 days later. So for felony arrestees it will be held anywhere from 2 to 17 days later.

For misdemeanants, those persons charged with misdemeanors, they are held until 10:30 on the last possible

day for arraignment. They are brought into the chapel. There is no lawyer present. In fact the record is quite clear in the description given by the defendants, in their own submission before the trial court they say that felony arrestees get attorneys, but there is no reference to misdemeanor arrestees, and I would submit that there are no attorneys provided for misdemeanor arrestees. And they are told that they have a right to a probable cause hearing if they request one. This is a one-way videotape, no live person there at this point, no attorney present, and no description --

QUESTION: Mr. Stormer, the court of appeals didn't consider this aspect of the case at all, as I understand it. Reading their opinion, I don't find anything corresponding to what you're saying.

MR. STORMER: They did not go into these specific facts.

QUESTION: Yes. And we're basically reviewing the decision of the court of appeals that something has to be done within a particular time. You're pointing out that in fact it may have taken a lot longer in some of these hearings than the person representing the county says, but I don't know how all of these details really bear on the judgment of the court of appeals.

MR. STORMER: The reason is, Mr. Chief Justice,

is that each of these segments has a different violation of Gerstein v. Pugh contained within it, a very specific action condemned by this Court.

QUESTION: Yes, but the court of appeals says the State of California, as I understand it, must provide a probable cause hearing within 36 hours. The State is saying Gerstein against Pugh doesn't require that. And you, instead of arguing that Gerstein v. Pugh does require that, are saying look, the county not only didn't do it in 36 hours, but they took 11 days. But that really isn't what we're talking about, how long the county did take. The question is how long does the Constitution permit them to take.

MR. STORMER: The Constitution permits them -- and I apologize to the Court for my incomplete description -- but the Constitution permits the County of Riverside to conduct a probable cause review within that time necessary to complete the steps incident to arrest. And the record below is that that process is approximately 24 hours.

QUESTION: Now you're drawing on language from Gerstein to say they must conduct it as soon as they have completed the booking process?

MR. STORMER: The language in Gerstein says those steps incident -- those administrative steps incident to the arrest. And that's the language we're drawing upon. That's

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been interpreted in many cases to mean essentially the booking process --

QUESTION: Well, what are cases from this Court?

MR. STORMER: There are no cases from this Court.

The cases -- well, however, the booking process is not the only process that is considered in this 24-hour period that is before this Court at this time. Also the time period that it takes the officer to complete his arrest report and to submit it to a supervisor who reviews it to determine if there is probable cause contained on the face of that report. That is essentially what we are proposing, which is the Orange County procedure, that that document would go to a neutral magistrate, perhaps as is done in Orange County, who comes to the jail. In Orange County they dealt with 14,557 in a year period, one magistrate.

QUESTION: You're saying that would be a possible method of complying with what you view as the requirement of the Constitution?

MR. STORMER: That is correct.

The -- the problems that exist for the county in this action also are demonstrated by the fact that there is nothing in the court record below that indicates what benefit is conferred upon any of these individuals as a result of the procedure used. They rely upon Schall v. Martin, which essentially says that if there are significant

benefits conferred in some fashion by the State's administrative process, you may elongate the process because of those benefits conferred. But Schall v. Martin is not comparable.

Schall v. Martin involved a situation where you had more benefits than it provided to an arrestee with a warrant. Schall v. Martin had, prior to detention, notice, hearing, opportunity to heard -- be heard, opportunity to have a parent or counsel. That is more than you get in a regular warrant situation, and that is what this Court in Schall found to be significant enough to extend the time period. And then in Schall, after that initial hearing, another hearing was held within 3 or 4 days that allowed -- that was a full-blown adversarial process.

This record is totally bereft of a single stitch of evidence as to what the probable cause review would consist of. They have never, ever, in any component of this case, submitted a single iota of evidence which would show what they complain, what they say would be the benefit.

QUESTION: Mr. Stormer, do you think that the Constitution allows for a lengthier period of delay before conducting arraignment than the probable cause hearing?

MR. STORMER: Yes, because the purpose --

QUESTION: And why is that?

MR. STORMER: The -- the probable cause hearing

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is a Fourth Amendment analysis of what took place at the arrest, and potentially even what could be gathered within the period incident to arrest. The arraignment and the preliminary hearing are Fifth Amendment procedures that deal with whether there is sufficient evidence to bind over for trial or to maintain the prosecution.

QUESTION: Well, what has this Court said is constitutionally required in terms of time for conduct of arraignment?

MR. STORMER: I, to be frank, don't know whether there is a specific ruling of this Court that has set a time period for arraignment.

QUESTION: Just that it has to be conducted promptly?

MR. STORMER: That's correct.

QUESTION: And it's not sufficient, in your view, to say that the probable cause hearing must be conducted promptly, and perhaps at the same time as arraignment?

MR. STORMER: They could be. Even under State procedure they could be, because People v. Powell and People v. Chambers say that if the delay is unnecessary, then it's unconstitutional. But the arraignment process is only of sufficient time -- combining the two, the Fourth Amendment probable cause and the Fifth Amendment arraignment process, is only of a benefit to the prisoner if there is some

analysis that goes into that process to look to see whether there is probable cause for the original arrest. That isn't what is done at the arraignment, nor is that what is done at the preliminary hearing.

QUESTION: Well, it could be, though. They could be combined, could they not?

MR. STORMER: They could be, and there is no reason why they couldn't.

QUESTION: And why wouldn't the time limit for each be adequate?

MR. STORMER: If the time period for arraignment was correspondent to the time period for probable cause, then they could. But the problem in this case, for arraignment you need a sitting judge, you need somebody to hear the defendant, you need the presence of the defendant, you need all of those components of the arraignment process. For a probable cause review, you don't need any of those things. All you need is the document that shows that on its face there is probable cause.

QUESTION: And the defendant needn't be present?

MR. STORMER: And the defendant needn't be present.

QUESTION: But a judge needs to conduct it --

MR. STORMER: Or a hearing --

QUESTION: -- or a magistrate?

MR. STORMER: I'm sorry. Or a hearing officer. Because, as in Orange County, there is one single appointed hearing officer who is an attorney who reviews these documents, and found in 1989 that 9.1 percent of the persons who were arrested could be released because, on the face of the documents, there was not probable cause. And when you are dealing with a county like Riverside, that's a significant number of people.

QUESTION: Mr. Stormer, we're dealing with the Riverside City Jail, aren't we?

MR. STORMER: Yes.

QUESTION: And the injunction applied only to the city jail?

MR. STORMER: That is correct.

QUESTION: Is this a widespread practice in California throughout the entire State?

MR. STORMER: The practice of conducting the arraignments at the same time as a probable cause hearing? It is -- it is not. The practice varies from county to county. In Santa Clara County, for instance, they do it by fax and telephone review. In Orange County they conduct it within the jail. They don't exclude weekends. It is a -- it is the beauty of Gerstein, which is each county is entitled to set up its procedure according to those administrative steps which are necessary.

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QUESTION: So we have a case of very narrow application here.

MR. STORMER: Extremely narrow application, because it simply applies to the facts of this case as they exist within Riverside County, within the Riverside County main jail.

QUESTION: Should we have taken the case?

MR. STORMER: I don't believe that the case should have been taken, to be frank. I think that, both on standing and on the Gerstein issue, that the facts of this case plainly indicate that this is not the type of case that has the significance or the importance that should be reviewed by this Court.

QUESTION: Do you feel there was any conflict with a Second Circuit case?

MR. STORMER: The only conflict that exists, if we're talking about Williams v. Ward, would be the analysis that goes into whether, in that 2 to 1 decision, it should have reached that result. The legal analysis was identical. Are there sufficient procedures in -- and sufficient protections and sufficient exigent circumstances in New York City to extend that time period to 72 hours. It's a simple factual analysis. In New York they said it's a highly populated crime wave-type city, you need the extra time period.

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QUESTION: The conflict is pretty shallow.

MR. STORMER: The conflict is extremely shallow. And certainly it does not exist for Robinson, which is the other case which was cited to by the county.

QUESTION: Is Gerstein satisfied if there has been an arrest warrant?

MR. STORMER: Yes. If there is an arrest warrant, that's the -- Gerstein essentially creates a post-arrest warrant, and if there is a pre-arrest warrant, then Gerstein doesn't apply.

Just very quickly on the issue of standing, the -- in the complaint at paragraph 11 the defend -- it was pled quite clearly that there would be, quote, "unless and until ordered by the court, excessive detention of warrantless arrestees before probable cause hearings." On the face of the complaint it is shown and complained that there should be a halt to those -- that extensive period of time that the plaintiffs at that time were suffering.

And for those reasons I believe that the -- this Court should either rule that this case was -- improvidently certified, or affirm the ruling of the Ninth Circuit.

Thank you.

QUESTION: Thank you, Mr. Stormer.

Mr. Coates, do you have rebuttal? You have 5 minutes remaining.

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REBUTTAL ARGUMENT OF TIMOTHY T. COATES

ON BEHALF OF THE PETITIONERS

MR. COATES: Yes, I do, Mr. Chief Justice. If I may respond to Justice Blackmun's inquiry as to the practice throughout the State of California. I note that when Mr. Stormer responded he talked about Santa Clara County which was subject to the injunction in Bernard v. City of Palo Alto, 24 hours, and also to Orange County, which was another county that was subjected to a district court hearing like this one. The general practice in California, and it is clearly evident in California Penal Code Section 991 and also in the California Supreme Court's decision in In re Walters, is that the Gerstein hearing is conducted at the time of arraignment.

People v. Powell, a California Supreme Court decision that predates In re Walters, says this is an issue that is raised at arraignment. So I take great exception with Mr. Stormer's representation that this is unique to Riverside County. It is not. It is completely codified in California law.

And I think it again bears noting that when you look at the district court's findings of fact, brief though they were in the order granting preliminary injunction, the time period it talks about is the arraignment time period. When the Ninth Circuit issued its opinion in this case it

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talks about the 2 court day time period of arraignment. I think there is an assumption here, and I think it's clear from the record, the county gives these hearings at arraignment if they are requested. You are advised of your right.

If there is a problem that the advisement isn't as clear for felons as it is for misdemeanants, or that the district court didn't believe we were doing it at arraignment but were waiting until preliminary hearing for felons, then the remedy would have been, and if the court believed you could do it at arraignment, would have been to require it -- make us clearly do it for felons at the time of arraignment. But the district court was willing to assume that we did it for felons at arraignment, but just said no, you can't do that, that is per se too long under Gerstein because you don't need that amount of time in which to basically do an ex parte hearing of probable cause issue alone.

And Mr. Stormer is correct that we acknowledged in the district court that a strict probable cause hearing alone might be done in the average case in 24 hours. It doesn't take that long to just prepare that paperwork. But what has never been denied in this case, that if we are in fact to be permitted to include it in our preexisting pretrial proceeding, such as arraignment, that proceeding

and the additional protections themselves inherently take more time. Those we cannot do within 24 hours. Those we largely cannot do within 36 hours, although I would suggest that a review of the booking sheets that we submitted in opposition to the motion for preliminary injunction, and I -- we have a statistical breakdown in our brief, show that we are fairly quick in arraigning people. There are people that are arraigned within 1 court day. The majority, vast majority are easily within 2 court days of arrest. We are not slow in arraigning people.

The essential issue before this Court is whether Gerstein meant what it said in many respects in terms of allowing the States to incorporate these hearings into existing pretrial proceedings.

Now, in Williams v. Ward the Second Circuit very carefully examined this Court's decision in Gerstein, and also in Schall, and said if the proceeding, such as arraignment, offers additional benefits and serves other State interests as well -- some of the benefits are for the arrestees, some are for the States -- then it's okay. It is a reasonable delay, it is necessary to incorporate it into existing pretrial proceeding.

But I suggest there is a clear conflict between that and the position taken by the Ninth Circuit, because the Ninth Circuit allows no delay beyond the time necessary

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to conduct those administrative steps incident to arrest. Now the Ninth Circuit decision in this case does not mention Williams v. Ward. It doesn't even talk about the California Supreme Court's decision in In re Walters. It doesn't mention Schall v. Martin. It simply declares that once, administrative steps incident to arrest have been completed, you must have this hearing.

And I suggest again, if you look at Bernard v. City of Palo Alto, where the Ninth Circuit upheld a 24-hour probable cause determination, you see the same counting done. That is to say, the lower -- in the lower court the public entity argued that under California procedures they were doing it at arraignment. The Ninth Circuit said, look, only at the time necessary to complete the administrative steps.

If States are to be permitted to incorporate these hearings --

QUESTION: May I just ask a question?

MR. COATES: Certainly.

QUESTION: Did you say that most arraignments are conducted within 36 hours?

MR. COATES: No. Well, no, they are not conducted within 36 hours. No, they are not.

QUESTION: You said they were conducted within 2 court days.

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MR. COATES: Within the 2 court day period, but not within 36 consecutive hours.

QUESTION: Within the 2 court day --

MR. COATES: It happens in some cases. It happens -- generally if someone is arrested on a warrant and then arraigned, they may be arraigned faster because there is less paperwork to do with them.

QUESTION: Just looking at the universe of warrantless arrests --

MR. COATES: Yes.

QUESTION: -- most of those are not -- the arraignment is not normally conducted within 36 hours?

MR. COATES: That is correct.

QUESTION: So they are asking that in most cases the time of the probable cause hearing be delayed beyond 36 hours?

MR. COATES: In most of them they are. The time of arraignment would be 2 court days, essentially.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. --excuse me. Thank you, Mr. Coates.

The case is submitted.

(Whereupon, at 1:38 p.m., the case in the above-entitled matter was submitted.)

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