OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: KITRICH POWELL, Petitioner v. NEVADA

CASE NO: 92-8841

PLACE: Washington, D.C.

DATE: Tuesday, February 22, 1994

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IN THE SUPREME COURT OF THE UNITED STATES

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KITRICH POWELL, :

Petitioner :

v. : No. 92-8841

NEVADA :

- - - - - - - - - - - - - - - - - -X

Washington, D.C.

Tuesday, February 22, 1994

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:00 p.m.

APPEARANCES:

MICHAEL PESCETTA, ESQ., Las Vegas, Nevada; on behalf of the Petitioner.

DAN M. SEATON, ESQ., Chief Deputy District Attorney of Clark County, Nevada, Las Vegas, Nevada; on behalf of the Respondent.

MIGUEL A. ESTRADA, ESQ., Assistant to the Solicitor General, Department of Justice, Washington D.C.; as amicus curiae, supporting the Respondent.

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P R O C E E D I N G S

(1:00 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 92-8841, Kitrich Powell v. Nevada.

Mr. Pescetta.

ORAL ARGUMENT OF MICHAEL PESCETTA

ON BEHALF OF THE PETITIONER

MR. PESCETTA: Thank you, Your Honor.

QUESTION: Is that an accurate pronunciation of the name?

MR. PESCETTA: Yes, very accurate, Your Honor, thank you.

Mr. Chief Justice, may it please the Court:

The issue upon which this Court granted certiorari in this case is a very narrow one, and I submit it becomes even narrower in light of the questions that are not contested by respondent or any party in this case. And I'd like to begin, if I may, by emphasizing what is not an issue, as we understand it.

First, no one before the Court, as I understand it, is asking this Court to reconsider Griffith v. Kentucky, and therefore I would submit that it is conceded before this Court that any Federal constitutional decision which is currently in effect must be applied to any decision on the merits of Mr. Powell's case, since his

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case is not yet final on direct appeal.

I submit it is further not contested before this Court that there was a presumptive McLaughlin violation in this case, because the 48 -- the petitioner did not receive a judicial determination of probable cause within the 48-hour time limit in which that is presumptively reasonable under McLaughlin.

And so third I would submit it is not contested that under McLaughlin if it is applied pursuant to Griffith v. Kentucky, the Nevada Supreme Court erred in failing to give Mr. Powell the benefit of that decision.

QUESTION: Mr. Pescetta, do I understand correctly that if the Nevada Supreme Court had not on its own brought up McLaughlin, it would not be in this case. You would have forfeited it because the only thing that was raised by Powell was arraignment and not probable cause?

MR. PESCETTA: I submit that we possibly could have raised it in the context of an ineffective assistance claim, imposed conviction, though that's not entirely clear.

QUESTION: But it wasn't in this case until the Nevada Supreme Court put it there.

MR. PESCETTA: Exactly, Your Honor, I agree. We acknowledge it was not raised. The Nevada Supreme Court,

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which does so periodically, reached out sua sponte and drew this issue out of the case, and it decided it correctly with respect to the substance but incorrectly with respect to its retroactive effect.

QUESTION: Wouldn't it be possible for the Nevada Supreme Court to say on remand, sorry, we certainly made a mistake; had we realized that McLaughlin had to be retroactive, we never would have brought it up, and so now we're deleting it?

MR. PESCETTA: That would be a terribly result-oriented result in the case, Your Honor, but I submit that until the Nevada Supreme Court decides to do that, that question is premature at this point. We might conceivably raise a law of the case argument in the Nevada Supreme Court since there is a very strong law of the case doctrine in Nevada. If the Nevada Supreme Court found some way to wriggle off the McLaughlin hook, I think that's a situation we would -- we should address if it, in fact, does so.

But they certainly have the power, and that has not been contested by any party to this case, to reach out and decide this Federal constitutional question. And having done so, under Cohen v. Cowles Media and all of this Court's precedents having reached the issue on the merits, the jurisdiction is properly in this Court. I submit it's

for another day if the Nevada Supreme Court -- as are many of these issues in this case, are for consideration another day if the Nevada Supreme Court acts on remand in a manner that denies petitioner relief.

QUESTION: Well, Mr. Pescetta, unless McLaughlin carries with it an exclusionary rule, what difference is it going to make in the judgment below, a conviction?

MR. PESCETTA: Your Honor, it's our position that the existence or nonexistence of a Federal exclusionary remedy for a McLaughlin violation is unnecessary to the disposition of this case because Nevada has its own State law remedy, essentially a State law McNabb-Mallory rule, which on remand, once it is -- once it is required to properly apply McLaughlin to this case, will kick in. And that's why we've cited a number of --

QUESTION: And you say that under Nevada State law alone the statement would have to be excluded from evidence?

MR. PESCETTA: We submit that it would have to be excluded under Federal and State law, because we submit on the merits that there should be a Federal exclusionary remedy. We submit that that issue also is not necessary to the disposition of the case because of the existence of a State law remedy for that violation.

That's why we have cited Welsh v. Wisconsin and

other cases in our reply brief in which very similar situations have arisen in which a Federal constitutional violation implicates a State law remedy in which this Court has not proceeded to the Federal exclusionary remedy that would be required, if any, but remands for consideration under the State law remedy.

QUESTION: Mr. Pescetta, I'm sure that is one of our options, and I guess in my mind whether it's an option we should take or not depends on the probability that Nevada will decide the exclusionary issue in a way which is, number one, dispositive of the case and, B, strictly on State law grounds. If there were a reasonable likelihood of decision on Federal grounds, then it seems to me it might be prudent for us to go further here.

Can you -- can you tell me categorically that in fact Nevada's State law rule, as distinct from Nevada's readiness to follow any Federal exclusionary rule, would be, so far as you understand it, dispositive in this case?

MR. PESCETTA: I believe so, Your Honor, and I believe that the terms of the Nevada Supreme Court's opinion --

QUESTION: But you've just told me in answer to the first question that the Nevada Supreme Court might, you said, wriggle out of it. Or to say we started out with a question about arraignment under Nevada law, and

then we picked up McLaughlin on our own and made a mistake in failing to understand that it is retroactive, and then we returned and, in fact, our decision was about the arraignment Nevada State law ground.

Couldn't this case go back and the Nevada Supreme Court could say thank you for the instruction about McLaughlin, we now understand that it's retroactive, it was never raised by Powell, our decision on arraignment stands just the way we wrote it? Just take out those paragraphs about McLaughlin and we've got a decision based solely on State law.

MR. PESCETTA: But, Your Honor, I don't think this Court should pretermit that analysis by the Nevada Supreme Court. I would submit that once this Court is properly invested with jurisdiction over the Federal question, which it is, this Court's responsibility is to decide the Federal question.

QUESTION: Justice Souter asked you what could the Nevada Supreme Court do on remand and would you represent that, indeed, they would exclude this evidence. You have already, I think, quite candidly said the Nevada Supreme Court could nonetheless decide this case on the State ground that they started and ended with, that is the arraignment point.

MR. PESCETTA: Your Honor, what I was suggesting

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in answer to Justice O'Connor's question was that since there is a State law remedy available for the Federal law violation, that this Court need not proceed to delineate the scope of the Federal exclusionary remedy. I submit that -- what I believed Justice Souter's question was was that if this is remanded and if the Nevada Supreme Court decides the McLaughlin issue on the merits, as I believe it must, the availability of the State law remedy will result in reversal. That's our position.

Now if their -- if the Nevada Supreme -- I would agree that the Nevada Supreme Court could do any number of things. It could reverse on remand on an entirely different ground and never reach this issue. But the question before this Court is whether having reached this issue, they decided it correctly.

QUESTION: Well, the question, as you said in the beginning, Mr. Pescetta, is narrow. And as you continue to discuss it, it's narrow indeed. One perhaps we would not ordinarily grant -- if it's as narrow as you say -- an hour's argument on it. It's simply whether the Supreme Court of Nevada was wrong in deciding that McLaughlin would not be given retroactive effect. And you say we can't possibly go any further than that.

MR. PESCETTA: I'm not saying that you can't, Your Honor. I'm saying that under this Court's consistent

practice you shouldn't, because it's unnecessary to the disposition of the case. I'd just like to remind the Court that in our petition for certiorari all we asked for was for this judgment to be vacated and the case remanded for proper consideration in light of Griffith. So although you have given us this hour, Your Honor, that is actually more than we asked for.

QUESTION: Well, maybe we think we need the full hour.

(Laughter.)

QUESTION: Let me -- may I just go back to the Nevada law question? Does Nevada have an announced rule that when relief can be granted as requested by a prisoner, Nevada will always take up the State law issue first?

MR. PESCETTA: I don't believe there is such a rule.

QUESTION: In other words what I'm getting at is what is the probability that if we rule as narrowly as you submit we should do, that in fact we will simply -- that we will have done anything more than perhaps engage in a summary reversal which will turn out to be of no significance?

MR. PESCETTA: I disagree, Your Honor. I believe the terms of the Nevada Supreme Court opinion

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which accept the prejudicial effect of the statement that was elicited from the defendant as a result of this delay in the probable cause determination will govern their disposition of this issue. I submit that if this Court reverses and remands for further proceedings in the Nevada Supreme Court, that the Nevada Supreme Court will properly apply its State law remedy which it has traditionally adhered to, and it will reverse this case.

And I don't -- you know, although it is difficult for me to stand up for the Nevada Supreme Court, until they do something that is unfair to us in that regard, I submit --

QUESTION: But would it be unfair to say that this is a defense that you forfeited and therefore we're going to make it clear that all we were trying to do was to tell the troops in Nevada from now on you've got to adhere to the 45 -- 48-hour standard? We said that en passant in a case that was about arraignment.

MR. PESCETTA: I disagree Your Honor, first because under this Court's consistent jurisprudence, most recently Ylst v. Nunnemaker, a Federal law claim can be forfeited all the way through a State system, and if it is revived by being considered on the merits by the highest court of the State, it's revived. Jurisdiction of this Court attaches and the decision of the Federal question by

the State court is subject to review.

On the question of whether this was dealt with en passant, I'd like to get to what I think is the thrust of respondent's contention and really respondent's only contention, which is that the Nevada Supreme Court did not, in fact, decide the Fourth Amendment Question.

QUESTION: Just before you get to that, just one last inquiry on this. What concerns me, Mr. Pescetta, is that this is a capital case. Even if we assume that we need not reach the Federal question, even if we intend to remand it to the State to give the State a chance of applying State law if it wishes, why shouldn't we nonetheless resolve the Federal question just to prevent this thing from ping-ponging back and forth forever?

It's obviously in your interest to have this case decided in as piecemeal a fashion as possible. That is to say if the Federal issue is going to be decided, you would -- because it might be decided against you, you'd rather have it decided later. Let's send it back to Nevada, then they will say, no, we won't apply the State ground. And then you will say but you must apply the Federal ground, and they will say, no, we don't have to apply the Federal ground, then it'll come up to us and the thing strings out.

Why don't we terminate this litigation as

completely as possible now by deciding the Federal issue so just in case the Nevada court doesn't hold the way you think it will on the State ground, we will spare you the trouble of another appeal to this Court?

MR. PESCETTA: Without being overly disingenuous about it, Your Honor, I would say that ever since Ashwander this Court has not decided Federal constitutional questions just in case. It has consistently adhered to the practice that if there is a State law remedy or if there is a Federal constitutional question which is presented but which is not necessary to the decision, that it will not reach that question.

Now, we are fairly confident, perhaps overly confident, that our analysis of the Federal exclusionary rule is accurate and that there should be a Federal exclusionary remedy consistent with Justice Blackmun's opinion in Brown v. Illinois. But I think that what I have to focus on before this Court is obtaining relief for my client, and as I see it, remanding this case to the Nevada Supreme Court will result in that relief.

QUESTION: Although it's not in the question presented, do you think that it's also necessary, even under your minimum suggested approach, that we reach the question of whether the Nevada Supreme Court was correct in saying that a right to seasonable arraignment is waived

when you waive your Miranda rights?

MR. PESCETTA: I submit that --

QUESTION: Or was that a matter of State law?

MR. PESCETTA: I submit, Your Honor, that that is correctly not within the question presented. But I additionally submit that that is also a question of State law which this Court need not reach. And their decision, the Nevada Supreme Court's decision --

QUESTION: Cannot reach. If it's a pure question of State law, which Nevada seems to have treated it. The arraignment question was raised, as I understand it, as a question of State law, it was resolved as a question of State law, then this Court has no business with it.

MR. PESCETTA: I agree, Your Honor. As I was --

QUESTION: But do you -- is it clear to you that it's a question of State law --

MR. PESCETTA: I believe with respect --

QUESTION: -- As the Nevada court treated it?

MR. PESCETTA: I submit with respect to the arraignment and first appearance statutory issue, that that is a question of State law. And if you look at page 8 of the joint appendix, the fact that the Nevada Supreme Court in resolving the question of waiver referred explicitly to the defendant's waiver of, quote, his right

to an appearance before a magistrate within 72 hours, which is the State law ground, the State statute which it had just found unconstitutional on McLaughlin grounds, makes it absolutely clear that that waiver point was decided purely as a question of State law and does not impact the disposition of the Fourth Amendment.

QUESTION: And we'll just footnote the fact that I don't understand how a State law waiver controls the existence of a Federal law.

MR. PESCETTA: My point exactly, Your Honor. If, as the State urges, that there has been a waiver, our response to that is Your Honor's response to that; there has been no waiver of the Federal constitutional right. And the discussion of the waiver issue in the Nevada Supreme Court's opinion is directed entirely at the State statutory right because having found the McLaughlin violation, the Nevada Supreme Court then tripped in this footnote and said, but we are not going to apply it to petitioner's case. And I would just like to repeat for emphasis, we cite --

QUESTION: But just to make sure I understand it correctly, everything that they said about waiver because of the Miranda warnings, that all tied into the arraignment State ground and they were not dealing with any Federal right anymore because they thought incorrectly

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that McLaughlin wasn't retroactive.

MR. PESCETTA: Absolutely, Your Honor. That portion of the opinion deals solely with the arraignment and first appearance statute, not with the Fourth Amendment ground. Because, as I think the Court recognizes, the Nevada Supreme Court, having found the Fourth Amendment violation, then did not apply that rule to petitioner's case despite the fact that it was before it on direct appeal. Now --

QUESTION: So this is an opinion that starts with State law arraignment, shifts to Federal probable cause, says Federal probable cause is not retroactive, goes back to arraignment and continues down the line with State law?

MR. PESCETTA: Yes, Your Honor. I agree that there are shards sticking up in various places on different issues, but what they get to and what I submit renders the respondent's argument completely indefensible is the language that appears on page 6 of the joint appendix when they finally get to the McLaughlin issue and they say, quote, the McLaughlin case renders NRS 171.1783 unconstitutional. Based on McLaughlin we hold -- we hold that a suspect must come before a magistrate within 48 hours, including nonjudicial days, for a probable cause determination.

Now, we've cited a number of cases in our brief on independent and adequate State grounds, and I submit that this language puts the State's position completely out of court. When a lower court says we hold that a Federal constitutional decision renders our practice unconstitutional, I submit that it really couldn't be clearer. And it is immediately after that paragraph that the Nevada Supreme Court goes in a footnote to the retroactivity analysis.

QUESTION: Well, I don't read it as saying that it holds our practice unconstitutional. It says based on McLaughlin we hold that a suspect must come before a magistrate within 48 hours, including for a probable cause determination. It doesn't say what the consequences of failure to come before the magistrate are.

MR. PESCETTA: I agree. But the previous portion of its opinion in which it cited the Huebner line of State cases, are the cases that adopt the McNabb -- State McNabb-Mallory rule. So it's our position that having found -- having gone through that analysis, having analyzed the question in terms of the inadmissability of a statement obtained in part on the basis of illegal prolongation of detention, that --

QUESTION: Yes, but in the -- in their footnote they don't just talk about inadmissability of the

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statement. They seem to assume in the footnote that if there was a violation of the 72-hour State law rule or the 48-hour Federal rule, that the prisoner would automatically be entitled to his freedom whether he confessed or not. That's the way the footnote reads. They're talking about untold numbers would all be set free. That can't be the right remedy, is it?

MR. PESCETTA: I don't think it is as a matter of State law. I think --

QUESTION: You're not representing that that's the State law remedy that would be applied?

MR. PESCETTA: No, Your Honor.

QUESTION: Just -- what is the case that holds that there's an exclusionary rule that's applied as a matter of State law when there's a violation of Federal law as to the period of detention?

MR. PESCETTA: We cited the Huebner v. -- Huebner v. State, Morgan v. Sheriff, Berman v. Sheriff. All of these cases are actually cited in the Nevada Supreme Court opinion at joint appendix 5.

QUESTION: And what is the proposition for which you cite them?

MR. PESCETTA: That there is a State McNabb-Mallory rule that results in the --

QUESTION: For when there's a violation of the

State detention rule.

MR. PESCETTA: Well, that inadmissability of a statement arises from an illegal prolongation of detention.

QUESTION: But illegal because of the State requirement of prompt arraignment.

MR. PESCETTA: They have not -- they have not distinguished between constitutional violation, State law violations in those cases. Delay is delay, as I see it.

QUESTION: We -- of course this Court has followed a McNabb-Mallory type of rule, and yet surely it's an open question here whether an exclusionary rule accompanies the violation of the McLaughlin rule. Why wouldn't the Nevada court take the same position; yes, in Huebner we have a McNabb-Mallory rule, but that doesn't necessarily answer the question as to the remedy for a violation of the 48-hour arraignment right?

MR. PESCETTA: I submit that the terms of those previous decisions do indicate that a delay, which is concededly -- concededly does not invoke a Federal exclusionary rule under McNabb-Mallory because McNabb-Mallory is not a Federal constitutional rule, nonetheless results in inadmissability. And it's our position that that line of cases does not discriminate amongst State law violations, Federal law violations, and

prolongation of detention.

Now, to turn briefly to the question of the Federal exclusionary rule, I submit that this is purely a rule that would follow all of the principles enunciated by numerous decisions in this Court, that the purpose of an exclusionary rule is to deter the wrongful conduct. Here we have a situation where it is within the power of the police within this 48-hour presumptive period, or at any period without unnecessary delay, to cause the probable cause determination to be made. They didn't. Instead they elicited a statement. Now the question, it seems to me, is --

QUESTION: Now, is it clear that the statement was elicited before the hearing was held, because the statement and the hearing were both November 7?

MR. PESCETTA: The Nevada Supreme Court implicitly found it did. The record does not show one way or the other.

QUESTION: And that -- explicitly found that the statement was prior to the hearing.

MR. PESCETTA: Implicitly, they made a finding --

QUESTION: Implicitly.

MR. PESCETTA: Implicitly, yes.

QUESTION: On the basis of what the Wisconsin

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Supreme Court made that finding? I'm sorry, the Nevada Supreme Court made the finding?

MR. PESCETTA: The Nevada Supreme Court's opinion says there are -- there is prejudice from the admissability --

QUESTION: On the basis of nothing in the record, you tell us.

MR. PESCETTA: On the basis of the fact that these statements -- the statement was elicited the same day as the -- as the probable cause determination. We've conceded that, certainly, before this Court. There is nothing, however, in the record upon which this Court can say the Nevada Supreme Court was clearly erroneous in that regard. It simply doesn't show it and that's, I take it, largely because it wasn't litigated below.

QUESTION: Did the Nevada Supreme Court say anything more than that they both happened on the same day?

MR. PESCETTA: No.

QUESTION: Well how can you say they made an implicit finding that one happened before the other?

MR. PESCETTA: Because they refer to the eliciting of the statements as being prejudicial in their discussion of the Huebner rule, which is key to --

QUESTION: Well, but surely that is the most

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implicit of implicit findings, if that's all there is to it.

(Laughter.)

MR. PESCETTA: A finding is a finding, Your Honor. I'm afraid --

QUESTION: I agree that a finding is a finding; I just don't agree with you that this is a finding.

MR. PESCETTA: Well, I submit that this is entitled under Sumner v. Madda and previous cases to the same respect that any State court finding is. Now, granted because of the posture in which this case comes to this Court, the record is not pellucid on many issues. That is why we submit that this case has to go back to the Nevada Supreme Court.

In fact, many of the respondent's arguments, including complaining about the inability to show attenuation or necessary delay, are in fact grounds for reversing this judgment and not for affirming it. And so although technically the State can't urge those grounds because no cross petition was filed, we submit that essentially they have conceded that there have to be future proceedings in this case.

Now, with respect to the deterrent --

QUESTION: Is one of the things that the Nevada Supreme Court could find is that the November 7 statement

was essentially duplicative, so whatever error existed was harmless because the same -- statements to the same effect had been made on November 3, which was well within the 48 hours?

MR. PESCETTA: I submit, Your Honor, that's, at most, a mixed question. The question of harmlessness is not a purely factual issue which the Nevada Supreme Court can determine.

I'd just like to say one more word about the deterrent effect of a Federal --

QUESTION: I'm sorry, I didn't follow the bottom line from that. If -- the Nevada Supreme Court conceivable could say that the November 7 statement is simply a repetition of the statement made on November 3rd and therefore it was -- whatever was harmless.

MR. PESCETTA: It can say it but that, I submit, is not a factual finding to which this Court must defer.

QUESTION: But they haven't --

MR. PESCETTA: Harmlessness is a Federal constitutional issue.

QUESTION: But suppose they did that, would that be the end of the case? I mean what Federal question would you have left then?

MR. PESCETTA: Well, first of all, we don't concede that they're identical. One of the statements is

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about 7 pages long, the other is 40 pages long, considerably more detailed, so that fruit is significantly more damaging than the first statement. But I would just like to emphasize that that issue is not a factual finding to which this Court must defer. That's a question of harmlessness.

QUESTION: Well, but let's assume that the Nevada Supreme Court said, well, we're going to send it back to the trial court for a consideration of harmlessness or a consideration of the somewhat broader issue of attenuation. The Nevada Supreme Court could perfectly well do that.

MR. PESCETTA: In fact they should do that, Your Honor, I submit.

QUESTION: Yeah.

MR. PESCETTA: And under rule 250 -- under Nevada Supreme Court Rule 250(IV)(H), we would ask for them to do that unless they simply reverse.

One final point about the Federal exclusionary remedy. This has exactly the same problems, this kind of situation involving McLaughlin, as every other exclusionary situation has. What we're trying to deter is the police from profiting from the illegal prolongation of the delay. This -- a Federal exclusionary remedy would be narrowly tailored to that, to the harm that is caused by

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that illegal prolongation, and therefore based on the argument we've presented in the briefs we would submit that this Court should adopt a Federal exclusionary remedy if it reaches that question which, again, I emphasize it does not need to.

If I may, I'd like to reserve the remainder of my time.

QUESTION: Very well, Mr. Pescetta.

Mr. Seaton.

ORAL ARGUMENT OF DAN M. SEATON

ON BEHALF OF THE RESPONDENT

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

Before we go further, I would like to clearly delineate what the Nevada procedure was in November of 1989. When a prisoner was taken to the -- when he was arrested, he would be taken to the booking desk, at which time the various booking procedures would go on. Either simultaneous with that or immediately thereafter at the jail --

QUESTION: Was this in Clark County?

MR. SEATON: This is in Clark County, Nevada, yes, it is. Immediately after at least the booking procedure, the police officer who was in charge of the arrest, in this case Detective Al Leavitt, would fill out

what is known as the affidavit of probable cause, along with other papers. Copies of those and the original would go to various places. One of them would go to the Justice of the Peace across the street in the courthouse. That Justice of the Peace, in those days, within 72 hours, excluding weekends and holidays, would read the declaration and determine whether or not there was probable cause to hold the prisoner for any greater length of time.

Completely separate and apart from the procedure in Nevada, at that time and today, is the procedure of first appearance, and that is governed entirely by NRS, Nevada Revised Statute 171.178. And that statute really says just about the same thing, that within 72 hours, excluding weekends and holidays, the prisoner must be brought before the Justice of the Peace for a first appearance, at which time that person is then advised of the various rights that attach to his proceedings.

So that the Court understands fully, the procedures then are similar in that the time limitations put forth by the legislature in the first appearance statute were used as guidelines by Nevada officials or police officers in determining how quickly they had to obey the prompt dictate of Gerstein. And they chose to utilize the 72 hours.

The defendant in this case has never, until coming before this Court, objected to any sort of a probable cause difficulty. It has always been couched in terms of a delay in first appearance. And, indeed, the Nevada Supreme Court began its opinion in this particular area, recognizing that that was the specific claim.

Now, since I would prefer to spend most of my time discussing the substantive issues that are before this Court relative to the exclusionary rule, I would like to say a brief word about jurisdiction and then go on to that area.

As I stated, the issue has always been framed in terms of first appearance and not in probable cause. Probable cause, as it relates to the Nevada Supreme Court's opinion, is relevant only if those two procedures, probable cause and first appearance, are combined. And they are not in Nevada; never have been and are not today.

QUESTION: In this case -- excuse me. In this case was there a probable cause determination by a magistrate?

MR. SEATON: There was.

QUESTION: When, on November 7 or before?

MR. SEATON: It was -- on November the 7th.

QUESTION: But that was beyond the time allowed in McLaughlin.

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MR. SEATON: It was beyond the time in McLaughlin. It was done 18 --

QUESTION: So whether or not the probable cause and the arraignment proceeding are combined, there was a violation of McLaughlin, assuming McLaughlin is retroactive, which I think it is.

MR. SEATON: Yes, it is retroactive, I have no quarrel with that proposition.

QUESTION: All right. So we begin with the premise that there's been a McLaughlin violation, and the Nevada Supreme Court is wrong on that point.

MR. SEATON: There was -- using the retroactivity analysis, there was a McLaughlin violation, yes.

QUESTION: And McLaughlin is retroactive, is it not?

MR. SEATON: It is.

QUESTION: And the Nevada Supreme Court was wrong on that point, was it not?

MR. SEATON: If -- yes, they were wrong on saying that McLaughlin was not retroactive. But McLaughlin -- the discussion in McLaughlin was not dispositive of the issue that was before the Court. The McLaughlin decision has nothing to do with first appearances. The McLaughlin discussion by the Nevada

Supreme Court had no place in this discussion of why -- whether or not there was an inappropriate delay in first appearance.

QUESTION: Is it plausible to read the Nevada Supreme Court's opinion as saying that if there were a McLaughlin violation, this statement would have to be excluded under the State's Huebner rule?

MR. SEATON: It is not -- we are not able to do that, I believe, Your Honor.

QUESTION: Wait, wait. I didn't hear your answer.

MR. SEATON: We are not able to make such a conclusion. The Nevada Supreme Court, just going from the --

QUESTION: Doesn't the Nevada Supreme Court's opinion indicate that they even thought that if there had been -- if the McLaughlin decision is retroactive, as everyone agrees it is, they would have to just release this defendant? I mean that's what the footnote, I think --

MR. SEATON: Well, the footnote does seem to indicate that, and that clearly is not the law in the State of Nevada and they have so said.

QUESTION: Well, what then was the purpose of Nevada's discussing McLaughlin at all?

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MR. SEATON: I wish I knew the answer to that question. I do not know the answer to the question. What I do know --

QUESTION: Well, in a death case I think we should know, don't you?

MR. SEATON: I agree.

QUESTION: But when this curious opinion came down, you didn't ask to have it clarified, because it goes from first appearance, as you call it, and then it shifts to this McLaughlin probable cause, and then goes back to first appearance? So it would be, apart from this intrusion of McLaughlin and the slip, an entirely State law decision that would have no place in this Court.

MR. SEATON: That --

QUESTION: But you didn't -- when this curious thing came out about McLaughlin and you didn't know how it got in there -- it certainly wasn't asked for by either of the parties -- you didn't ask the court to alter or amend its decision?

MR. SEATON: We -- my knowledge of the appellate procedure that took place was that upon receiving the opinion, a motion for rehearing was asked for. In fact, if memory serves me correct, both parties asked for that rehearing. It was declined and the supreme court chose not to have a rehearing, but to rely on their judgment as

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they wrote it. And other than that, I can't offer an explanation as to why they did what they did, but I can offer the conclusion that what they did really had no bearing on the only question that was before the court.

QUESTION: Couldn't, then, on remand -- if we were to say, Nevada Supreme Court, McLaughlin's retroactive, couldn't they then say, thank you for that information about Federal law. Now we understand that this case was about arraignment. It started there, it ended there. We never would have intruded this suggestion on our own, if we had known that what we were saying was incorrect about the retroactivity.

MR. SEATON: They could take that position. I think what I would forward to the Court at this time is that it's unnecessary to do that. I believe that the judgment below, even though torturously gotten to, was correct. I believe that the way that the Nevada Supreme Court ultimately disposed of the case is a correct one, and that for this Court to send it back for that kind of correcting would render this Court's judgment not more -- much more than an advisory opinion, which I know it prefers not to do.

QUESTION: Well, even if we're with you -- even if we're with you so far, was not, in this case, there a combined arraignment and probable cause hearing on

November 7?

MR. SEATON: There was not. On November 7th the only thing that happened was an ex parte reading by the Justice of the Peace of the declaration of arrest.

QUESTION: Oh, a simply McLaughlin hearing.

MR. SEATON: It is simply McLaughlin. The first appearance occurred late on November the 13th, 1989.

QUESTION: All right, all right.

MR. SEATON: So clearly in this case two separate proceedings were had. And whether the court, the Nevada Supreme Court --

QUESTION: I have to confess I'm a little puzzled. You're saying the probable cause determination is not made in the course of the first appearance before the magistrate?

MR. SEATON: It is not.

QUESTION: But the Nevada Supreme Court, on page 6, says: "Based on McLaughlin, we hold that a suspect must come before a magistrate within 48 hours, including nonjudicial days, for a probable cause determination." That reads to me like saying they have to have the probable cause determination in the first appearance.

MR. SEATON: One reading of the opinion might be very similar to what you're suggesting.

QUESTION: That's exactly what that sentence --

you'll agree that sentence says that?

MR. SEATON: That sentence says that.

QUESTION: Now what says something else in the opinion?

MR. SEATON: Well, the court might have been, at that particular moment, deciding to --

QUESTION: That's not my question.

MR. SEATON: I'm sorry.

QUESTION: What is there in the opinion that says something else?

MR. SEATON: Something us --

QUESTION: I know -- you told us there are two separate proceedings, but does the court say that -- elsewhere in its opinion that the probable cause determination is not made in the first appearance here?

MR. SEATON: No, not to my recollection, and that is what I think befuddles some of us. Because they started off talking about first appearance and then all of a sudden, recognizing the McLaughlin decision, started talking about it as though it applied to the statutory first appearance when it -- in fact, it did not. And then they finished up, as Justice Ginsburg pointed out, by holding their decision based on Nevada waiver law of the Miranda right.

QUESTION: I understand that. I just don't

understand what the authority is for the proposition that the probable cause determination is not made in the first appearance hearing, which seems to be something you're arguing?

MR. SEATON: Yes, I am arguing that. And the authority --

QUESTION: And what is there in writing that tells us that is so?

MR. SEATON: My answer to Justice Kennedy a few moments ago, that the probable cause hearing in this case was held on November the 7th, and on November the 13th the first appearance was held. That shows, in fact, in this case there were two separate proceedings. The --

QUESTION: Yes, but that doesn't show that it is correct to have -- not to make the probable cause determination in the first appearance hearing.

MR. SEATON: No, it could be correct. Obviously, California does that in some of their counties.

QUESTION: Well, and obviously the Nevada Supreme Court says that's what you're supposed to do in Nevada, according to this opinion.

MR. SEATON: Well, and if they're saying that, and we don't know that that's what they're saying --

QUESTION: Well, you just agreed with me that that's what that sentence says.

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MR. SEATON: Well, I don't know if that's what that sentence means.

(Laughter.)

QUESTION: Oh, that's what it says, but we have some kind of secret meaning behind what the words are.

QUESTION: Go back -- you were telling us what happens in this county in Nevada. I think you started out that way. Are these still separate proceedings?

MR. SEATON: Yes, they are still separate proceedings. They have never been combined. In the years since Gerstein, I have not once seen a probable cause determination made at the same time that a first appearance is made. There's no case holding. The statute in question, the first appearance statute, alludes absolutely not at all to probable cause. That is an animal that has come about, I think, by virtue of the Gerstein decision, and our State's efforts by local rule to abide by it. And in doing that, they chose to follow the 72-hour rule that was announced in the -- in the first appearance --

QUESTION: Well, has the Nevada Supreme Court made it clear that the Huebner line of cases would not apply to a violation of the time limits for a probable cause hearing?

MR. SEATON: Well, in respect -- with respect to

my opposing counsel's statement, I would tell the Court that the Nevada Supreme Court in those line -- in that line of cases has stated what the rule is in almost all of the United States, and that is that the McNabb-Mallory line of cases do not have to apply to the States. And our State does not follow that line of cases.

QUESTION: My question was has Nevada said, as a definitive matter, that its State McNabb-Mallory rule does not apply to a probable cause hearing when the probable cause hearing is beyond the legal -- legally set time?

MR. SEATON: It has not.

QUESTION: Thank you.

MR. SEATON: And I say that, if I might just follow up on it, because in Nevada there are a dearth of cases, if there are any at all, which discuss the problem that faces us here, that discusses any sort of a probable cause difficulty. All of the cases talk about first appearance. That factor may have been something that aided the court in making its wrongful assumptions. It was just so unfamiliar with a local procedure which had not ever before come before it, that it, in reading McLaughlin, just assumed that it applied back to the first appearance statute.

QUESTION: May I ask about your first -- your first appearance hearing, is that always an arraignment

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where the defendant pleads not guilty or guilty?

MR. SEATON: Unless it is continued for that purpose, it is.

QUESTION: In this case it was an arraignment.

MR. SEATON: I can't tell you whether or not there was a continuation, but the -- but when they finally had the first appearance --

QUESTION: But the November 13th hearing was an arraignment.

MR. SEATON: It was an arraignment, to the best of my understanding.

QUESTION: So is it not conceivable that the probable cause determination could take place at the earlier date, with the defendant present or not present, yet still have the arraignment at a later date?

MR. SEATON: That is the procedure in Nevada, yeah.

QUESTION: So that -- I mean it could be the first appearance would have been at the time of the probable cause determination, rather than the arraignment is what I'm asking?

MR. SEATON: Our first appearances cannot take place ex parte. They may -- must take place in front of the Justice of the Peace.

QUESTION: I understand. But they are not

necessarily an arraignment?

MR. SEATON: I believe eventually, given continuances, they are always the arraignment. The --

QUESTION: Well, let me ask you this. Is it possible as a matter of Nevada law that on November 7th the magistrate made a probable cause determination at which the defendant was present. Or maybe he wasn't, but as a matter of routine he could have been present, even though he was not yet ready for arraignment?

MR. SEATON: No.

QUESTION: That could not happen.

MR. SEATON: It does not happen. It could happen, yes, if a judge somehow summoned a defendant before him in his chambers where the probable cause hearings are held, that could happen. I --

QUESTION: It seems to me that what the Nevada Supreme Court has said in its opinion, that's what must happen in the future, that he must -- the defendant must be present at the probable cause determination in less than 48 hours, even though he doesn't have to be arraigned at that time.

MR. SEATON: That could be a possible reading of the Nevada case. That has not happened since that time, and I believe in the event that a remand does occur for the Nevada Supreme Court to clarify its opinion, it will

go along with its past practices.

QUESTION: There's certainly nothing in our McLaughlin case that suggests a defendant would have to be personally present at the probable cause determination.

MR. SEATON: Not that I ever read.

QUESTION: Just following -- we just followed Gerstein.

MR. SEATON: That's correct.

With the very short remaining time that I have left, I would simply like to go on past these aspects of the case and suggest to the Court that are -- there are two reasons, which have been fairly fully briefed in our briefs, why the exclusionary rule in this particular case, or cases like it, should not occur.

And one of them clearly is that in this particular case the statement, the confession, if you will, of the defendant, was clearly not the fruit of the delay in the finding of probable cause that occurred in this particular case. And we know that if there is no causal link to the violation, then the exclusionary rule should not work.

And this case seems to be somewhat analogous to the reasoning at least behind the case of New York v. Harris. And this case, like that one, the probable cause existed at the very beginning. Some sort of a bad

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intervening event happened. In Powell it was a Payton arrest. In this case it's a delay of a finding of probable cause, which I would want to remind the Court that there always was probable cause. The affidavit which was eventually viewed and ruled upon never changed. There was no exploitation of any delay to change the nature and circumstances of that particular affidavit.

And the Court in Harris seemed to indicate that the custody, albeit the -- for the Payton violation, that custody was still lawful. And in this case, I would say that the custody is still lawful even though there is a delay. There is a Fourth Amendment violation because of the delay, but it doesn't render the custody unlawful.

And the confession or statement, then, is not a product of the delay. It, like the one in Harris, is the product of the probable cause arrest, an appropriate arrest. A man should be in prison -- or in jail, I'm sorry, for the things that he has done and that the police know about at that time. They are then entitled to go ask questions of him, which they did.

And we have to remember that -- as was brought out in the earlier argument, that those same statements were gotten from him several times. Six times before, I believe, he told people how these particular injuries occurred. He was more than willing, in fact even eager to

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tell that story.

And so there can be no reasonable assumption, I believe, here that the statements in question were in any way the product of some sort of a delay. Had the delay not happened, we still would have had the statements. He still would have been willing to tell us the same thing that he told us on other occasions.

The other reason for the nonutilization of the exclusionary rule in this case are the line of cases having to do with good faith, and those cases teach us that when police officers reasonably rely on presumptively valid statutes or search warrants, that to exclude the things that come from those valid pieces of evidence is to -- thank you very much.

QUESTION: Thank you, Mr. Seaton.

Mr. Estrada, we'll hear from you.

ORAL ARGUMENT OF MIGUEL A. ESTRADA

ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

SUPPORTING THE RESPONDENT

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

I would like to start by answering the question that was posed at the outset concerning the possibility of State remedies, and by saying that there is no reason to think in this case that there is any State remedy. In

Powell's view, the State court in this case, A, found that the Fourth Amendment was blatantly violated but, B, refused to give a Federal remedy based on what everyone now says is a wrong view of Federal retroactivity rule -- rules.

If there were indeed -- if there were indeed a separate and independent State remedy, the Supreme Court of Nevada, by hypothesis having found that the Fourth Amendment was violated, surely would have granted it. And indeed it is a little bit strange that the principle authority cited for the claim that there is an independent State remedy in this court is the opinion of the Supreme Court of Nevada in this case which, if it stands for anything, is that there is no State remedy for --

QUESTION: Well, why would it give a State remedy for a statute which it found was inapplicable because of its misunderstanding of retroactivity?

MR. ESTRADA: It did not -- there are two different issues, Justice Souter. The Supreme Court of Nevada stated in its opinion that there is a remedy, much like the McNabb-Mallory remedy, for the violation of its statute. It also stated that as a matter of State law, that right is waiveable. Now, neither of those two statements have anything to do with the error of Federal law that the court made, which is to say that as a matter

of Federal law there is no Federal remedy available in this case.

If we concede the premise for this Court's having jurisdiction, which is the claim that the Supreme Court of Nevada necessarily found a Fourth Amendment violation in this case, then it must follow that there can be no independent State remedy for that since if there were, the court surely would have given it.

QUESTION: Mr. Estrada, I don't follow that line of reasoning, because I thought the Nevada Supreme Court was saying there was a violation of a Federal constitutional right, but it's not retroactive, and are we glad it isn't retroactive because if it were we would have to release this man from incarceration totally, not simply exclude the statement.

MR. ESTRADA: What they said was it is not retroactive as a matter of Federal law, Justice Ginsburg, which if -- which is a statement --

QUESTION: So why should it be retroactive as a matter of State law, but they -- wouldn't they think that the State law, at least in that respect, would be the same as the Federal?

MR. ESTRADA: Yes, but they wouldn't have to. And unless there is something in what the court did to lead to the conclusion that the court felt compelled by

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its reading of Federal law to say that there is no State remedy, the court, having found that the Constitution was violated, would have given a State remedy if there were one. Truly --

QUESTION: But, Mr. Estrada, correct me if you have a different interpretation. I had thought the submission from the petitioner was that if there had been a violation of Federal law, if McLaughlin were retroactive, which it is, that the State would have invoked its own McNabb-type rule to exclude the statement?

MR. ESTRADA: The court did find by hypothesis a violation of the Fourth Amendment. It refused to give a Federal remedy based on an error of Federal law, but that didn't keep the State from granting a State remedy if there were one. The problem with the argument is that the remedy that there is is a McNabb-Mallory remedy, which the court stated is tailored to Fifth Amendment interests and which, as a matter of State law, is waiveable. Now --

QUESTION: Well, I suppose that the concern that I have, at least, is that the State court ought to be the one to make this explicit determination in the first instance.

MR. ESTRADA: Well --

QUESTION: It's not clear to me that that's exactly -- that the Nevada court would have denied relief

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had it assumed a Federal violation under McLaughlin.

MR. ESTRADA: Well, I -- we don't read the -- what the court said as indicating that the court felt compelled to deny a State remedy based on Federal law. And unless the court can be read to have said so, the judgment it rendered in this very case is evidence for the view that there is no independent State remedy, and that --

QUESTION: Mr. Estrada, excuse me for interrupting, but I -- maybe I'm not following you, but you're saying that the court said there was a violation of the Fourth Amendment. And you mean the McLaughlin rule.

MR. ESTRADA: Yes.

QUESTION: But they say it is important to note that the 48-hour requirement mandated in McLaughlin does not apply to the case at hand. That seems to me to say it was not violated because it simply didn't apply, because they mistakenly thought it was not retroactive.

MR. ESTRADA: Well, I think what they were saying, and as we read it, Justice Stevens, is to say that --

QUESTION: How can they find a violation of a rule that doesn't even apply to the case at hand?

MR. ESTRADA: Well --

QUESTION: They say that in -- I mean, I'm

not -- you know, I'm not interpolating. Those are the very words the court used, it does not apply to the case at hand. Now why do you say that a rule that doesn't apply was found to have been violated?

MR. ESTRADA: Well, I was taking not our statement of what they did, but their statement as to why this Court has jurisdiction, which is that the highest State court chose to notice a plain error and to waive a bar. If the State court didn't do that, then there is a bar to this Court's jurisdiction. If we take their --

QUESTION: But that Federal rule that they misapplied is not McLaughlin, it's Griffith. It's Griffith is the Federal rule that was misapplied, that the case was -- that did apply to judgments --

MR. ESTRADA: Yes, of course.

QUESTION: We have jurisdiction. There's no question we have jurisdiction.

MR. ESTRADA: And we do agree that the Griffith rule was misapplied.

QUESTION: And that -- you do agree that was a Federal rule.

MR. ESTRADA: Yes. And we do --

QUESTION: And based on that violation of a Federal rule, this Court had jurisdiction.

MR. ESTRADA: I think that there's certainly

much to be said for that view.

QUESTION: And nothing to be said against that, is there?

MR. ESTRADA: Well, the State has made an argument to --

QUESTION: I understand they've made arguments.

MR. ESTRADA: -- The opposite effect.

QUESTION: But you don't subscribe to those arguments, do you?

MR. ESTRADA: We have not subscribed one way or the other to any view, and we're happy to go forward on the view that the Court does have jurisdiction. All I am saying is that from what the court did in this case, there is nothing that would lead one to think that there is an independent State remedy, because the court stated the State rule as being one designed to protect the Fifth Amendment right and one, in that light, which is waiveable under State law, and it found it waived.

QUESTION: Well, there's just so much help one can get from this opinion, Mr. Estrada, and it's not very much.

MR. ESTRADA: I would not disagree with you on that, Mr. Chief Justice. On the other hand, the Court -- this Court has always held that it does not sit to overturn statements in opinions, and if there is

nothing wrong with the judgment as a matter of Federal law, and we say there is not despite the error in the statement, then the judgment should not be overturned.

In our view, there is nothing wrong with the judgment as a matter of Federal law because, as a matter of Federal law, the statement is not a fruit of the timing violation on which the petitioner relies, and the good faith exception would apply to bar suppression even if the statement is deemed a fruit in the circumstances of this case.

QUESTION: But all that assumes that Hawaii -- that Nevada will not apply its Huebner rule to a McLaughlin violation, and we don't know that for sure. And I can understand the interest of the Solicitor's office in arguing the exclusionary rule; it's a very important issue. But I cannot understand the interest of the Solicitor's office in urging that we proceed to that in the light of this -- in the light of this opaque opinion.

MR. ESTRADA: Well, that's -- I mean obviously reasonable minds can disagree about how what the court did may be read. All we're saying is that our reading is that it is fair to infer that there is no State remedy, and in the light of that, the only issue for the Court is whether there is a Federal remedy. And for -- based on cases like

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Harris and Motalvo, we think that it is reasonably clear that as a matter of Federal law there is no Federal remedy if there's --

QUESTION: But wouldn't it be -- wouldn't it have been appropriate for the -- to -- instead of asking the Court to decide what is a fairly weighty question, what are the consequences of a McLaughlin violation, to say this is a very poor case in which to make any such decision; there are two paragraphs thrown into an opinion that's all about State law. Why are you urging the Court to make a significant decision in a case where this issue just crept into the case, was in and out before anybody could notice it?

MR. ESTRADA: Because we also -- we only learned of the existence of the case after the case had been granted, which we take to be an indication that the Court is interested in dealing with the Federal issues that there may be in the case. And in light of that assumption, we thought that we would come into the case and give the Court our views as to the Federal issues, which are as we have stated in our brief.

And I thank the Court.

QUESTION: Thank you, Mr. Estrada.

Mr. Pescetta, you have 2 minutes remaining.

REBUTTAL ARGUMENT OF MICHAEL PESCETTA

ON BEHALF OF PETITIONER

MR. PESCETTA: I will try to talk fast, Your Honor.

The answer to Justice Ginsburg's question about what happens if the Nevada Supreme Court says we are not going to decide this issue, is that would then not be an adequate State ground for the decision. We submit that if the Nevada Supreme Court adopts a procedural bar rule that says we will forgive procedural bars so long as we don't have to reverse, but we will invoke procedural bars so long as we can affirm, that's not an independent and adequate State ground. And that I submit is the short answer to your concern about what happens if the case goes back.

I submit that the McLaughlin violation, contrary to what counsel said, means --

QUESTION: In other words, are you arguing that the Nevada Supreme Court is estopped? Powell didn't raise this issue. The court did on it's own. And you're saying that now having raised it, the court is estopped from withdrawing it?

MR. PESCETTA: Then we have to litigate the procedural bar issue in the Nevada Supreme Court, and ultimately in this Court, but that's not ripe for decision today.

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QUESTION: Why would that be a Federal question?

MR. PESCETTA: Because the adequacy of a State procedural bar is always a question of Federal law, to bar review of a Federal constitutional issue.

QUESTION: Which the court itself injected.

MR. PESCETTA: Yes. Yes, Your Honor. It reviewed the issue; that's the end of the question.

Now, as to good faith, the State is relying on the statute which it says has nothing to do with the probable cause determination, the first appearance statute, to say they could, in good faith, rely on that in allowing the 72 hour time limit. I submit that's entirely anomalous to say on the one hand it has nothing to do with the probable cause determination, but on the other hand that's the good faith reliance on the statute that invokes Illinois v. Krull.

With respect to Harris and the illegality of custody, illegal custody under McLaughlin is illegal custody. He shouldn't be in custody because it's illegal. The difference between Harris is the manner of arresting him was the constitutional violation; the custody was legal. Here, once the McLaughlin time limit was passed, the custody became illegal. He should not have been in custody, under the Fourth Amendment, at that point.

I thank the Court.

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CHIEF JUSTICE REHNQUIST: Thank you, Mr. Pescetta.

The case is submitted.

(Whereupon, at 2:00 p.m., the case in the above-entitled matter was submitted.)

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BY Ann Marie Federico

(REPORTER)