SUPREME COURT OF THE UNITED STATES

No. 92–8841

KITRICH POWELL, PETITIONER
v. NEVADA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NEVADA

[March 30, 1994]

JUSTICE GINSBURG delivered the opinion of the Court.

In *Gerstein* v. *Pugh*, 420 U. S. 103 (1975), we held that the Fourth Amendment's shield against unreasonable seizures requires a prompt judicial determination of probable cause following an arrest made without a warrant and ensuing detention. *County of Riverside* v. *McLaughlin*, 500 U. S. 44 (1991), established that "prompt" generally means within 48 hours of the warrantless arrest; absent extraordinary circumstances, a longer delay violates the Fourth Amendment. In the case now before us, the Supreme Court of Nevada stated that *McLaughlin* does not apply to a prosecution commenced prior to the rendition of that decision. We hold that the Nevada Supreme Court misread this Court's precedent: "[A] . . . rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, . . . not yet final" when the rule is announced. *Griffith* v. *Kentucky*, 479 U. S. 314, 328 (1987).

Petitioner Kitrich Powell was arrested on Friday, November 3, 1989, for felony child abuse of his girl-friend's 4-year-old daughter, in violation of Nev. Rev. Stat. §200.508 (1991). That afternoon, the arresting officer prepared a sworn declaration describing the

cause for and circumstances of the arrest. Not until November 7, 1989, however, did a magistrate find probable cause to hold Powell for a preliminary hearing. That same day, November 7, Powell made statements to the police, prejudicial to him, which the prosecutor later presented at Powell's trial. Powell was not personally brought before a magistrate until November 13, 1989. By that time, the child had died of her injuries, and Powell was charged additionally with her murder.

A jury found Powell guilty of first-degree murder and, following a penalty hearing, sentenced him to death. On appeal to the Nevada Supreme Court, Powell argued that the State had violated Nevada's "initial appearance" statute by failing to bring him before a magistrate within 72 hours, and that his conviction should therefore be reversed.

The Nevada statute governing appearances before a magistrate provides:

> "If an arrested person is not brought before a magistrate within 72 hours after arrest, excluding nonjudicial days, the magistrate:
>
> "(a) Shall give the prosecuting attorney an opportunity to explain the circumstances leading to the delay; and
>
> "(b) May release the arrested person if he determines that the person was not brought before a magistrate without unnecessary delay." Nev. Rev. Stat. §171.178(3).

Powell emphasized that 10 days had elapsed between his arrest on November 3, 1989, and his November 13 initial appearance before a magistrate. In view of the incriminating statements he made on November 7, Powell contended, the unlawful delay was prejudicial to him. Under Nevada law, Powell asserted, vindication of his right to a speedy first appearance required that his conviction be reversed, and that he be set free. Appellant's Opening Brief in No. 22348 (Nev.), p. 85.

The District Attorney maintained before the Nevada Supreme Court that there had been no fatal violation of Nevada's initial appearance statute. First, the District Attorney urged, the confirmation of probable cause by a magistrate on November 7 occurred within 72 hours of the November 3 arrest (excluding the intervening weekend). This probable cause finding, the District Attorney contended, satisfied the 72-hour prescription of Nev. Rev. Stat. §171.178. In any event, the District Attorney continued, under

Nevada law, an accused waives his right to a speedy arraignment when he voluntarily waives his right to remain silent and his right to counsel. Powell did so, the District Attorney said, when he made his November 7 statements, after he was read his *Miranda* rights and waived those rights. See Respondent's Answering Brief in No. 22348 (Nev.), pp. 56–60. In reply, Powell vigorously contested the District Attorney's portrayal of the probable cause determination as tantamount to an initial appearance sufficient to satisfy Nev. Rev. Stat. §171.178's 72-hour prescription. Powell pointed out that he "was neither present [n]or advised of the magistrate's finding." Appellant's Reply Brief in No. 22348 (Nev.), p. 1.

The Nevada Supreme Court concluded, in accord with the District Attorney's assertion, that Powell had waived his right under state law to a speedy arraignment. 108 Nev. 700, ___, 838 P. 2d 921, 924–925 (1992). If the Nevada Supreme Court had confined the decision to that point, its opinion would have resolved no federal issue. But the Nevada Supreme Court said more. Perhaps in response to the District Attorney's contention that the magistrate's November 7 probable cause notation satisfied Nev. Rev. Stat. §171.178 (a contention the State now disavows), the Nevada Supreme Court, *sua sponte*, raised a federal concern. That court detoured from its state-law analysis to inquire whether the November 3 to November 7, 1989, delay in judicial confirmation of probable cause violated the Fourth Amendment under this Court's precedents.

County of Riverside v. *McLaughlin*, 500 U. S. 44 (1991), the Nevada Supreme Court recognized, made specific the probable cause promptness requirement of *Gerstein* v. *Pugh*, 420 U. S. 103 (1975); *McLaughlin* instructed that a delay exceeding 48 hours presumptively violates the Fourth Amendment. Merging the speedy initial appearance required by Nevada statute and the prompt probable cause

determination required by the Fourth Amendment, the Nevada Supreme Court declared: "The *McLaughlin* case renders [Nev. Rev. Stat. §]171.178(3) unconstitutional insofar [as] it permits an initial appearance up to seventy-two hours after arrest and instructs that non-judicial days be excluded from the calculation of those hours." 108 Nev., at ___, 838 P. 2d, at 924. While instructing that, henceforth, probable cause determinations be made within 48 hours of a suspect's arrest, the Nevada Supreme Court held *McLaughlin* inapplicable "to the case at hand," because that recent precedent postdated Powell's arrest. *Id.*, at ___, n. 1, 838 P. 2d, at 924, n. 1. *McLaughlin* announced a new rule, the Nevada Supreme Court observed, and therefore need not be applied retroactively. *Ibid*.

Powell petitioned for our review raising the question whether a state court may decline to apply a recently rendered Fourth Amendment decision of this Court to a case pending on direct appeal. We granted certiorari, 510 U. S. ___ (1993), and now reject the state court's prospectivity declaration.

Powell's arrest was not validated by a magistrate until four days elapsed. That delay was presumptively unreasonable under *McLaughlin*'s 48-hour rule. The State so concedes. Appellee's Answer to Petition for Rehearing in No. 22348 (Nev.), p. 7; Tr. of Oral Arg. 28. The State further concedes that the Nevada Supreme Court's retroactivity analysis was incorrect. See *ibid*. We held in *Griffith* v. *Kentucky*, 479 U. S., at 328, that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final." *Griffith* stressed two points. First, "the nature of judicial review . . . precludes us from `[s]imply fishing one case from the stream of appellate review, using it as a vehicle for pronouncing

new constitutional standards, and then permitting a stream of similar cases subsequently to flow by unaffected by that new rule.'" *Id.*, at 323 (quoting *Mackey* v. *United States*, 401 U. S. 667, 679 (1971) (Harlan, J., concurring in judgment)). Second, "selective application of new rules violates the principle of treating similarly situated defendants the same." *Griffith*, *supra*, at 323. Assuming, *arguendo*, that the 48-hour presumption announced in *McLaughlin* qualifies as a "new rule," cf. *Teague* v. *Lane*, 489 U. S. 288, 299–310 (1989), *Griffith* nonetheless entitles Powell to rely on *McLaughlin* for this simple reason: Powell's conviction was not final when *McLaughlin* was announced.

It does not necessarily follow, however, that Powell must "be set free," 108 Nev., at ___, n. 1, 838 P. 2d, at 924, n. 1, or gain other relief, for several questions remain open for decision on remand. In particular, the Nevada Supreme Court has not yet closely considered the appropriate remedy for a delay in determining probable cause (an issue not resolved by *McLaughlin*), or the consequences of Powell's failure to raise the federal question, or the District Attorney's argument that introduction at trial of what Powell said on November 7, 1989 was "harmless" in view of a similar, albeit shorter, statement Powell made on November 3, prior to his arrest. See Brief for Respondent 22. Expressing no opinion on these issues,[1] we

---

[1]JUSTICE THOMAS would reach out and decide the first of these questions, though it is not presented in the petition for review. He would rule inappropriate "suppression of [Powell's November 7] statement . . . because the statement was not a product of the *McLaughlin* violation." *Post*, at 5. It is "settled law," he maintains, *post*, at 3, that if probable cause in fact existed for Powell's detention, then *McLaughlin*'s 48–hour rule, though violated, triggers no suppression remedy. Quite the opposite, JUSTICE THOMAS recognizes, is "settled law" regarding

hold only that the Nevada Supreme Court erred in failing to recognize that *Griffith* v. *Kentucky* calls for retroactive application of *McLaughlin*'s 48-hour rule.

* * *

For the reasons stated, the judgment of the Nevada Supreme Court is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

---

search warrants: a court's post-search validation of probable cause will not render the evidence admissible. See *Vale* v. *Louisiana*, 399 U. S. 30, 35, 34 (1970) (absent circumstances justifying a warrantless search, it is "constitutional error [to] admi[t] into evidence the fruits of the illegal search," "even though the authorities ha[d] probable cause to conduct it").

JUSTICE THOMAS maintains, however, that our precedents, especially *New York* v. *Harris*, 495 U. S. 14 (1990), already establish that no suppression is required in Powell's case. In *Harris*, we held that violation of the Fourth Amendment's rule against warrantless arrests in a dwelling, see *Payton* v. *New York*, 445 U. S. 573 (1980), generally does not lead to the suppression of a post-arrest confession. But Powell does not complain of police failure to obtain a required arrest warrant. He targets a different constitutional violation—failure to obtain authorization from a magistrate for a significant period of pretrial detention. Whether a suppression remedy applies in that setting remains an unresolved question. Because the issue was not raised, argued, or decided below, we should not settle it here.