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Criminal Procedure—Probable Cause—A Bright-Line Time Limit: The Constitution Requires a Probable Cause Determination Within Forty-Eight Hours of Arrest. County of Riverside v. McLaughlin,

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CRIMINAL PROCEDURE—PROBABLE CAUSE—A BRIGHT-LINE TIME LIMIT: THE CONSTITUTION REQUIRES A PROBABLE CAUSE DETERMINATION WITHIN FORTY-EIGHT HOURS OF ARREST. *County of Riverside v. McLaughlin*, 111 S. Ct. 1661 (1991).

In early August 1987 the police arrested Donald Lee McLaughlin without a warrant and placed him in the Riverside County Jail.[1] Mr. McLaughlin remained in jail for five days.[2] While in custody, he did not see a judge and was subsequently released when criminal charges were not filed.[3] In late August 1987 McLaughlin filed a complaint under 42 U.S.C. § 1983 in the United States District Court for the Central District of California against the County of Riverside.[4] McLaughlin later sought class certification to include all persons arrested without a warrant and denied a prompt probable cause hearing.[5] The class action was certified in November 1988 despite the defendant's claim that McLaughlin had no standing to bring suit.[6] The action alleged that the defendant violated the holding in *Gerstein v. Pugh*[7] that following an arrest without a warrant a person must be given a "prompt" probable cause hearing.[8]

The district court found that the County of Riverside violated the *Gerstein* rule, granted the plaintiff an injunction, and adopted the rule that a county must provide a probable cause hearing within thirty-six hours of arrest, except in exigent circumstances.[9]

The United States Court of Appeals for the Ninth Circuit affirmed the injunction.[10] The court rejected the county's argument that the named plaintiff lacked Article III standing to bring the class action for

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1. Brief for the Petitioners, County of Riverside v. McLaughlin, 111 S. Ct. 1661 (1991) (No. 89-1817).
2. *Id.*
3. *Id.*
4. County of Riverside v. McLaughlin, 111 S. Ct. 1661, 1665 (1991).
5. *Id.*
6. *Id.* at 1666. The county asserted that McLaughlin had no standing to bring suit because he failed to show that he would be subjected to the allegedly unconstitutional acts again. *Id.* at 1665-66. *See also* Los Angeles v. Lyons, 461 U.S. 95 (1983) (required a showing that the petitioner again be subjected to the objectionable act).
7. 420 U.S. 103 (1975).
8. 111 S. Ct. at 1666; *See Gerstein*, 420 U.S. at 125.
9. 111 S. Ct. at 1666.
10. McLaughlin v. County of Riverside, 888 F.2d 1276, 1279 (9th Cir. 1989).

injunctive relief.[11] The court reasoned that at the time the complaint was filed, the plaintiffs were in custody and were suffering injury as a result of defendant's allegedly unconstitutional acts.[12] The court held that no more than thirty-six hours were needed to complete the administrative steps incident to arrest and that the defendant's policy of providing probable cause determination at arraignment, as late as forty-eight hours after arrest, was unconstitutional.[13]

The United States Supreme Court granted certiorari[14] to resolve the split among the circuits in their interpretation of *Gerstein*.[15] Agreeing that the plaintiff had Article III standing to bring suit under the "relation back" doctrine,[16] the Court proceeded to the merits of the case.[17] The Court held that the County of Riverside could constitutionally combine the probable cause determination with the arraignment proceeding provided that the proceeding is held within forty-eight hours after arrest.[18] However, the forty-eight hour time allotment is not a blank check for jurisdictions to unreasonably delay a determination when one can be made sooner.[19] The Court remanded the case to determine if the county's policy caused unreasonable delays.[20] *County of Riverside v. McLaughlin*, 111 S. Ct. 1661 (1991).

In *McLaughlin* the Court addressed an issue that courts have struggled with since the adoption of the Fourth Amendment: What

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11. *Id.* at 1277.

12. *Id.*

13. *Id.* at 1278-79.

14. 111 S. Ct. 40 (1990).

15. 111 S. Ct. 1667. *See, e.g.*, Llaguno v. Mingey, 763 F.2d 1560, 1567-68 (7th Cir. 1985) (en banc) (the court required a probable cause hearing immediately following the completion of administrative steps incident to arrest and did not allow the probable cause determination to be combined with other pretrial proceedings); Fisher v. Washington Metro. Area Transit Auth., 690 F.2d 1133, 1140 (4th Cir. 1982) (an arrestee can only be detained for a brief period after arrest and the brief period is the time in which the administrative steps incident to arrest are completed). *But see* Williams v. Ward, 845 F.2d 374, 386 (2d Cir. 1988), *cert. denied*, 488 U.S. 1020 (1989) (allowed the combination of probable cause determination with other pretrial procedures even if a delay in presentment results).

16. 111 S. Ct. at 1667. *See infra* note 96.

17. 111 S. Ct. at 1667.

18. *Id.* at 1671.

19. *See id.* at 1670-71. Just because a probable cause determination is made within 48 hours does not mean the requirements of this decision are met. If unreasonable delay is proven, even when a probable cause determination is made within 48 hours, the jurisdiction will be in violation of the holding. *Id.*

20. *Id.* at 1671. The county's current practice is to provide the probable cause determination on the last day possible. *Id.* The Court is concerned that although this may be a legitimate practice, it may constitute an unreasonable delay. *Id.*

constitutes an "unreasonable seizure"? The Fourth Amendment guarantees that a person will not be faced with an unreasonable seizure.[21] This amendment protects a person from unreasonable seizures but does not specifically state a time limit that would be unreasonable if a person were arrested. Moreover, the Fourth Amendment does not define what constitutes an "unreasonable seizure," thus allowing for flexibility and interpretation by the individual jurisdictions.[22]

English common law has long required that an arrestee be presented to a magistrate as soon as reasonably possible.[23] American courts followed English common law.[24] The American common-law interpretation of the Fourth Amendment attempted to balance the competing interests of the states to control crime with the individual's right to liberty.[25] Presenting the arrestee to the magistrate as soon as reasonably possible relieved the arresting authority of responsibility if the arrestee escaped and of liability for false imprisonment if the arrestee had not committed a crime.[26] The common law also permitted the arrestee a reasonable determination of probable cause.[27]

The drafters of the Fourth Amendment sought to allow for flexibility and experimentation by the states.[28] This intent is evident in all

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21. U.S. CONST. amend. IV provides: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, the persons or things to be seized.

Id.

22. *See McLaughlin*, 111 S. Ct. at 1668. The Fourth Amendment sought to allow for flexibility and experimentation by the states so they could establish a workable procedural framework that incorporated their individual needs. At the same time, it sought to uphold the idealogy behind the Bill of Rights. Gerstein v. Pugh, 420 U.S. 103, 123 (1975). The English common law furnished the model for criminal procedure in America immediately following the adoption of the Fourth Amendment. Jane H. Settle, Note, *Williams v. Ward: Compromising the Constitutional Right to Prompt Determination of Probable Cause Upon Arrest*, 74 MINN. L. REV. 196, 198 (1989). There are also indications that the framers of the Bill of Rights regarded the common law as a model for a reasonable seizure. *Gerstein*, 420 U.S. at 116.

23. 1 MATTHEW HALE, PLEAS OF THE CROWN, 77, 81, 95, 121 (1847); Wright v. Court, 107 Eng. Rep. 1182 (K.B. 1825).

24. *See, e.g.*, 5 AM. JUR 2d *Arrest* §§ 76, 77 (1962); Venable v. Huddy, 72 A. 10, 11 (1909); Atchison, T. & S.F. Ry. v. Hinsdell, 90 P. 800, 801 (1907); Ocean S.S. Co. v. Williams, 69 Ga. 251, 262 (1883); Johnson v. Mayor of Americus, 46 Ga. 80, 86-87 (1872); Low v. Evans, 16 Ind. 486, 489 (1861); Tubbs v. Tukey, 57 Mass. 438, 440 (1849); Rollin M. Perkins, *The Law of Arrest*, 25 IOWA L. REV. 201, 254 (1940).

25. Settle, Note, *supra* note 22, at 199.

26. HALE, *supra* note 23, at 589-90.

27. Settle, Note, *supra* note 22, at 199.

28. *See* Gerstein v. Pugh, 420 U.S. 103, 123 (1975).

fifty states' statutes pertaining to the presentment of arrestees to magistrates.[29] Some states have specific time limits on the processing of arrestees.[30] Others require an arrestee to be brought before a magistrate "without unnecessary delay."[31] A few states require the arrestee to be brought before a magistrate "forthwith,"[32] and the remaining states use different language to indicate that the arrestee must not be subjected to unnecessary delays prior to presentment.[33]

The flexibility envisioned by the drafters of the Fourth Amendment also appears in each jurisdiction's interpretation of what constitutes an "unreasonable seizure." For example, the District Court for the District of Columbia believes that any detention over one-and-a-half hours may be unreasonable.[34] On the other hand, the Second Circuit believes a detention for up to seventy-two hours before a probable cause determination is made is reasonable.[35] The various interpretations of what is meant by "unreasonable seizure" have led to the implementation of different procedures from jurisdiction to jurisdiction.[36]

The United States Supreme Court examined Florida's procedure in *Gerstein v. Pugh*.[37] The Court recognized a delicate balance between Florida's interest in law enforcement and an arrestee's individual rights.[38] Attempting to clarify the ambiguous wording of the Fourth

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29. Wendy L. Brandes, *Post-Arrest Detention and the Fourth Amendment: Refining the Standard of Gerstein v. Pugh*, 22 COLUM. J.L. & SOC. PROBS. 445, 478 (1989). *See infra* notes 30-33 and accompanying text.

30. *See, e.g.*, ALASKA STAT. § 12.25.150 (1990) (24 hour time limit); IND. CODE ANN. § 36-8-3-11 (Burns 1989) (24 hour time limit); MO. ANN. STAT. § 544.170 (Vernon 1989) (20 hour time limit).

31. *See, e.g.*, COLO. REV. STAT. § 16-2-112 (1986); NEB. REV. STAT. § 29-410 (1989); S.D. CODIFIED LAWS ANN. § 23A-4-1 (1991).

32. *E.g.*, ARK. CODE ANN. § 16-85-201 (Michie 1987 & Supp. 1991).

33. *E.g.*, WIS. STAT. § 970.01 (1987-88).

34. Lively v. Cullinane, 451 F. Supp. 1000 (D.D.C. 1978).

35. Williams v. Ward, 845 F.2d 374 (2d Cir. 1988).

36. *See, e.g.*, Bernard v. City of Palo Alto, 699 F.2d 1023 (9th Cir. 1983); Williams v. Ward, 671 F. Supp. 225 (S.D.N.Y. 1987), *rev'd*, 845 F.2d 374 (2d Cir. 1988), *cert. denied*, 488 U.S. 1020 (1989); Sanders v. City of Houston, 543 F. Supp. 694 (S.D. Tex. 1982), *aff'd without opinion*, 741 F.2d 1379 (5th Cir. 1984); Lively v. Cullinane, 451 F. Supp. 1000 (D.D.C. 1978); Dommer v. Hatcher, 427 F. Supp. 1040 (N.D. Ind. 1975), *rev'd in part sub nom*, Dommer v. Crawford, 653 F.2d 289 (7th Cir. 1981).

37. 420 U.S. 103 (1975). Persons arrested on information to the prosecutor were not provided with probable cause hearing. *Id.* at 106. The only method for obtaining a probable cause determination was FLA. STAT. ANN. § 907.045 (1973) which allowed a preliminary hearing after 30 days. *Id.* at 106.

38. 420 U.S. at 112. To protect the individual from unfounded invasions of liberty and privacy, the Court has required that probable cause exist and that it be decided by a neutral and detached magistrate. Johnson v. United States, 333 U.S. 10, 13-14 (1948).

Amendment, the Court held that a determination of probable cause must be made by a judicial officer either "before or promptly after arrest."[39] Emphasizing the need for a "prompt" determination of probable cause, the Court in *Gerstein* found that the Fourth Amendment did not require an adversarial proceeding for determination of probable cause.[40] The Court reasoned such adversarial needs would only overburden the criminal justice system and exacerbate the problem of pretrial delays.[41] The Court stated that the Fourth Amendment does not require that the probable cause determination be adversarial.[42] The Court went on to state that the function of an adversarial hearing for a probable cause determination is limited because the prosecution has not reached the critical stage where the defendant might be impaired should he proceed without counsel.[43]

The Court also held that states may use flexibility and experimentation in implementing the probable cause determination by combining it with other pretrial procedures such as the arrestee's first appearance in front of a judicial officer or the setting of bail.[44] The Court refrained from espousing an exact measure of a prompt determination of probable cause because it recognized that individual jurisdictions' criminal procedure systems vary widely[45] and that no single pretrial procedure is preferred.[46] Whatever procedure a state may adopt, the Court noted such a state must provide a fair and reliable determination of probable cause before restraint of liberty may continue.[47]

The Court recognized that once a suspect is in custody, the reason for dispensing with a magistrate's neutral judgment evaporates.[48] A prompt determination must be made due to the negative consequences of continued detention.[49] However, the Court stopped short of requiring

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39. 420 U.S. at 125.

40. *Id.* at 120.

41. *Id.* at 122 n.23.

42. *Id.* at 120.

43. *Id.* at 122. *But see* Coleman v. Alabama, 399 U.S. 1 (1970); United States v. Wade, 388 U.S. 218 (1967) (adversarial determinations are constitutionally mandatory).

44. 420 U.S. at 123-24.

45. *Id.* at 123. *See, e.g., supra* notes 30-33 and accompanying text.

46. 420 U.S. at 123.

47. *Id.* at 125.

48. *Id.* at 114. With the suspect in custody, there is no further danger that he will commit other crimes while the evidence is reviewed by the magistrate. *Id.*

49. *Id.* A prolonged confinement may risk the loss of the suspect's job, interrupt his source of income, and harm his relationship with family members. *Id. See also* Brandes, *supra* note 29, at 446-47; Marc Zilversmit, *Granting Prosecutors' Requests for Continuances of Detention Hear-*

that arrestees be brought before a magistrate immediately after being taken into custody.[50] The Court's holding[51] in *Gerstein*, along with the individual jurisdiction's desires for flexibility and experimentation, led jurisdictions in subsequent cases to varying interpretations of *Gerstein*.[52]

Since *Gerstein*, various locales have faced class action suits brought by arrestees detained for an extended period of time prior to their presentment to a judicial officer for a probable cause determination.[53] Each court that has decided the issue has based its decision on its own locale's preference for what constitutes the necessary administrative steps incident to arrest.[54]

The District Court for the District of Columbia in *Lively v. Cullinane*[55] interpreted *Gerstein* to mean that police can delay an arrestee's presentment only when such a delay is administratively necessary.[56] The court based its decision on the language in *Gerstein* that law enforcement officials must present arrestees upon completion of "administrative steps incident to arrest."[57] The court determined that the average time to process an arrestee should normally take no longer than one-and-a-half hours.[58] The hour-and-a-half time limit did not include the fingerprinting or photographing of suspects, and if the paperwork incident to the arrest could not be completed during that time, it was to be completed at a later time so it would not delay the hearing.[59]

The *Lively* standard was far more stringent than the *Gerstein* rule.[60] The District Court for the District of Columbia based its decision on its definition of what constitutes "substantial" steps.[61] Other jurisdictions that based their holdings on the definition of "substantial"

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ings, 39 STAN. L. REV. 761, 780 (1987).

50. *See* 420 U.S. at 123-24.

51. *See supra* note 39 and accompanying text.

52. *See infra* notes 55-91 and accompanying text.

53. Brandes, *supra* note 29, at 457.

54. Brandes, *supra* note 29, at 457.

55. 451 F. Supp. 1000 (D.D.C. 1978). Lively was acquitted of the charges against him but was held for two-and-a-half hours, during which time he suffered a broken wrist. *Id.* at 1002-03. Lively was held for the time period while police filled out the forms of his arrest. *Id.*

56. 451 F. Supp. at 1005.

57. *Id.* at 1004 (quoting *Gerstein*, 420 U.S. 103, 114).

58. 451 F. Supp. at 1003.

59. *Id.* at 1006.

60. Brandes, *supra* note 29, at 459. The standard is more stringent in that the police could not photograph, fingerprint, or even verify the name given by the arrestee if these procedures delayed the probable cause proceeding. *Id.*

61. 451 F. Supp. at 1005.

steps reached inconsistent results because each jurisdiction decided what steps were "substantial" and the time allowed in each varied.[62]

In *Dommer v. Hatcher*,[63] the Seventh Circuit interpreted *Gerstein* differently and imposed a bright-line rule.[64] The court held that an arrestee cannot be detained longer than twenty-four hours without a probable cause determination.[65] The court also held that a forty-eight hour detention may be permissible when a legal holiday or a Sunday intervenes.[66] Fearing that detailed regulations would hamper law enforcement, the Seventh Circuit did not greatly detail the substantial administrative steps needed prior to presentment as did the court in *Lively*.[67] However, unlike the Court in *Gerstein*, the Seventh Circuit imposed a strict time limit as to when an arrestee must be presented for a probable cause determination.[68]

Next, the Fifth Circuit interpreted the *Gerstein* rule in *Sanders v. City of Houston*.[69] The court struck down the city's procedure of "investigative hold"[70] as a violation of the Fourth Amendment and implemented a twenty-four hour time limit for detention prior to presentment of the arrestee.[71]

The court analyzed the holding in *Gerstein* that an arrestee must be given a "prompt" probable cause determination and held that administrative steps not necessary to prepare the arrestee for presentment in one case may be proper in another, depending on the case.[72] However, the court held that regardless of whether all these steps might be taken prior to presentment, the twenty-four hour requirement must be

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62. Settle, Note, *supra* note 22, at 205.

63. 427 F. Supp. 1040 (N.D. Ind. 1975), *rev'd in part sub nom*, Dommer v. Crawford, 653 F.2d 289 (7th Cir. 1981) (the essential holding was not affected by the appeal).

64. *Dommer*, 427 F. Supp. 1040, 1045 (N.D. Ind. 1975).

65. *Id.* at 1045.

66. *Id.* at 1047.

67. *Id.* at 1044.

68. *Id.* at 1045.

69. 543 F. Supp. 694 (S.D. Tex. 1982), *aff'd without opinion*, 741 F.2d 1379 (5th Cir. 1984).

70. Investigative hold was a procedure whereby the Houston Police Department detained an arrestee for up to 72 hours without explanation. *Sanders*, 543 F. Supp. at 703. During this detention, the police investigated the case to determine whether charges should be filed. *Id.* at 697.

71. *Id.* at 702.

72. *Id.* at 700. For example, fingerprinting, photographing, or conducting laboratory tests may be proper in some cases. *Id. But see Lively*, 451 F. Supp. 1000, 1006 (D.D.C. 1978) (fingerprinting, photographing, and the completion of paperwork are not proper substantial administrative steps incident to arrest).

met.[73] The significance of *Sanders* is its imposition of a twenty-four hour limit for determination of probable cause once a suspect is arrested.[74]

The Ninth Circuit interpreted the *Gerstein* rule as well in *Bernard v. City of Palo Alto.*[75] The court affirmed the district court's ruling that a warrantless arrestee could be held no longer than twenty-four hours before presentment unless the city could prove that special circumstances precluded presentment within this time.[76]

The city appealed the district court's ruling based on the language in *Gerstein* that allowed states and localities to formulate their own procedures as long as they adhered to the constitutional standard set out in *Gerstein.*[77] The Ninth Circuit rejected the city's interpretation and focused on the language in *Gerstein* that said presentment must be made as soon as the administrative steps incident to arrest are completed.[78] Therefore, *Bernard* joined *Dommer*[79] in setting a specific time limit and requiring presentment as soon as the administrative steps incident to arrest are complete.[80]

Not until 1988, in *Williams v. Ward,*[81] did a court interpret *Gerstein* to allow jurisdiction to implement their own procedures and combine a probable cause determination with other pretrial procedures that take longer than twenty-four hours.[82] The Second Circuit held that a postarrest detention of up to seventy-two hours is constitutionally permissible[83] and that combining the probable cause determination with the arraignment proceeding was clearly constitutional under *Gerstein.*[84]

The Second Circuit grounded its reasoning on five propositions.

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73. 543 F. Supp. at 700-01.

74. *Id.* at 702.

75. 699 F.2d 1023 (9th Cir. 1983) (per curiam).

76. *Id.* at 1024.

77. *Id.* at 1025. *See supra* notes 37-50 and accompanying text.

78. 699 F.2d at 1025.

79. *Dommer,* 427 F. Supp. 1040 (N.D. Ind. 1975) (holding that an arrestee cannot be held longer than 24 hours between arrest and presentment for a probable cause hearing).

80. *See* 699 F.2d 1025.

81. 845 F.2d 374 (2d Cir. 1988), *cert. denied,* 488 U.S. 1020 (1989).

82. Settle, Note, *supra* note 22, at 209. The Second Circuit interpreted *Gerstein* to mean that a probable cause determination could be made at the arrestee's first appearance before a magistrate or incorporated into pretrial release procedures. *Williams,* 845 F.2d at 386. The court's interpretation of *Gerstein's* holding does not automatically trigger a right to an immediate probable cause hearing because other steps are necessary to prepare an arrestee for a pretrial proceeding in which the probable cause determination may be merged. *Id.*

83. 845 F.2d at 387.

84. *Id.* at 386.

First, the arrestee would benefit by the consolidation because it would afford the arrestee the opportunity for an adversarial probable cause hearing.[85] Second, the court reasoned that the seventy-two hour time limit was constitutionally permissible based on the Supreme Court's ruling in *Schall v. Martin*,[86] where the Court held that a probable cause finding was not constitutionally required at the initial appearance of a juvenile.[87] Third, the court felt that *Gerstein* did not require a uniform system of criminal procedure, thus allowing individual jurisdictions to implement their own procedures.[88] Fourth, the court believed its jurisdiction to be unique because of the quantity of arrests and the complexity of its arraignment procedures.[89] Finally, the court found that a probable cause determination within twenty-four hours would require an additional hearing between arrest and arraignment, thereby lengthening the detention period for many arrestees and increasing costs to a level too burdensome to bear.[90] The Second Circuit became the first federal court in the nation to allow more than a twenty-four hour delay prior to presenting an arrestee to a magistrate for a probable cause determination.[91]

Because of the split among the circuits in their interpretation of the promptness requirement espoused in *Gerstein*, the Supreme Court granted certiorari to give guidance as to what "prompt" means.[92] The first issue decided by the Court in *McLaughlin* was whether the plaintiff in the original action had standing to bring suit.[93] The Court rejected the county's argument that since the plaintiff was no longer in custody or suffering harm, his action was moot and he lacked standing.[94] The Court held "that by obtaining class certification, [the] plaintiffs preserved the merits of the controversy" for review.[95] The Court

85. *Id.* at 387.
86. 467 U.S. 253 (1984).
87. 845 F.2d at 386.
88. *Id.* at 383.
89. *See id.* at 381-82.
90. *Id.* at 388-89.
91. *See supra* notes 55-80 and accompanying text.
92. *McLaughlin*, 111 S. Ct. 1661, 1667 (1991).
93. *Id.*
94. *Id.*
95. *Id.* The court based its decision on United States Parole Comm'n v. Geraghty, 445 U.S. 388, 399 (1980) (citing Gerstein v. Pugh, 420 U.S. 103, 110 n.11 (1975)). *Geraghty* was a similar factual case that held some claims are so transitory that a proposed representative's individual interest may expire before the court will even be able to rule on the motion for class certification. *Id.*

applied the "relation back" doctrine to preserve the merits of the case for judicial resolution.[96]

Proceeding to the merits of the case, the Court defined "prompt" under *Gerstein*.[97] In order to define "prompt," the Court examined its holding in *Gerstein*.[98] Although reluctant to do so, the Court imposed a bright-line time limit of forty-eight hours in which a jurisdiction must provide a probable cause determination.[99]

The Court recognized that its decision was a practical compromise between the rights of individuals and the realities of law enforcement.[100] The Fourth Amendment requires that a person arrested on the suspicion of having committed a crime must be given a fair and reliable determination of probable cause as a precondition for any significant pretrial restraint of liberty.[101] Such a determination must be made by an impartial judicial officer either before or promptly after arrest.[102] The Court also recognized that the Fourth Amendment does not require a rigid procedural framework and states may choose to comply in different ways by implementing their own individual procedures.[103] If a state chooses to combine the probable cause determination with other pretrial procedures, inevitable delays may occur.[104] Delays may occur due to the everyday problems police confront in processing suspects through an overly burdened criminal justice system.[105] Such delays may include paperwork and logistical problems, the reviewing of records, drafting of charging documents, setting of bail, or arrangement of counsel.[106] The Court, however, deemed these delays permissible under the Fourth Amendment since it does not compel an immediate determination of probable cause upon the completion of the

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96. *McLaughlin*, 111 S. Ct. at 1667. *See* Swisher v. Brady, 438 U.S. 204, 213-14 n.11 (1978); Sosna v. Iowa, 419 U.S. 393 (1975). The relation back doctrine is a principle which means that an act done today is considered to have been done at an earlier time. BLACK'S LAW DICTIONARY, 1289 (6th ed. 1990).

97. 111 S. Ct. at 1670.

98. *Id.* at 1667-68. Under *Gerstein* prompt was held to mean that a probable cause determination must be "made as soon as the administrative steps incident to arrest were completed." *Id.* at 1669.

99. 111 S. Ct. at 1670.

100. *Id.* at 1668.

101. *Id. See supra* note 21 and accompanying text.

102. 111 S. Ct. at 1668.

103. *Id.*

104. *Id.* at 1669.

105. *Id.*

106. *Id.*

administrative steps incident to arrest.[107] Plainly, if the Fourth Amendment required a probable cause determination at the completion of the administrative steps, there would be no room for the flexibility or experimentation explicitly contemplated by *Gerstein*.[108]

Although reasoning that the Fourth Amendment allowed for delays due to states implementing their own procedures, the Court warned that unreasonable delay, even within the forty-eight hour time limit, would be unconstitutional and would leave the jurisdiction open to systematic challenges.[109] Unreasonable delays may include delays for further investigation of the alleged crime, delays motivated by a dislike of the arrestee, or delays with no reasonable explanation.[110] When determining whether or not a delay is reasonable, each court must consider the often inevitable delays that arise due to the practical realities of law enforcement.[111] When an arrestee does not receive a probable cause determination within forty-eight hours, the Court held that the arrestee will not bear the burden of proving an unreasonable delay.[112] Rather, the burden shifts so that the government must prove that a bona fide emergency or other extraordinary circumstances existed that caused the delay.[113] The government cannot claim that a particular case requires more than forty-eight hours for a probable cause determination because it follows a procedure of consolidating this determination with other pretrial proceedings.[114] Nor can the government escape the forty-eight hour limit due to an intervening weekend between the time of arrest and presentment.[115] The Court held that a jurisdiction may choose to combine the probable cause determination with other pretrial proceedings, but it must do so as soon as possible within the forty-eight hour time period after arrest.[116]

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107. *See id.* at 1668. The Court believes that an immediate determination of probable cause after completion of the administrative steps incident to arrest is not required by the Fourth Amendment because of the desirability of experimentation and flexibility. *Id.*

108. *Id.*

109. *Id.* at 1669-70.

110. *Id.* at 1670.

111. *Id.* Such inevitable delays may include transporting arrestees from one facility to another, handling late night arrests, obtaining the presence of the arresting officer, or any other practical reality. *Id.*

112. *Id.* In the past, arrestees bore the burden of proving an unreasonable delay which was sometimes impossible. *See id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

In reasoning that the forty-eight hour time limit is appropriate, the Court found that the Constitution does not compel direct interference with local control of procedures.[117] The Court held that the Constitution does not compel jurisdictions to accelerate their criminal justice mechanisms or order them to allocate tax dollars to hire additional police officers and magistrates.[118] If a twenty-four hour time limit were imposed, as suggested by the dissent, an intrusion into local affairs would be necessary.[119] Thus, the Court held that a probable cause determination must be held within forty-eight hours of arrest and that jurisdictions may combine the determination with other pretrial proceedings.[120]

Justice Marshall, with whom Justices Blackmun and Stevens joined, dissented and reasoned that the Constitution compels a prompt determination of probable cause.[121] Thus, Marshall reasoned that the court of appeals should be affirmed.[122]

In his dissent,[123] Justice Scalia first questioned the majority's analysis of the issue as balancing public safety on the one hand and avoiding prolonged detention on the other hand.[124] Justice Scalia reasoned that the balance had already been struck by the Bill of Rights and subsequent interpretations by the common-law courts.[125] According to Justice Scalia, this established balance allowed for the warrantless arrest of a person suspected of having committed a crime, thus satisfying the government's need to protect public safety, while at the same time allowing an arrestee a prompt probable cause determination prior to a prolonged detention, thus satisfying the individual's need for constitu-

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117. *Id.* The Court does not explain the reasons why the government should not interfere with local procedures. *See id.* However, one may infer that the Court is maintaining that the federal government should not overstep the bounds of its authority by imposing procedures that might better be left to the individual states to determine.

118. *Id.*

119. *Id.*

120. *Id.* The Court pointed out that only those pretrial proceedings that take place very early, such as bail hearings and arraignments, would be candidates for combination because of the promptness requirement. *Id.* at 1671.

121. 111 S. Ct. at 1671. (Marshall, J., dissenting). The dissent differs from the majority in its definition of "prompt." *Id.* The dissent would affirm the court of appeals' decisions that defined "prompt" as a determination made immediately upon completion of the administrative steps incident to arrest. *Id.* (citing Gerstein v. Pugh, 420 U.S. 103, 114).

122. *Id.*

123. 111 S. Ct. at 1672 (Scalia, J., dissenting).

124. *Id.* at 1672.

125. *Id.*

tional protection.[126]

Turning to the promptness issue, Justice Scalia defined a prompt determination as that which must be made after the completion of the administrative steps incident to arrest, without intentional delay caused by procedures unrelated to the administrative steps.[127] The dissent recognized that the Fourth Amendment does not require an immediate determination of probable cause after the administrative steps are completed.[128] However, Justice Scalia questioned the majority's reasoning that a delay is reasonable when it comes about as a result of combining postarrest proceedings for administrative convenience.[129] The dissent argued that the majority's reliance on dictum in *Gerstein*,[130] which recognized the desirability of flexibility and experimentation, is misplaced.[131] The majority used this dictum to imply that the timing of a probable cause hearing, as well as its nature, is flexible.[132] According to Scalia, that dictum referred to the type of probable cause hearing and not the time in which it must be made.[133] The timing is specifically addressed by the words "either before or promptly after arrest."[134] Therefore, Justice Scalia reasoned that the Fourth Amendment requires that a probable cause determination be made after the administrative steps incident to arrest are completed and should not be delayed for administrative convenience or for combining the determination with other pretrial proceedings.[135]

In his second departure from the majority's opinion, Justice Scalia disagreed with the Court's finding that a probable cause determination could be combined with other pretrial proceedings if done before the expiration of forty-eight hours from the time of arrest.[136] Based on existing data and past Court decisions, Justice Scalia espoused an outer time limit of twenty-four hours in which an arrestee must be presented

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126. *Id.*

127. *Id.* at 1673.

128. *Id.* at 1673-74.

129. *Id.* at 1674.

130. *Gerstein*, 420 U.S. 103, 123 (1975). The dictum the majority relies on is that in which the *Gerstein* court recognized the need for flexibility and experimentation by the individual jurisdictions when implementing the probable cause determination. 111 S. Ct. at 1674 (Scalia, J., dissenting).

131. 111 S. Ct. at 1674.

132. *Id.*

133. *Id.*

134. *Id.* (quoting *Gerstein*, 420 U.S. 103, 125).

135. 111 S. Ct. at 1675.

136. *Id.*

to a magistrate for a probable cause determination after arrest.[137] Justice Scalia reasoned that the Fourth Amendment was created to protect the innocent arrestee and not to benefit the career criminal.[138] Thus, according to Justice Scalia, the Court's holding repudiated the Fourth Amendment's concern for protecting the innocent from wrongful arrest.[139] The dissent stated that it is unconstitutional under the Fourth Amendment to delay a probable cause determination for reasons unrelated to the completion of administrative steps incident to arrest[140] or to hold an arrestee for more than twenty-four hours after arrest.[141] However, Justice Scalia agreed with the majority that the burden should shift to the government to prove the delay was reasonable when a probable cause determination is not made within twenty-four hours after a suspect is arrested.[142]

The *McLaughlin* decision is significant for several reasons. First, the adoption of the forty-eight hour time limit specifically details what is constitutionally permissible under the Fourth Amendment. Individual jurisdictions will now be free from systematic challenges claiming unconstitutional detention as long as an arrestee is afforded a probable cause determination within forty-eight hours from the time of the arrest and the delay is reasonable.[143]

More significant, perhaps, is the effect the decision will have on the individual jurisdictions and the warrantless arrestees. In order to comply with the strict forty-eight hour time limit, many jurisdictions will have to implement additional court sessions[144] and will likely expe-

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137. *Id.* at 1676. His dissent relies on the holdings of federal courts that have found an outer time limit. *Id.* All but one have selected twenty-four hours after arrest as the limit. *Id. See* Bernard v. Palo Alto, 699 F.2d 1023, 1025 (9th Cir. 1983); McGill v. Parsons, 532 F.2d 484, 485 (5th Cir. 1976); Sanders v. Houston, 543 F. Supp. 694, 701-03 (S.D. Tex. 1982), *aff'd without opinion*, 741 F.2d 1379 (5th Cir. 1984). *Cf.* Dommer v. Hatcher, 427 F. Supp. 1040, 1046 (N.D. Ind. 1975), *rev'd in part*, Dommer v. Crawford, 653 F.2d 289 (7th Cir. 1981). *But see* Williams v. Ward, 845 F.2d 374, 388 (2d Cir. 1988), *cert. denied*, 488 U.S. 1020 (1989) (holding that a 72-hour detention before presentment is permissible). *See also* A.L.I. MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 310.1 (1975); Brandes, *supra* note 29, at 474-75.

138. 111 S. Ct. at 1677 (Scalia, J., dissenting).

139. *Id.*

140. *Id.* Justice Scalia believed that combining the determination with other pretrial proceedings is not an administrative step and therefore the delay that the combination creates is unconstitutional. *Id.*

141. *Id.*

142. *Id.* at 1677.

143. *Id.* at 1670.

144. ARKANSAS GAZETTE, May 28, 1991, at 1B, col. 6; ARKANSAS GAZETTE, May 31, 1991, at 1B, col. 6.

rience additional costs associated with the added sessions.[145] Inevitably, the taxpayer will also be affected due to the need to fund these changes with increased taxes.[146] Many jurisdictions have already imposed Sunday court sessions to determine probable cause for persons arrested on Friday nights.[147] The costs associated with the Sunday sessions and the impact on taxpayers is yet to be determined as jurisdictions are still scrambling to meet the requirements of the decision. Inevitably, however, these burdens will eventually be calculated and the full impact of *McLaughlin* will be better known.

The effects on the arrestees are twofold. An arrestee may benefit from the imposition of the forty-eight hour time limit. Prior to this decision, most jurisdictions did not incorporate intervening weekends or holidays into their calculation of an outer time limit that would be constitutionally acceptable.[148] The Court stated that forty-eight hours would be the outermost time limit that an arrestee could be detained prior to presentment to a magistrate for a probable cause determination, inclusive of weekends and holidays.[149] Therefore, one possible benefit to the arrestee, if he is arrested on a Friday night or before a holiday, is that he will likely be detained for a shorter amount of time in jurisdictions that do not normally convene court on weekends.

A second possible benefit to arrestees is the availability of an adversarial hearing in jurisdictions that choose to combine the probable cause determination with other pretrial procedures. Although the Court in *McLaughlin* stated that adding further procedural complexity into the probable cause hearing would burden the judicial system,[150] the

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145. Added court sessions will probably require the hiring of additional police officers and magistrates. *See* Williams v. Ward, 845 F.2d 374, 388 (2d Cir. 1988) (stating it would be necessary to add more than 200,000 hearings per year to conform to the 24 hour standard).

146. Logically, if additional sessions are added, additional clerks, court reporters, administrative staff, and magistrates will be needed. The additional personnel would increase the budget needs of the jurisdiction which would call for additional tax dollars to be appropriated. *But see* Pugh v. Rainwater, 332 F. Supp. 1107, 1114 (S.D. Fla. 1971) (concluding that the additional costs were greatly outweighed by the idea of detaining an innocent person longer than necessary).

147. *See, e.g.*, ARKANSAS GAZETTE, May 31, 1991, at 1B, col. 6. The city of Conway has implemented the additional court sessions in order to comply with the decision. Presumably, the same will be needed for persons arrested on Sunday night when a holiday, such as Christmas, falls on Tuesday and for persons arrested on Thanksgiving Day.

148. *See* 111 S. Ct. at 1671. *See also* Dommer v. Hatcher, 427 F. Supp. 1040, 1046 (N.D. Ind. 1975), *rev'd in part sub nom.*, Dommer v. Crawford, 653 F.2d 289 (7th Cir. 1981) (excluding Sundays and holidays from computation of the outer time limit).

149. 111 S. Ct. at 1670-71.

150. *Id.* at 1668 (citing *Gerstein*, 420 U.S. at 122 n.23).

court in *Williams*[151] specifically pointed to the benefit of an adversarial hearing as a reason for allowing delay and for incorporating a probable cause hearing into the arraignment proceeding.[152] In an adversarial hearing, the accused is present and accompanied by counsel.[153] The entire matter may be resolved at the hearing by negotiating, through an attorney, a final disposition of the arrestee's case or by the court setting bail or other conditions of pretrial release.[154] An arrestee's rights may be better protected if he is provided with an adversarial hearing. The danger exists that if a probable cause determination is an entirely nonadversarial procedure, the process may become routine and methodical and the accusations of the prosecutor may be rubberstamped by the court.[155] Therefore, the adversarial hearing would allow the arrestee to refute hearsay and suspicions and stand a greater probability of receiving an impartial and informed determination of probable cause.

While *McLaughlin* may potentially benefit the arrestee, the decision may also adversely affect the arrestee. The Court found that it is constitutionally acceptable for jurisdictions to combine the probable cause determination with other pretrial proceedings.[156] It is possible that jurisdictions that now have separate determinations may incorporate them into other proceedings and thus prolong the detention of wrongfully arrested persons. The dissent provided a disturbing example of how the *McLaughlin* decision may affect a wrongfully arrested person if the jurisdiction chooses to delay the probable cause determination for combination with arraignment.[157] The negative effects of detention, even for a short period of time, can be devastating, and therefore the effects should be avoided if at all possible.[158] As jurisdictions rear-

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151. 845 F.2d 374 (2d Cir. 1988), *cert. denied*, 488 U.S. 1020 (1989). The court believed that the adversarial proceeding was a benefit to an arrestee because the arrestee would be accompanied by counsel and the final disposition of the entire matter could be made. *Id.* at 387.

152. *Id.* at 387.

153. A normal probable cause hearing is held ex parte without the arrestee being notified or present. BLACK'S LAW DICTIONARY 576 (6th ed. 1990).

154. *Williams*, 845 F.2d at 387.

155. Comment, *Pretrial Detainees Have a Fourth Amendment Right to a Nonadversary, Judicial Determination of Probable Cause*, 10 VAL. U.L. REV. 199, 216 (1976).

156. 111 S. Ct. at 1668-69.

157. *Id.* at 1677 (citing, WASHINGTON POST, Apr. 29, 1991, p. 1). A student was arrested for a misunderstanding at a restaurant and later released for lack of cause. *Id.* If the jurisdiction had combined the probable cause determination with arraignment, the innocent student could have been held for up to 48 hours. *Id.*

158. *See* Settle, Note, *supra* note 22, at 200. The negative effects may include the loss of

range their pretrial procedures to take advantage of the *McLaughlin* decision, allowing for the probable cause determination to be combined with other proceedings, many arrestees may be detained longer than before and may suffer the negative effects associated with incarceration.

Although it is far too early to accurately predict the effects the *McLaughlin* decision will have on jurisdictions and arrestees, it appears that what may have looked like a blessing to jurisdictions hoping to improve judicial efficiency may be a nightmare in disguise. Many jurisdictions will have to implement additional court sessions to comply with the forty-eight hour time limit between arrest and presentment when a weekend or holiday intervenes. Additional costs and unforeseen burdens will likely follow. These costs may be somewhat offset by combining procedures, but at what cost to the innocent arrestee? Arrestees will no longer face unreasonable detention due to an intervening weekend or holiday, but many that may have been released within one day in jurisdictions that provide separate probable cause determinations may now be faced with an almost certain two day incarceration as jurisdictions piggy-back probable cause hearings with other pretrial procedures. Only time will tell if judicial efficiency is more important than individual liberty.

Gregory Taylor

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employment, the breakdown of family relationships, and embarrassment in the community. Zilversmit, *supra* note 49, at 780.