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Alycia B. Olano

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Determination of Probable Cause for a Warrantless Arrest: A Casenote on *County of Riverside v. McLaughlin*

I. INTRODUCTION

In a five-four decision written by Justice O'Connor, the U.S. Supreme Court held in *County of Riverside v. McLaughlin* that a judicial determination of probable cause for a warrantless arrest must be made within forty-eight hours of the arrest, including weekends and holidays.¹ Three dissenters, led by Justice Marshall, would have affirmed the lower courts' decisions that thirty-six hours was an appropriate outside time limit. Justice Scalia took the most stringent stance, arguing that twenty-four hours should be the outside constitutional limit for a determination of probable cause in a warrantless arrest situation.

Riverside is an excellent example of the difficulty involved in formulating a bright line test. The three suggested time limits set forth by the justices are each separated by only twelve hours. As this casenote will reveal, however, Justice Scalia's opinion was the soundest approach; the fourth amendment as interpreted by a prior United States Supreme Court opinion, *Gerstein v. Pugh*,² requires a twenty-four hour outside time limit for the determination of probable cause in a warrantless arrest.

In presenting the analysis which leads to this conclusion, Section II will trace the law prior to and prompting *Riverside*. Section III will discuss the facts and holding of *Riverside*. Section IV will present an analysis of *Riverside* and explain the problems with its outcome. Finally, Section V will recommend procedures that Louisiana and other states should implement in light of *Riverside* and this writer's conclusions.

II. BACKGROUND LAW

The fourth amendment of the U.S. Constitution provides that, "no Warrants shall issue, but upon probable cause, supported by Oath or

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1. 111 S. Ct. 1661 (1991).

2. 420 U.S. 103, 95 S. Ct. 854 (1975).

affirmation. . . ."³ One aspect of the requirement of probable cause supported by oath or affirmation is that the existence of probable cause must be determined by a "neutral and detached magistrate."⁴ The reason for this requirement is as follows:

The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.⁵

The fourth amendment, however, does not require that a warrant always be issued prior to arrest.⁶ Rather, the validity of a warrantless arrest depends on whether probable cause existed at the time of arrest.⁷

Therefore, the question arises as to whether or not the fourth amendment requires a separate determination of probable cause by a "neutral and detached magistrate" in cases of warrantless arrests. If such a determination is required, how soon after a warrantless arrest must that determination be made?

In *Gerstein v. Pugh*, the Court held that a suspect arrested without a warrant is entitled to a "fair and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty, and this determination must be made by a judicial officer either before or promptly after arrest."⁸

Recognizing that the states have an interest in protecting public safety and that an individual has an interest in avoiding pretrial confinement on anything less than probable cause, the *Gerstein* Court found the requirement of a "prompt" determination to be a "practical compromise."⁹ The Court emphasized that the consequences of prolonged detention may be more serious than the consequences of arrest. For

3. U.S. Const. amend. IV:

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, and the persons or things to be seized. (emphasis added).

4. *Shadwick v. City of Tampa*, 407 U.S. 345, 350, 92 S. Ct. 2119, 2123 (1972); *Coolidge v. New Hampshire*, 403 U.S. 443, 450, 91 S. Ct. 2022, 2029 (1971).

5. *Johnson v. United States*, 333 U.S. 10, 13-14, 68 S. Ct. 367, 369 (1948).

6. *U.S. v. Watson*, 423 U.S. 411, 96 S. Ct. 820 (1976).

7. *Beck v. Ohio*, 379 U.S. 89, 91, 85 S. Ct. 223, 225 (1964).

8. *Gerstein v. Pugh*, 420 U.S. 103, 125, 95 S. Ct. 854, 868-69 (emphasis added).

9. *Id.* at 113, 95 S. Ct. at 863.

instance, a person's family relations, employment and reputation could be severely harmed by an unjustified detention.¹⁰

In articulating the type of probable cause determination required, the Court stated,

The standard is the same as that for arrest. That standard—probable cause to believe the suspect has committed a crime—traditionally has been decided by a magistrate in a nonadversary proceeding on hearsay and written testimony, and the Court has approved these informal modes of proof.¹¹

Furthermore, "adversar[ial] safeguards are not essential. . . ."¹² However, the Court declared that "desirability of flexibility and experimentation by the States" allows the combining of the probable cause determination with other pretrial procedures in which adversarial safeguards do exist.¹³ Therefore, states may determine the existence of probable cause at presentment or arraignment, upon appointment of counsel, at the hearing to set bail, or during any other pretrial procedure a state may already have in existence, as long as the probable cause determination is prompt.¹⁴

The *Gerstein* Court reasoned that combining the probable cause determination with other procedures would be the least burdensome requirement on an already overburdened criminal system.¹⁵ Furthermore, the Court did not interpret the Constitution to be so rigid as to require any particular procedure.¹⁶

However, the *Gerstein* decision itself soon burdened the criminal justice system with an onslaught of cases challenging state criminal procedures as violations of *Gerstein*.¹⁷ Judges struggled with the meaning of "prompt" and, finally, in *County of Riverside v. McLaughlin*, some sixteen years later, the Court attempted to resolve the issue.

III. FACTS AND HOLDING OF *RIVERSIDE*

Donald McLaughlin and others brought a class action suit alleging that Riverside County's policy for probable cause determination was in direct violation of *Gerstein*. The County's policy was to determine

10. *Id.* at 114, 95 S. Ct. at 863.

11. *Id.* at 120, 95 S. Ct. at 866.

12. *Id.* at 120, 95 S. Ct. at 866. Also, note that those adversarial safeguards not required include "appointed counsel, confrontation, cross-examination and compulsory process for witnesses." *Id.* at 119, 95 S. Ct. at 866.

13. *Id.* at 123, 95 S. Ct. at 868.

14. *Id.* at 123-25, 95 S. Ct. at 868-69.

15. *Id.* at 123-24, 95 S. Ct. at 868.

16. *Id.* at 123, 95 S. Ct. at 868.

17. See *infra* note 26.

probable cause at the arraignment proceeding which was to be held within two days of arrest, excluding weekends and holidays. As Justice O'Connor pointed out in the majority opinion, if a person is arrested during the Thanksgiving holiday, that person could be held as long as seven days without any probable cause determination.¹⁸

McLaughlin and his co-plaintiffs sought to limit the time between a warrantless arrest and a probable cause determination to thirty-six hours. The district court granted that relief, and the appellate court affirmed.¹⁹ Although the entire Supreme Court agreed that Riverside's policy was contrary to the fourth amendment, the Court was divided as to what would be an appropriate outside time limit.

Justice O'Connor, writing for the majority, held that forty-eight hours was a more appropriate time limit than the thirty-six hours sought by the plaintiffs and granted by the lower courts. Justice O'Connor declared this to be the balance struck between the interests of public safety and the harm to a potentially innocent person.²⁰ She emphasized the increased administration costs that would result from a time limit any shorter than forty-eight hours.²¹ She further pointed out that *Gerstein* said that the Constitution "does not compel an immediate determination of probable cause," but instead allowed the determination to be combined with existing pretrial procedures.²²

In dissent, Justice Marshall, joined by Justices Blackmun and Stevens, found *Gerstein's* requirement of "prompt" determination to mean that such determination must be made immediately upon completion of the administrative steps incident to arrest.²³ Because the lower courts had found that thirty-six hours was more than ample time to complete the administrative process, Justice Marshall's dissent advocated that the decision should be affirmed.²⁴

Justice Scalia stressed the historical implications relied upon by the Court in *Gerstein*,²⁵ and agreed with Justice Marshall that the period of warrantless detention should be limited to that time necessary to

18. *County of Riverside v. McLaughlin*, 111 S. Ct. 1661, 1665.

19. *Id.* at 1666.

20. *Id.* at 1669.

21. *Id.* at 1670.

22. *Id.* at 1668.

23. The administrative steps include but are not limited to booking, photographing, and fingerprinting the suspect. *Id.* at 1671.

24. Actually, the County had acknowledged that "nearly 90 percent of all cases . . . can be completed in 24 hours or less." *Riverside*, 111 S. Ct. 1676 n.3, citing Brief for District Attorney, County of Riverside, at Amicus Curiae 16.

25. *Id.* at 1672, citing 2 M. Hale, *Pleas of the Crown* 95 n.13 (1st Am. ed. 1847). At common law, which formed the basis of the U.S. criminal justice system, a person arresting a suspect without a warrant must deliver the arrestee to a magistrate "as soon as he reasonably can."

complete the administrative steps incident to arrest. Justice Scalia further noted that only one federal court in interpreting *Gerstein* had ever held that twenty-four hours was an inadequate amount of time to complete post-arrest procedures. In fact, with the same exception, he noted that every court facing the issue had selected twenty-four hours as an appropriate time limit.²⁶

IV. ANALYSIS OF THE RIVERSIDE DECISION

Justice O'Connor, writing for the majority, placed her greatest reliance on factors other than that upon which *Gerstein* relied. Justice O'Connor placed great weight on the administrative costs associated with a twenty-four hour time limit: "In advocating a 24-hour rule, the dissent would compel Riverside County—and countless others across the Nation—to speed up its criminal justice mechanisms substantially, presumably by allotting local tax dollars to hire additional police officers and magistrates."²⁷

The possibility of increased administrative costs is certainly an important consideration. However, Justice O'Connor's reasoning unfortunately de-emphasizes the importance of individual rights and assumes that states *must* combine the determination of probable cause with existing pretrial procedures in order to avoid any increase in administrative costs. Certainly, if the Constitution so compels, a separate procedure must be established, as the fourth amendment was designed to protect persons against unlawful arrest and unjustified detention.

The *Gerstein* Court recognized the possible danger to an individual's liberty resulting from delay of the probable cause determination as an important factor in deciding that adversarial safeguards are unnecessary:

Criminal justice is already overburdened by the volume of cases and the complexities of our system. The processing of misde-

26. *Williams v. Ward*, 845 F.2d 374 (2d Cir. 1988), cert. denied, 109 S. Ct. 818 (1989) (because New York afforded adversarial protection, 72 hours was permissible maximum length of detention); *Bernard v. City of Palo Alto*, 699 F.2d 1023, 1025 (9th Cir. 1983) (because no more than 8 to 10 hours was required to complete the administrative steps incident to arrest, 24 hours was maximum detention without presentment); *Sanders v. City of Houston*, 543 F. Supp. 694, 700 (S.D. Tex. 1982), aff'd without opinion, 741 F.2d 1379 (5th Cir. 1984) (24 hours was all that was necessary to complete the "proper" administrative steps); *Lively v. Cullinane*, 451 F. Supp. 1000, 1005 (D.D.C. 1978) (those steps necessitated by "substantial administrative need" only required 1 1/2 hours); *Dommer v. Hatcher*, 427 F. Supp. 1040 (N.D. Ind. 1975), rev'd in part, 653 F.2d 289 (7th Cir. 1981) (24 hours is maximum time of detention unless Sunday or holiday intervenes, in which case 48 hours is the maximum. The court did not make a determination as to the length of time necessary to complete the administrative steps.). See also *Gramenos v. Jew Companies, Inc.*, 797 F.2d 432, 437 (7th Cir. 1986) (an exact time limit was not decided, but a four hour delay after completion of administrative steps "requires explanation").

27. 111 S. Ct at 1670.

meanors, in particular, and the early stages of prosecution generally are marked by *delays that seriously affect the quality of justice*. A constitutional doctrine requiring adversary hearings for all persons detained pending trial could exacerbate the problem of pretrial delay.²⁸

Thus, individual rights which mandate the need for immediacy in determination, not administrative costs, were the reasons the *Gerstein* Court held that the determination of probable cause must be "prompt."

Additionally, Justice O'Connor repeatedly emphasized the fact that the Court, in *Gerstein*, allowed some flexibility.²⁹ Thus, the determination of probable cause could be combined with previously established pretrial procedures. The Court in *Gerstein* "recognize[d] the desirability of flexibility and experimentation by the States."³⁰ However, the Court did not compel such combinations. Again, the *Gerstein* Court reasoned that the combination of the probable cause determination with existing procedures might ease the burden on the criminal justice system. Given the grave importance of individual rights recognized by the *Gerstein* Court, it is hard to imagine that the Court in any way meant for this flexibility to justify any delay between arrest and determination of probable cause. When further considering the fact that the Court did not require adversarial safeguards for fear that to do so would further delay the system, it seems clear that the *Gerstein* Court intended that there be "flexibility" in the nature of the *hearing*, not in the *timing*.

Therefore, Justice O'Connor's justification of a time limit greater than that set by the lower courts based upon increased administrative costs, flexibility, and combining procedures is clearly inconsistent with the principal basis of *Gerstein*, individual liberty.

Justice O'Connor did not interpret *Gerstein* to require the determination of probable cause to be made immediately upon the completion of the steps incident to arrest. She found such a requirement to be inflexible.³¹ The Constitution, as she saw it, did not require a "rigid procedural framework."³²

The *Gerstein* Court clearly did not state that the Constitution compels an immediate determination of probable cause after the arrest. However, the Court did state that, "a policeman's on-the-scene assessment of

28. *Gerstein v. Pugh*, 420 U.S. 103, 122, 95 S. Ct. 854, 867 n.23 (emphasis added).

29. For example, Justice O'Connor stated that "[g]iven that *Gerstein* permits jurisdictions to incorporate probable cause determinations into other pretrial procedures, some delays are inevitable." *Riverside*, 111 S. Ct. at 1669.

30. *Gerstein*, 420 U.S. at 123, 95 S. Ct. at 868.

31. It is important to reiterate that the Court was split, 5-4, on whether or not *Gerstein* meant that the determination of probable cause must be made *immediately* upon the completion of the steps incident to arrest.

32. *Riverside*, 111 S. Ct. at 1668.

probable cause provides legal justification for arresting a person suspected of crime, and for a brief period of detention to take the administrative steps incident to arrest."³³ All but one federal court and four out of the nine Justices on the Court in *Riverside* saw *Gerstein* as requiring that the determination of probable cause be made immediately upon the completion of the steps incident to arrest. When combined with the importance *Gerstein* placed on timing, it seems clear that the *Gerstein* Court meant for the determination of probable cause for a non-warrant arrest to be made immediately following completion of the steps incident to arrest.

Once more, it is necessary to reiterate that with one exception no federal court has held that twenty-four hours is inadequate for the completion of the steps incident to arrest.³⁴ These courts, even Justice O'Connor admitted, are certainly in a better position to make such an inquiry and decision than is the more remote U.S. Supreme Court.³⁵

Because authority exists for the proposition that the *Gerstein* Court intended for the determination of probable cause to occur immediately upon completion of the steps incident to arrest and because an individual in a criminal situation deserves the utmost constitutional protection, it seems logical that twenty-four hours be the maximum period of detention before a determination of probable cause is made.³⁶

V. RECOMMENDATIONS

A. Generally

Bright line tests are generally inflexible. As flexibility in U.S. Supreme Court decisions increases, however, states may often dilute individual rights by following the "floor" of rights established by the decision. Unfortunately, the most efficient way to ensure the constitutionally demanded protection of individual liberty in the case of pretrial detention is with a bright line test regarding the timing of the determination of probable cause.

The gravity of harm that could potentially be caused to the arrested individual is great. An individual's family relations, job, and reputation could be severely and unjustly damaged by a prolonged detention.³⁷ Therefore, the bright line should be drawn so as to allow the least

33. *Gerstein*, 420 U.S. at 113-14, 95 S. Ct. at 863 (emphasis added).

34. See *supra* note 26.

35. *Riverside*, 111 S. Ct. at 1670.

36. Incidentally, a 24 hour time limit is an effective deterrent which will prevent police officers from further investigating a crime after the suspect is in custody in an effort to establish probable cause where it did not otherwise exist at the time of arrest.

37. *Gerstein* at 114, 95 S. Ct. at 863.

possible delay before the determination of probable cause is made. It is no secret that our criminal justice system is extremely overburdened. Any increase in that burden is an important consideration. However, the fourth amendment is designed to protect individual rights, and every effort should be made to maintain those protections. We cannot choose to ignore the Constitution simply because it is costly to comply with it in this instance.

Fortunately, there is a solution which would not be detrimental to any of the factors articulated in the three opinions of *Riverside*, or in *Gerstein*. This solution is arguably more consistent with *Gerstein* than is *Riverside's* majority opinion: states should adopt warrant-like procedures for the determination of probable cause in a non-warrant arrest. That is, procedures similar to those for obtaining a warrant could be followed *after* the arrest is made.

First, a warrant-like procedure does not require the defendant's presence. To require the defendant's presence would add practical difficulties, including problems with security, which would increase administrative costs and delay the timing of the probable cause determination. This is consistent with *Gerstein*, which did not require adversarial safeguards.³⁸

Secondly, the *Gerstein* Court said "[t]he [probable cause] standard is the same as that for arrest."³⁹ Warrant procedures are the standard for arrest. Furthermore, warrant procedures would not greatly burden the criminal justice system financially, nor would they create delays in timing. Under Louisiana law, which, in this situation, is similar to that of most other states, a warrant only requires that "[t]he person making the complaint execute[] an affidavit specifying, to his best knowledge and belief, the nature, date and place of the offense . . ." and present the affidavit to any magistrate for his separate determination of the existence of probable cause.⁴⁰

If a state has an established procedure that takes place within twenty-four hours, then the probable cause determination may be made in combination with that procedure. Alternatively, however, states should implement a new, warrant-like procedure to determine probable cause for a non-warrant arrest within twenty-four hours of arrest, including weekends and holidays.

B. In Louisiana

Interestingly enough, Louisiana's Code of Criminal Procedure does not include an article which addresses the determination of probable

38. *Id.* at 120, 95 S. Ct. at 866.

39. *Id.*

40. La. Code Crim. Proc. art. 202(1). See *infra* note 42.

cause for a non-warrant arrest. Evidently, the procedure for such determination has been left to individual jurisdictions despite the *Gerstein* decision in 1975 which made a probable cause determination in a warrantless arrest a constitutionally mandated protection. Now, after *Riverside's* imposition of time limits, the constitutional protections afforded individuals are even greater. Without any code article to address these issues, Louisiana and its individual jurisdictions leave themselves open to litigation.⁴¹

Under current Louisiana law, the earliest judicial proceeding following arrest is to occur within seventy-two hours, excluding weekends and holidays. Louisiana Code of Criminal Procedure article 230.1 governs the maximum time for appearance of the defendant before a judge for the purposes of appointing counsel and setting bail. As mentioned previously, because presentment of the defendant adds practical difficulties, it would be administratively infeasible to amend this article so as to require appointment of counsel and setting of bail to occur within twenty-four hours of arrest. Therefore, Louisiana must adopt a new warrant-like procedure to occur within twenty-four hours of a warrantless arrest. Louisiana Code of Criminal Procedure article 202 governs pre-arrest warrant procedure. A post-arrest procedure similar to this article should be adopted to occur within twenty-four hours of arrest, excluding weekends and holidays.⁴²

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41. Even if the legislature were not to adopt the conclusions of this casenote, an amendment to the Louisiana Code of Criminal Procedure is necessary, in light of *Riverside*, to avoid lawsuits by creating uniformity amongst the various local jurisdictions.

42. La. Code Crim. Proc. art. 202 reads as follows:

A warrant of arrest may be issued by any magistrate, and, except where a summons is issued under article 209, shall be issued when:

(1) The person making the complaint executes an affidavit specifying, to his best knowledge and belief, the nature, date, and place of the offense, and the name and surname of the offender if known, and of the person injured if there be any; and

(2) The magistrate has probable cause to believe that an offense was committed and that the person against whom the complaint was made committed it.

(3) A justice of the peace shall not have the authority to issue a warrant for the arrest of a peace officer for acts performed while in the course and scope of his official duties.

When complaint is made before a magistrate of the commission of an offense in another parish, the magistrate shall also immediately notify the district attorney of the parish in which the offense is alleged to have been committed.

