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System Impact In *Gerstein v. Pugh*

WILLIAM A. McKINSTRY*

Tinkering by federal courts with a particular step in state criminal procedure may cause a substantial impact on the whole of the state criminal justice system. In theory, a federal court must consider both the accused's interest in revising the procedure he is subject to and the state's interest in maintaining its institutions. In practice, all too often, a court's intense focus on the accused's interest at one stage in the criminal proceeding has blinded it to the governmental interest in the entire criminal justice system. The United States Supreme Court in the October 1974 term confronted a case wherein the lower court, in complete disregard for the government's concerns, had ordered that the accused be given procedural relief previously not provided by state law.2

The court of appeals' decision in *Pugh v. Rainwater* generated speculation that the preliminary hearing, with the panoply of rights found in adversary proceedings, would be imposed upon the criminal justice system of those states which did not otherwise require it.3

In Comment, 60 Va. L. Rev. 540, 550 (1974), the author concluded that the "Rainwater court's emphasis of the preliminary hearing's role is a significant step in the direction of fairer treatment of those accused of crime."

It was predicted in Griffin, The Preliminary Hearing vs. the Grand Jury Indictment: "Wasteful Nonsense of Criminal Jurisprudence" Revisited, 26 U. Fla. L. Rev. 825, 842 (1974): [T]he United States Supreme Court will uphold the decision of the Fifth Circuit Court of Appeals in *Pugh v. Rainwater* [483 F.2d 778 (5th Cir. 1973)] and require that any citizen charged by information with a crime be afforded a prompt judicial review of the charges against him. Such a holding will affect the criminal procedure of many states by reducing the procedural framework to the simple requirement that every accused be given either a prompt preliminary hearing or grand jury indictment.

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3. 483 F.2d 778 (5th Cir. 1973).
4. See, e.g., Comment, 25 Vand. L. Rev. 434, 445 (1972), where the author predicted:
   The preliminary hearing is likely to become more and more important, even to the point at which it will be recognized as an absolute right of all criminal defendants, regardless of how they are arrested, charged, or proceeded against. The instant case [*Pugh v. Rainwater*, 332 F. Supp. 1107 (S.D.Fla.1971)] is an important step in that direction.

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The Supreme Court, however, disagreed and merely ordered a non-adversary probable cause determination. The prediction of the commentators regarding the outcome of *Pugh* failed in part because they neglected to consider, as did the lower federal court, the impact of a preliminary hearing requirement on the criminal justice system. The Supreme Court fashioned relief which accommodates both the interest of the detainee and the interest of the responsible criminal justice system. This, then, is the topic of this article: how the concern for the impact a preliminary hearing would have on the criminal justice system contributed to the Supreme Court's decision in *Gerstein v. Pugh.*

The impact of the imposition of preliminary hearing procedures on those criminal justice systems, which do not otherwise provide for it, is measured in the elementary level, in terms of the cost of accommodation; however, in the past the governmental interest in saving costs has been recognized, but accorded little weight. But there are other aspects to that portion of the formula termed governmental interest. Since a court reviewing a state criminal procedure for due process purposes "must take into consideration the entire course of proceeding in the courts of the state," factors in addition to cost analysis must be weighed. Other factors include projected change in the caseload to be carried by the system; expansion or attention of personal and physical facilities an attendant delays in executing such changes; maintenance or modification of the functions performed by various agencies within the system; and any change in the basic nature of criminal law practice in the particular system.

This article, after a preliminary review of the history of *Gerstein v. Pugh,* discusses that decision in terms of its impact on the criminal justice system, isolates the Court's response to pertinent argu-

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See also Note, *A Constitutional Right To Preliminary Hearings For all Pretrial Detainees,* 48 S. Cal. L. Rev. 158, 183, where the author, after disposing of the major objection to requiring preliminary hearings prior to binding an accused over for trial—the incremental expenditure occasioned thereby—concludes:

In the context of pretrial detention, a reasonably reliable method of truth ascertainment requires that probable cause to hold for trial be determined by a neutral decisionmaker and that the accused have the right to a personal evidentiary hearing to challenge the existence of probable cause. Since the preliminary hearing is the only procedure presently utilized which complies with these due process requirements, it should be considered a constitutionally required step in all pretrial criminal proceedings which subject the accused to pretrial detention.

ments, and in conclusion, notes the reaction in some states to the Court’s response.

THE CASE

In March of 1971, plaintiffs were arrested in Florida for felonies and misdemeanors. They were held in custody pending trial on a state’s attorney’s information which was neither preceded nor followed by a preliminary hearing before a magistrate. Later that month, the Public Defender for Dade County, Florida, filed in the United States District Court for the Southern District of Florida, a class action suit on behalf of plaintiffs against the state’s attorney, Richard E. Gerstein, and others. Plaintiffs contended that they had been deprived of their constitutional right to a preliminary hearing before a judicial officer to determine whether there was probable cause to believe that they had committed the offenses with which they were charged. In May of 1971, the district court took defendant’s motion for summary judgment under advisement for the purpose of permitting the Florida legislature to consider legislation introduced by the Dade County Bar Association which would have granted plaintiffs’ relief. The legislature adjourned without enacting the proposed statute. “When this [deferment to the legislature] proved fruitless,” the court observed “the time of restraint is past and the Court has no alternative except to act.” The district court initially considered whether the Federal Anti-Injunction Statute or the ruling in Younger v. Harris prevented

8. Pugh v. Rainwater, 332 F. Supp. 1107, 1109 (S.D. Fla. 1971). Count II alleged that plaintiffs had been denied their constitutionally protected rights to equal protection of the law in that in certain instances the police would proceed through the offices of the justices of the peace instead of going to the offices of the state’s attorney. The justice of the peace would conduct a preliminary hearing whereas the state’s attorney would not. It was contended that the unfettered discretion of the police in deciding whether to file through the justice of the peace or through the state’s attorney resulted in arbitrary and unreasonable creation of two classes of arrested persons, those who were afforded a preliminary hearing and those who were not. The district court granted relief as to count I, and thus considered it unnecessary to determine whether the system was invalid for failure to afford equal protection of the law. In count III, plaintiffs contended that the setting of a monetary bail bond as a condition for release of persons financially unable to post bond discriminated against poor persons, thereby violating their right of equal protection of the law. The district court found that, in setting bond, the severity of the crime, along with the accused’s ties to the community, past criminal record, and financial resources were all considered. There was no allegation that any bond in excess of that necessary to ensure trial appearance was set. Since plaintiffs’ confinement was not the result of a classification based solely upon wealth, the court concluded that they had not been deprived of their right to equal protection of the law. Id. at 1115.

9. 332 F.Supp. at 1109.

10. Id.

11. 28 U.S.C. § 2283 (1970). This statute provides:
it from acting in this case. The court reasoned that plaintiffs re-
quested only a declaration of procedural rights and an injunction
from the continued denial of those rights, so that a district court was
empowered to act. The court concluded

that under the Fourth and Fourteenth Amendments, arrested per-
sons, whether or not released on bond, have the constitutional right
to a judicial hearing on the question of probable cause.\textsuperscript{13}

The district court then certified the case as a valid class action and
ordered that plaintiffs "shall immediately be given a preliminary
hearing to determine probable cause for their arrest by a commit-
ting magistrate unless their cases have been otherwise concluded."\textsuperscript{14}
The district court further ordered defendants to submit within 60
days a plan providing for timely preliminary hearings before a judi-
cial officer in all cases where the accused is prosecuted upon direct
information.\textsuperscript{15}

At this point, the effect intended by the district court upon the
criminal justice system in Dade County, Florida should be noted.
First, the court found that since it was not enjoining a particular
prosecution it was empowered to rule in the matter. Secondly, the
court determined to act after the legislature of the State of Florida
had failed to do so. Thirdly, the district court ordered that the
police, prosecutors and judges of the county's inferior courts provide
accused persons with a timely adversary hearing to determine
whether the prosecution should continue. The degree to which the
federal court decided to restructure the criminal justice system was
well illustrated by the detailed plan it subsequently adopted.

On January 25, 1972, the district court ordered that its modifica-
tion of a plan submitted by defendants be implemented within three
months. The plan provided for a first appearance hearing within
three hours after arrest. At that appearance, the accused was to be
advised by a magistrate of the charges against him, and of his con-
stitutional rights. A preliminary hearing date would then be set
within four days thereof. At the preliminary hearing the accused
would be afforded the right to compel attendance of witnesses

\textsuperscript{12} A court of the United States may not grant an injunction to stay proceedings in a
State court except as expressly authorized by Act of Congress, or where necessary
in aid of its jurisdiction, or to protect or effectuate its judgments.
\textsuperscript{13} 401 U.S. 37 (1971). That decision essentially prohibited federal court injunctions of
pending state criminal proceedings except under extraordinary circumstances where the dan-
ger of irreparable injury is great and immediate.
\textsuperscript{14} 332 F.Supp. at 1115.
\textsuperscript{15} Id.
within the state, to confront and cross-examine witnesses against him, to exclude witnesses during the testimony of other witnesses, to separate witnesses until all are examined, to present a defense, and to secure a transcript of the proceedings. Should the prosecution fail to provide the accused with a timely preliminary hearing, he would be entitled to have the charges withdrawn.\textsuperscript{18}

Implementation of this modified "Purdy Plan" was stayed by the Fifth Circuit Court of Appeals on the 31st of March, 1972.\textsuperscript{17} Nevertheless, on April 15, 1972, the Dade County magistrate system was created by administrative order of the Chief Judge of the Eleventh Judicial Circuit of Florida. The fifth circuit heard oral argument on the appeal from the district court on October 18, 1972. Thereafter, the case was remanded to the district court for specific findings on the constitutional deficiencies of the Dade County magistrate system. Prior to that consideration, however, the procedural format of the criminal justice system shifted again. On December 6, 1972, the Florida Supreme Court issued its amended Rules of Criminal Procedure, effective as of February 1, 1973.

Based on 16 days of experience under the new rules, the district court found that these amended rules were defective in four aspects.\textsuperscript{18} First, the new rules did not afford an accused a preliminary hearing if he was charged on an information filed by the State's Attorney. The court held that:

This practice cannot be reconciled with the constitutional requirements of the due process clause of the fourteenth amendment and the fourth amendment. The continuation of the practice is in clear conflict with the plan previously entered by the court and with the original decision of this court.\textsuperscript{19}

Second, the new rules authorized preliminary hearings only for those charged with felonies. Although the modified "Purdy Plan" did not specifically provide for misdemeanors, it was implicit that all persons charged with crimes, be they misdemeanors or felonies, were to be accorded preliminary hearings. Since misdemeanants held in custody suffer the same loss of liberty as felons, the district court concluded that the "present practice deprives misdemeanants of equal protection of the law, in addition to due process and fourth amendment guarantees."\textsuperscript{20} Third, the rules established time re-

\textsuperscript{17} Pugh v. Rainwater, 355 F.Supp. 1286, 1287 (S.D.Fla. 1973).
\textsuperscript{18} Id. at 1287-88.
\textsuperscript{19} Id. at 1289.
\textsuperscript{20} Id. at 1291.
quirements for preliminary hearings dependent on the severity of the possible punishment. In capital offenses the preliminary hearing would be held within 7 days of the first appearance, otherwise, the preliminary hearing would be held within 72 hours of defendant's first appearance. The district court indicated that

the present practice of not setting the same time requirement for all persons who will be proceeded against by information violates the fourth and fourteenth amendments.21

Fourth, the amended rules did not provide for sanctions as did the district court's plan:

The failure to provide sanctions is not, of itself, a constitutional infirmity. It is the failure to accord probable cause hearings which offends the Constitution. Thus, the lack of sanctions is invalid only insofar as the failure to provide sanctions results in a system which tolerates the denial of, or overruling of, a preliminary hearing. . . . Therefore the court finds that the failure of the present practice to provide a remedy for the denial of a preliminary hearing or the overruling of a preliminary hearing by the use of the information process, insofar as that failure tolerates and condones such denials or overrulings, results in a violation of the fourth and fourteenth amendments.22

The Fifth Circuit Court of Appeals affirmed23 the district court regarding the primary issue: whether the fourth and fourteenth amendments require that a person arrested and held for trial be afforded a hearing before a judicial officer to determine probable cause even if an information has been filed against him by a state's attorney. They found plaintiffs' claim not barred by federal/state comity, and distinguished actions which sought declaratory or injunctive relief interfering with pending or future state prosecutions from actions which merely presented questions that would affect state procedures for handling criminal cases. Since the relief sought by plaintiffs "was not against any state prosecution as such, but only against the state's practice" no necessity was found to abstain from considering the matter.24 The court next addressed the central issue and affirmed the judgment of the district court "requiring the State of Florida to immediately give plaintiffs a preliminary hearing to determine probable cause for their arrests unless their cases have

21. Id. at 1292.
22. Id. at 1293.
23. Pugh v. Rainwater, 483 F.2d 778 (5th Cir. 1973).
24. Id. at 781-83.
25. Id. at 788.
Directing its attention to the particular conflicts between the amended rules and the modified "Purdy Plan," the court vacated that portion of the "Purdy Plan" which set a four-day maximum period between first appearances and preliminary hearing, in contrast to the six-day period provided for in the amended rules, on the ground that such a finding was unnecessary to the disposition of the case. The court further vacated that portion of the district court's order which provided for sanctions. However, the court did agree that since Florida had not shown that it required more time to handle the mechanics of a preliminary hearing where life or capital offenses are involved, a time disparity was inconsistent with equal protection. Likewise violative of equal protection was the exclusion of the right to a preliminary hearing for misdemeanants.

Thus, the lower courts resolved the central issue of the case in favor of plaintiff and ordered a restructuring of the Florida criminal justice system to provide for adversary preliminary hearings in virtually all criminal cases. The United States Supreme Court, however, disagreed and refrained from granting plaintiff similar relief and merely required a non-adversary probable cause determination. The lower courts accorded little weight to the impact of their decision on the state criminal justice system. A review of the arguments made to the Supreme Court by various amici regarding this aspect of governmental interest will reveal, in part, the reason the Court selected this less drastic alternative solution.

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26. Id.
27. Id. at 788-90.

In September of 1973, the state's attorney petitioned the Supreme Court for a writ of certiorari on the ground that a preliminary hearing was not mandated by the fourth or fourteenth amendments once an information had been filed against a defendant by the state's attorney. Plaintiffs below filed a cross-petition for certiorari because the court of appeals did not order a preliminary hearing immediately after arrest. The Supreme Court granted the state's attorney's petition, 414 U.S. 1062 (1973), but denied that of the plaintiffs, 42 U.S.L.W. 3549-50 (April 2, 1974). Thereafter, upon filing of a brief by petitioner and respondent and by the Dade County Bar Association and the State of Florida as amicus, the matter was argued to the Supreme Court of the 25th of March, 1974. 42 U.S.L.W. 3549-50 (April 2, 1974). The matter was set for re-argument and, on the 28th of May, 1974, the United States was invited to file an amicus brief as well as all fifty states. Gerstein v. Pugh, 417 U.S. 905 (1974).

The States of Washington, California, Utah, Louisiana and New Jersey, Texas, Georgia, Massachusetts and Vermont filed briefs of amicus primarily asserting the arguments of petitioner. The National Legal Aid and Defenders Association filed an amicus on behalf of the respondents. The United States also accepted the invitation to file a brief of amicus. Respondents filed a supplemental brief in response to the amicus briefs for the states and a second supplemental brief for respondents in response to the brief of amicus of the United States. The matter was reargued on October 21, 1974, 43 U.S.L.W. 3245-46 (1974), and decided on February 18, 1975.

THE ARGUMENT

Through the Gerstein tapestry runs a common thread concerning the impact of the decision upon the criminal justice system. Weighing plaintiffs’ loss of liberty against the countervailing interests of the state in avoiding the burden of preliminary hearings, the district court declared:

Although the state may incur additional expense in expanding its existing committing system to include hearings for direct Information cases, this expense will be more than offset by savings in jail and trial costs regarding those persons heretofore jailed and/or tried without probable cause. Moreover, these financial considerations are so grossly overbalanced by the prolonged loss of freedom by innocent persons that further comment is unnecessary.\(^9\)

However, three years later, the Supreme Court, in the same case, observed:

Criminal justice is already overburdened by the volume of cases and the complexities of our system. The processing of misdemeanors, in particular, and the early stages of prosecution generally are marked by the delays that can seriously affect the quality of justice. A constitutional doctrine requiring adversary hearings for all persons detained pending trial could exacerbate the problems of pretrial delay.\(^3\)

As the case traversed the federal judiciary many facets of system impact were argued. First, concern for reduction of the caseload within the system was manifested. The district court noted that between January 1, 1970, and March 31, 1971, the state’s attorney declined to file charges in the cases of 1,165 persons arrested for criminal behavior.\(^2\) The Court concluded:

Obviously, a judicial officer considering probable cause on a preliminary hearing would have promptly disposed of all these cases with a tremendous saving of human misery (to all those who had been arrested on insufficient evidence) and of tax dollars (to the average citizen who is paying for the cost of a vastly overcrowded jail facility in Dade County, Florida).\(^2\)

The court of appeals opined that it did “not lightly dismiss the

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32. The court’s conclusion was a non sequitur because the court confused probable cause to detain with probable cause to hold to answer for trial, i.e., a prima facie case, with sufficiency of the evidence to charge and convict a criminal defendant.
detention of a minimum of 1,165 defendants against whom charges were subsequently dropped.\textsuperscript{33} The district court further considered the caseload aspect of system impact when it dismissed the prediction that

- if the five Dade County judges assigned as magistrates were to provide preliminary hearings for misdemeanants as well as felons their caseload might increase by as much as 30 to 35,000 cases a year, or approximately 3,000 a month.\textsuperscript{34}

The district court concluded, however,

- that the increase in the magistrate's caseload from providing preliminary hearings to misdemeanants who face potential imprisonment will fall considerably short of [the] projection and, if substantial, will not be overly burdensome. The court concludes, moreover, that while more magistrates as well as courtroom facilities may be needed as a result of our order, and that costs may increase in the short run, it will not be a significant increase.\textsuperscript{35}

The court did derive comfort in its estimate that

- as a result of the magistrate system [existing apparently under the Florida Amended Rules of Criminal Procedure and not the modified “Purdy Plan”] felony caseloads have been reduced by 20 to 25 percent, with corresponding savings to the taxpayers of Dade County.\textsuperscript{36}

One is struck by the selective use of statistics by these courts.\textsuperscript{37}

\textsuperscript{33} Pugh v. Rainwater, 483 F.2d 778, 783 n.12 (5th Cir. 1973). The subsequent recitation of these statistics by the Fifth Circuit's is incomprehensible in view of the curious shifting factual basis of this case. These statistics were generated under the practice that existed when plaintiffs were arrested in March of 1971. See Gerstein v. Pugh 420 U.S. 103 (1975). On January 25, 1972, the district court ordered the modified “Purdy plan” to be implemented by defendants in 90 days. Pugh v. Rainwater, 336 F. Supp. 490, 493 (S.D. Fla. 1972). However, on March 31, 1972, the fifth circuit stayed this order. Then on April 15, 1972, Chief Judge Marshall C. Wisehart of the Eleventh Judicial Circuit of Florida independently created a committing magistrate system by administrative order. On October 24, 1972, the fifth circuit ordered the district court to make specific findings on the constitutional deficiency of the “present” practice. But before the Dade County Magistrate System could be reviewed, the Florida Supreme Court on December 6, 1972, issued its amended rules of criminal procedure. Thereafter, the “parties agreed and stipulated to the premise, in which the court concurs, that the mandated assessment of present practices must concern itself with the state procedures after February 1, 1973, under the Florida Rules of Criminal Procedure as now amended.” Pugh v. Rainwater, 355 F.Supp. at 1288 (emphasis added). Although the system to be reviewed shifted from that in effect on March of 1971 to the modified “Purdy Plan” to the Dade County magistrate system, to the Florida Rules of Criminal Procedure in effect as of February 1, 1973, the fifth circuit saw fit to cite the 1971 statistics in its review of the practice as of 1973.

\textsuperscript{34} Pugh v. Rainwater, 355 F.Supp. 1286, 1291 (S.D. Fla. 1973).

\textsuperscript{35} Id.

\textsuperscript{36} Id.

\textsuperscript{37} See note 33 supra.
When the United States Supreme Court granted certiorari in *Gerstein*, the criminal justice system to be affected by this decision expanded from that prevailing in Dade County, Florida, to systems of the 50 states and the federal system. The United States as amicus curiae argued that

in considering misdemeanor cases (four to five million annually in the state courts, ten thousand, in the federal courts and 6,500 in the superior courts of the District of Columbia), it is particularly appropriate to balance the supposed benefit to the accused from a preliminary hearing against the strain on the criminal justice system that will be imposed by diverting overburdened judges, court personnel, lawyers, and facilities from the task of speedily disposing of cases to trial.\(^\text{38}\)

The district court indicated a ready willingness to drastically affect the disposition of manpower and facilities in the Dade County criminal justice system by its modified “Purdy Plan,” rejecting system impact as a real consideration:

Although we acknowledge that a state has a proper interest in maintaining its fiscal integrity and may legitimately attempt to limit its expenditures, it is well settled that a state may not accomplish such a purpose by invidious distinctions between classes of its citizens [felons and misdemeanants]. In the case before us, defendants must do more than show that denying due process to misdemeanants will save money. In the absence of other suggestions of compelling interests, we must conclude that present practice deprives misdemeanants of equal protection of the law, in addition to due process and fourth amendment guarantees.\(^\text{39}\)

However, the Solicitor General took the opposite tack and observed that:

Our analysis of the requirements of due process necessarily considers the cost to the criminal justice system of requiring preliminary hearings with live witnesses in every case. Such a requirement will divert already overburdened judges, prosecutors, defense lawyers, court personnel and court facilities from the task of speedily disposing of cases. Moreover, the very real problem of securing the cooperation of lay witnesses will be exacerbated by procedures requiring them to spend additional time waiting to testify and actually testifying in court; and law enforcement officers called to

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court for such preliminary matters, will be taken away from the active prevention and investigation of crime.\textsuperscript{40}

Another facet of the criminal justice system potentially affected by \textit{Gerstein} was the function of certain of the participants in the system. Although the district court apparently did not intend to infringe upon the charging function of the state's attorney, the timing requirements and sanctions imposed by the modified "Purdy Plan" tended to deny the state's attorney free reign to exercise the prerogatives of his office. The first paragraph of the modified "Purdy Plan" implied that the election to proceed by information or indictment would remain with the state's attorney. However, the requirement that a preliminary hearing be conducted not more than four days after the first appearance, which occurred within 24 hours of arrest, sharply circumscribed the time in which the state's attorney had to charge by indictment.\textsuperscript{41} The brief of the State of Washington as amicus curiae called to the Supreme Court's attention this problem:

The preliminary hearing schedule adopted by the district court and court of appeals below places tight time restrictions on filing the information and preparing for the hearing. One effect, we submit, is to substantially reduce the prosecutor's role in the decision to charge. He is more likely to file an information on the appearance that the defendant has committed a crime, put on the necessary quantum of evidence to get the magistrate to bind over the case, and then, at greater leisure and upon fuller investigation, determine whether he really wants to prosecute. If he does not file immediately, he may lose the opportunity to do so later if the putative defendant is no longer available. The effect arguably is to have persons charged and confined following the hearing who would otherwise not have been charged. But on the other hand, a less aggressive prosecutor would have the tendency to act more conservatively and avoid charging suspects when he does not believe from the evidence initially available that he will be able ultimately to get a conviction.\textsuperscript{42}

Plaintiff's first count prayed for a preliminary hearing to determine probable cause to detain the plaintiff. Yet the probable cause hearing designed by the district court went beyond probable cause to detain to include probable cause to hold to answer for the charge.

\textsuperscript{40} Brief for the United States as Amicus Curiae at 19, Gerstein v. Pugh, 420 U.S. 103 (1975).
\textsuperscript{42} Brief for the State of Washington as Amicus Curiae at 20-21, Gerstein v. Pugh, 420 U.S. 103 (1975).
The modified "Purdy Plan" provided that if a defendant was not afforded preliminary hearing within the time period set forth,

then all charges shall be withdrawn and the defendant, if incarcerated, shall immediately be released. The State shall be permitted to refile a charge so withdrawn, however, in the event the charge is twice withdrawn pursuant to this provision, the defendant shall not again be held to answer to that charge except upon an indictment of the Grand Jury returned within thirty (30) days of the date of the second withdrawal. 44

Also, if the magistrate at a preliminary hearing discharges the defendant, he

shall not be required to answer to a subsequent charge for the same offense(s) except upon an indictment from the Grand Jury which shall have been returned within thirty (30) days of the defendant's discharge. 44

Fortunately, these overzealous sanctions imposed by the court which struck at the charging function of the state's attorney were eliminated by the court of appeals: "We will not presume that such onerous sanctions are necessary to insure compliance with the law of this circuit." 45

The Solicitor General voiced concern for the attack on the charging function implicit in the decisions below, arguing that the charging decision is an executive function that is not amenable or subject to judicial review.

Is the result a release on bail or a dismissal of the charges? If the result is release on bail, then the bail hearing is adequate for the purposes of determining probable cause to hold the accused in custody. On the other hand, if the result is the dismissal of the charges, then the result is anomalous: What of the persons who have already been released from bail; do they get the review of probable cause? 46

The government concluded that "if the fifth circuit is upheld then the whole system of information in the charging responsibility falls by the wayside." 47

The responsibility of the prosecutor to charge crimes was not the only function placed in jeopardy. The decision below tended to shift

44. Id.
45. Pugh v. Rainwater, 483 F.2d 778, 790 (5th Cir. 1973).
46. 43 U.S.L.W. 3245-46 (Oct. 29, 1974).
47. Id. at 3246.
the pretrial responsibilities from a court of general trial jurisdiction to one of limited jurisdiction. The State of Florida questioned the propriety of this shift, distinguishing the functions in the Florida criminal justice system circuit courts, which are courts of general jurisdiction, and county courts, lesser tribunals presided over by officials akin to magistrates whose jurisdiction is limited to misdemeanors, and concluding that:

By ruling as they did in the decision below, the Court of Appeals purported to vest the several magistrates (county judges) in Florida with jurisdiction to review an accused's custody ostensibly on the theory of a preliminary hearing. The net effect of this is to permit (by dint of an impossible judicial fiat) Florida's lowest court to override the authority of a Florida circuit court, even to the point of ordering the release of an accused theretofore controlled only by the circuit court or by other courts above it mentioned previously. The Florida Supreme Court has never vested magistrates with that kind of authority—they do not now have it—and they cannot be given it, however desirable that conclusion may appear to the Court of Appeals below.48

Finally, the decision's impact on the practice of criminal law in each jurisdiction was debated. New Jersey, Texas and Vermont each summarized their practice and argued that their procedures should not be altered.49 Louisiana asked that, should the Supreme Court affirm the lower court, application of the decree be applied prospectively only.50 In support of its argument that an adversary hearing ought not be constitutionally required, Washington presented the Supreme Court with a realistic view of criminal practice vis-a-vis preliminary hearings, which apparently made a substantial impression on the Supreme Court.51 The crux of Washington's argument was that:

49. Brief for the State of New Jersey as Amicus Curiae at 4-10; Brief for the State of Texas as Amicus Curiae at 3-11; Memorandum of the Attorney General of the State of Vermont as Amicus Curiae at 1-10, Gerstein v. Pugh, 420 U.S. 103 (1975).
51. Washington based its argument on a study, F. MILLER, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME, which is cited by the Supreme Court in that portion of the opinion which rejects the constitutional necessity for an adversary hearing. Gerstein v. Pugh, 420 U.S. at 622. Substantial portions of the Washington Brief deserve note:

An analysis of the prosecutors' role in filing an information and of the effect and practice of preliminary hearings justifies a conclusion that there is no absolute
constitutional due process right to a preliminary hearing pursuant to the fourth and fourteenth amendments. The court, however, we believe, misapprehends the nature of the preliminary hearing and its value to obtain minimum standards of due process.

The preliminary hearing, perhaps ideally, is employed to protect the defendant from oppressive and false prosecutions and save both him and the public the expense and trauma of unnecessary trials. The reality, is a hearing more in the form of an ex parte proceeding with the defendant present.

There are apparently a number of reasons for this, such as the unavailability in some places of counsel for indigents at the preliminary hearing, the objective of each party to avoid revealing their case to the other side, and the tendency of magistrates to give a cursory review of the evidence and rely on the prosecutor to make the correct charging decision and on the trial court to finally sift the evidence. In addition, a preliminary hearing can be advantageous to the defense by setting the prosecution witnesses in their testimony, solidifying the allegiance of the prosecutor's witnesses, increasing adverse publicity, and preserving adverse witness testimony. Given the general real nature of preliminary hearings, it is appropriate to ask whether the preliminary hearing is a sufficiently useful evidence screening device as to make its availability a matter of constitutional imperative.

The typical approach by the prosecutor to a preliminary hearing is to put on as little evidence as he feels necessary to get a bind-over decision. Normally, this is accomplished through the testimony of one or two witnesses, usually the arresting officer and perhaps some sort of expert testimony. The prosecutor wants to give as little of his case of the defendant who in turn, even when represented by counsel, will seldom offer any rebuttal evidence preferring to save his ammunition for the jury. The result of this policy is that occasionally cases are dismissed or bound over when they should not be. This does not mean that the evidence available would actually be insufficient to provide probable cause to charge or that there is an affirmative defense, but simply that enough has not been offered. In addition, both deputy prosecutors and defense attorneys normally enter preliminary hearings having had too little time to investigate and prepare for useful adversary probing of the issues. Part of the reasons defendants make no serious effort to obtain a dismissal in those cases is the reliance on the thorough screening of the prosecutor prior to the preliminary examination to eliminate the weak case. If there is conscientious case screening by the prosecutor and indeed police officials, there is little need for further screening by a magistrate. The number of cases dismissed at preliminary hearings is quite low—probably an average dismissal rate of about two percent of all persons entitled to a preliminary hearing which would include those who waive the preliminary hearing. The workload borne by prosecutor's offices, particularly in our urban areas, encourages prosecutors to weed out weak cases and charge only in instances where probability of conviction is high. There are some indications the prosecutors are concerned about a good conviction rate. This factor, to the extent that it plays a part in the decision to prosecute, together with the desire to avoid conviction of the innocent and mitigate the harshness of the law by applying a measure of human tolerance to the rigid letter of the law, and the workload and limited time of manpower resources of prosecutor offices all tend to encourage early and critical screening of criminal allegations and to encourage the application of a standard to the charging decision based upon the probability of ultimate conviction rather than the less demanding standard of probable cause to believe that the defendant committed the crime.

Magistrates tend to apply one of three standards in deciding whether to bind over the defendant. They may see their functions solely as to test the sufficiency of the evidence to go to the jury. Or the judge may see his function as that of screening out unconvictable people, a standard normally adopted by the prosecutors to govern their own charging decisions. Finally, the magistrate may bind a defendant over if a prima facie case is indicated but advise dismissal if the defen-
In search for due process in a state's criminal procedure, the Supreme Court ought to look beyond the forms to the substance of process and . . . consider the whole course of the criminal proceedings and not merely a single step. . . . [T]o require as a matter of due process preliminary hearings in all cases where prosecution is by information, rather than improve the quality of justice, would create new frustrations and impediments to the timely adjudication of criminal matters. . . . The difficulty of defining due process in quantitative terms indicates the elusive quality of that element of judicial mechanism. Its essence is best approached when we have fairly balanced competing interests within the mechanism. The Court must weigh what is to be gained by requiring a preliminary hearing and the likelihood of gaining it against the cost of such a step.

The instant case presents a situation in which it can be seen that the quality of due process will be little advanced by sustaining the rulings of the courts below.52

The Supreme Court was, of course, presented with opinions and argument on factors other than the pragmatic element, as summarized above. The procedural problems, the implications of prior decisions of the Supreme Court and conflicting views of the requirements of the fourth amendment and the due process and equal protection clauses attracted the primary attention of the lower courts, the litigants and the amici. Yet, a review of the opinion of the Court reveals that it was the practical principal, i.e., concern

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for the impact of the decision on the criminal justice system, which probably shaped the resolution of the issue.

THE DECISION

Initially, the Supreme Court deftly eliminated any procedural barriers to a discussion of the merits and affirmed the district court’s holding that plaintiffs claim for relief was not barred by “the equitable restrictions on federal intervention in state prosecutions, . . .”53 Similarly, the Court brushed aside concern for the particular mode of federal relief sought, noting that “[b]ecause relief was neither asked nor ordered, the lawsuit did not come within the class of cases for which habeas corpus is the exclusive remedy.”54 Further, the Court engaged in mental gymnastics in order to cope with the shifting procedural basis of the decision below. While the original order did not enjoin a state statute or legislative rule of statewide application, the constitutionality of a state “statute” was drawn into question for the first time when the criminal rules were amended and considered on remand. The Court observed:

The District Court supplemental opinion can fairly be read as a declaratory judgment that the amended rules were unconstitutional; the injunctive decree was never amended to incorporate that holding and the opinion of the Court of Appeals is not inconsistent with the conclusion that the District Court did not enjoin enforcement of the statewide rule.55

Thus, a district court of three judges was not required.

Finally, the Court avoided the last hurdle of mootness (since the named respondents had been convicted) when it observed that “[t]he attorney representing the named respondents is a public defender, and we can safely assume that he has other clients with a continuing live interest in the case.”56

Determining the merits of the case, the Court found that an arrestee has a right to a probable cause determination prior to continued detention,57 and that the fourth amendment requires that this determination be made by a judicial officer.58 Moreover, the Court relieved governmental concern over the impact on the criminal justice system that an affirmation of the district court’s order would cause.

54. Id. at 107.
55. Id. at 109-10 n.10.
56. Id. at 111 n.11.
57. Id. at 111.
58. Id. at 117.
This relief was provided when the court found that the judicial determination of probable cause can be had "without an adversary hearing."\textsuperscript{59}

The nonadversary probable cause determination required by the Court approached an \textit{ex parte} determination by a magistrate issuing a search warrant or a warrant of arrest. The Court indicated that the determination may be based on hearsay and written testimony, and that counsel, confrontation or cross-examination were not required. Implicitly the Court also found that compulsory process and an opportunity to present a defense were not included in the proceeding. Finally, the Court indicated that the probability that defendant had committed the offense for which he was detained was all that was to be found at this nonadversary hearing.\textsuperscript{60}

The Court's resolution that fourth amendment requirements could be met in a nonadversary hearing appears to have been motivated in part by a concern for the impact upon the caseload burden of the criminal justice system that a full adversary hearing might have been imposed:

Criminal justice is already overburdened by the volume of cases and the complexities of our system. The processing of misdemeanors in particular, and the early stages of prosecution generally are marked by delays that can 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.\textsuperscript{61}

Certainly by declining to require another full procedural hearing, the Supreme Court reduced the impact that each individual case would impose on the criminal justice system. The impact of a few additional papers to be filed to show probable cause to detain and the time that a magistrate, already concerned with the case, must take to read those documents is less than that which might have been required.

Likewise, an immense investment of manpower and facilities was avoided by the Court's designation that the determination be nonadversary and observation that "the nature of the probable cause determination usually will be shaped to accord with a State's pretrial procedure viewed as a whole."\textsuperscript{62} In summary, the existing procedures of some states may satisfy the requirements of the fourth

\textsuperscript{59} Id. at 120.
\textsuperscript{60} Id. at 125.
\textsuperscript{61} Id. at 122 n.23.
\textsuperscript{62} Id. at 123.
amendment. Others may require only minor adjustment, such as acceleration of existing preliminary hearings.\textsuperscript{43} The Court, by precise definition of the issue, was careful not to effect any shift in the functions performed by various units within the criminal justice system. In its original opinion, the district court had articulated the issue as whether the arrestees have a right “to a preliminary hearing before a judicial officer to determine whether there is probable cause that they committed the offense with which they are charged.”\textsuperscript{44} The court ruled that “under the Fourth and Fourteenth Amendments, arrested persons, whether or not released on bond, have the constitutional right to a judicial hearing on the question of probable cause.”\textsuperscript{45} The district court’s loose definition and resolution of the issue confused the propriety of the detention with the propriety of the prosecution. The district court would have had the magistrate validate not only the police officers’ arrest, but the prosecutor’s decision to charge. The preliminary hearing designed by the district court would have committed “defendant to answer to the court having trial jurisdiction; otherwise the magistrate shall discharge the defendant.”\textsuperscript{46} In its third opinion, the district court compounded this confusion by declaring that the issue involved whether the plaintiffs ought to receive “an impartial judicial determination of probable cause for their detention,” yet addressing itself to sanctions for the “denial of, or overruling of, a preliminary hearing.”\textsuperscript{47} The court of appeals narrowed the issue to whether the fourth and fourteenth amendments required “an expeditious hearing before a judicial officer on the question of probable cause for arrest.”\textsuperscript{48} Finally, the Supreme Court stated the issue precisely: “whether a person arrested and held for trial under a prosecutor’s information is constitutionally entitled to a judicial determination of probable cause for pretrial restraint of liberty.”\textsuperscript{49} The Court thus removed from contention the sufficiency of evidence required to file an information and the existence of probable cause to hold an arrestee to answer for trial. Thus, from its very statement of the issues the Supreme Court clearly indicated that it did not intend to challenge the function of the state’s attorney in bringing the charge.

\textsuperscript{43} Id. at 124.
\textsuperscript{44} Pugh v. Rainwater, 332 F.Supp. 1107, 1109 (S.D. Fla. 1971).
\textsuperscript{45} Id. at 1115.
\textsuperscript{48} Pugh v. Rainwater, 483 F.2d 778, 779 (5th Cir. 1973).
\textsuperscript{49} Gerstein v. Pugh, 420 U.S. 103, 105 (1975).
The Supreme Court specifically did not "imply that the accused is entitled to judicial oversight or review of the decision to prosecute."70 Indeed, the Court opined that the prosecutor's "conscientious decision that the evidence warrants prosecution affords a measure of protection against unfounded detention."71 This safeguard distinguishes criminal prosecutions from parole revocations by correctional authorities.72 Manifestly, the increased professionalization of prosecutors throughout the nation justifies these observations by the Supreme Court.73 Additionally, the Court's requirement that the determination be timely, rather than immediately after arrest, tends to permit the prosecutor time to make a reasoned and deliberate decision on the propriety of charging those whom the police have arrested.

Finally, the Court cautiously fashioned its order to avoid alteration of the fundamental nature of criminal law practice. In providing for a post-arrest nonadversary hearing which was a mirror image of the pre-arrest determination for issuance of a search warrant or warrant for arrest, the Court took care not to reflect on the propriety of established pre-arrest procedures. The Court observed that a person arrested under warrant would have received a prior judicial determination of probable cause. Under Florida law, a warrant may be issued upon a sworn complaint that states facts showing that the suspect has committed a crime. The magistrate may also take testimony under oath to determine whether reasonable grounds exist to believe the complaint is true.74 Similarly, the Court also refrained from disturbing the practice of charging criminals by grand jury indictment.75 By fashioning post-arrest procedures which parallel procedures preceding arrest, impact to well-established criminal law procedures was diminished.

The degree to which the Court was successful in affording the incarcerated defendant judicial review of his continued detention without affecting a major impact on the states' criminal justice

70. Id. at 119.
71. Id. at 117.
72. Id. at 121-22 n.22.
73. See, e.g., National District Attorney's Association, The Prosecutor's Screening Function, Case Evaluation and Control.
75. The willingness to let a grand jury's judgment substitute for that of a neutral and detached magistrate is attributable to the grand jury's relationship to the courts and its historical role of protecting individuals from unjust prosecutions (citations omitted).

Id. at 117 n.19.
systems can be measured by reviewing the response of the states to Gerstein. The Supreme Courts of Florida and California have each addressed themselves to adopting their particular system to the requirements of Gerstein. In those responses may be found practical guidelines for other jurisdictions as they cope with the new fourth amendment mandates.

RESPONSE OF THE STATES

Florida

The Florida Supreme Court responded immediately by promulgating a new rule regarding preliminary hearings, providing that upon arrest, if a defendant either remains in custody, or shows that his conditions of release are a significant restraint on his freedom, there "shall" be a nonadversary probable cause determination by a magistrate. However, persons arrested on warrants or individuals who are out of custody and cannot show a significant restraint are not entitled to a nonadversary probable cause determination.

The magistrate will hear the probable cause determination within three days of defendant's arrest. That hearing shall occur either at defendant's first appearance (within 24 hours of his arrest) or should the proof be unavailable, within 72 hours of the defendant's arrest. If the probable cause determination is made at the first appearance, it is specifically designated as nonadversary.

In either case, at the first appearance or at the ex parte determination within 72 hours of arrest, the hearing is to be based upon either a sworn complaint, affidavit, deposition under oath, or recorded testimony under oath.

The probable cause determination must be made in writing and filed along with the evidence considered. If probable cause is found, defendant is held to answer to the charges. If no probable cause is found, or if the nonadversary probable cause determination is not

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78. FLA. R. CRIM. P. 3.131 a(2) (1975).
80. FLA. R. CRIM. P. 3.131a(1) (1975). At the first appearance, an accused is informed of the charge and given a copy of the complaint. The complaint is typically the initiating document. Prosecution is typically had on indictment or information. An indictment may be prosecuted on for any offense, but must be used for an offense involving the death penalty. An information may be used for prosecuting any offenses except those carrying the death penalty. However, county court prosecutions may be on informations, indictments or complaints. If the proof is not available, then a probable cause determination is made ex parte. Id.; FLA. R. CRIM. P. 3.131a(3), 3.140(a), 3.140(g) (1975).
made within appropriate time limitations, defendant is released outright. However, if an indictment or information is filed, defendant is released on the condition that he appear on such indictment or information.\textsuperscript{82} Note that contrary to the Supreme Court's opinion that an indictment conclusively determines the existence of probable cause, the defendant under the new rule is entitled to such a determination, even if the grand jury has acted.

If neither an information nor indictment is filed within 21 days after arrest, defendant becomes entitled to an adversary preliminary hearing on the felony charges,\textsuperscript{83} in which compulsory process, confrontation, cross-examination, opportunity to present a defense, transcripts, and written findings are made available to the accused.\textsuperscript{84} If probable cause is found at the adversary preliminary hearing, the accused is held to answer to the circuit court which has jurisdiction to try felony cases.\textsuperscript{85} If, however, no probable cause is found at the adversary preliminary hearing, defendant is released, unless an indictment or information is filed, in which case defendant is released on the condition that he appear on those accusatory pleadings. The finding of no probable cause does not bar the bringing of indictment or an information.\textsuperscript{86}

The new Florida preliminary hearing rule does not appear to substantially threaten an increase in caseload or require an adjustment of added manpower or facilities because, in effect, it utilizes existing magistrates and court time already committed to defendant's case, either at the first appearance or subsequently. Further, the nature of the nonadversary hearing prescribed does not admit of an expansion of the time to be devoted to cases. Of course, as the finding of the magistrate does not bar further prosecution, the function of the prosecutor is not threatened. Although the Florida Supreme Court elected to extend the right to a probable cause determination to those who are indicted, the charging decision of the grand jury is not interfered with because no sanction follows, except discharge. Accordingly, the previous practice appears to be maintained, in that direct informations continue to be permitted.

\textsuperscript{82} FLA. R. CRIM. P. 3.131a(4) (1975).
\textsuperscript{83} FLA. R. CRIM. P. 3.131b(1) (1975). An information or indictment is required to prosecute a felony. FLA. R. CRIM. P. 3.140a, 3.140g (1975). Presumably, a misdemeanor may be tried without an indictment or information, \textit{i.e.}, on a complaint. FLA. STAT. ANN. § 34.13 (1975).
\textsuperscript{84} FLA. R. CRIM. P. 3.131b(2), (3), (4), (5) (1975).
\textsuperscript{85} FLA. STAT. ANN. § 26.012 (1975).
\textsuperscript{86} FLA. R. CRIM. P. 3.131b(5) (1975).
California

In California every felony prosecution not initiated by grand jury indictment is brought upon an information filed after a magistrate determines probable cause in an adversary preliminary hearing.87 In addition, an accused felon may seek review of the grand jury's determination or the magistrate's finding by moving to set aside the indictment or information on the grounds that he had been indicted or committed without probable cause.88

California's response to Gerstein89 began on February 19, 1975. Leonard Walters, who had been arrested without a warrant on misdemeanor charges, was arraigned on a complaint reciting the charges in the language of the relevant code section. Walters pleaded not guilty, a trial date was set and bail fixed at $500. Walters then requested a preliminary hearing to determine the existence of probable cause for his detention, relying on Gerstein v. Pugh,

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89. Law enforcement in California made immediate efforts to comply with Gerstein. In February of 1975, the Alameda County District Attorney's Office advised California must now adapt its procedures to comply with the mandates handed down in Gerstein. Where an arrest in this State is made by warrant, the Gerstein decision does not require an adjustment. . . .

Arrests made without warrant, however, present a different picture. In such situations, the suspected offender is arrested on the basis of an officer's or a citizen's determination that probable cause exists to believe the person in question has committed a crime. The arrest usually is made on the scene, and the District Attorney files a complaint alleging the appropriate violation. In each instance—peace officer, citizen, prosecutor—the "probable cause" determination has been made by an individual who is a "non-judicial" entity. Gerstein requires that such determination be made by a judicial officer in order to justify the suspect's retention in custody. Additionally, this judicial hearing must be conducted "promptly" after the suspect's incarceration.

It is believed that in misdemeanor cases the procedures presently used in warrant situations should be extended to filing of all misdemeanor complaints. That is, all misdemeanor complaints should be accompanied by a declaration under oath which sets forth the required "probable cause". In warrant situations, the magistrate's issuance of an arrest warrant would constitute his finding that the probable cause standard has been met. In non-warrant situations, the magistrate could examine the declaration attached to the misdemeanor complaint and note for the record his determination the "probable cause" has been demonstrated . . . .

In Alameda County it has been decided that dependence upon the felony preliminary hearing as the method to comply with the Gerstein decision is hazardous. Therefore, a procedure will be adopted wherein a "probable cause" declaration will be filed as part of all felony complaints. Therefore, the procedures in this county will be the same for felonies as well as misdemeanors. A declaration will be filed as part of the complaint procedure in all cases (felony or misdemeanor). The court then will be requested to make a "prompt" ruling upon the sufficiency of such showing.

VI Point of View 20-21 (1975).
decided by the United States Supreme Court the previous day. On the basis of the police report of Walters' arrest, the court found probable cause.90

In a proceeding upon Walters' petition for a writ of habeas corpus the California Supreme Court concluded that "the probable cause determination made at [Walters'] arraignment complied with [the California Supreme Court's] interpretation of Gerstein's procedural requirements."91 Prior to so concluding the court reviewed existing California procedure, analyzed Gerstein, and rendered a decision which would, in the court's words "act as a declaration of rights of all persons detained for the alleged commission of a misdemeanor as well as others detained for infractions or violations as of the date this opinion becomes final."92

California procedures governing pre-trial detention of accused misdemeanants was readily found to be deficient, as an accused is not afforded a post-arrest judicial determination that probable cause exists for his continued detention. Thereupon, the court detailed who would be entitled to such a determination, as well as when and how such a determination would be made.

Any person who had been arrested with or without a warrant and held for trial on a misdemeanor or infraction or lesser offense and who was not released on bail or on his own recognizance would be entitled to a probable cause determination.93 The court extended Gerstein to include arrests with a warrant, noting:

It thus appears that when a magistrate has determined the existence of probable cause for arrests, even in an informal ex-parte proceeding before arrest, Gerstein has been satisfied.

A difficulty is immediately apparent, however, in that after his arrest a defendant is not afforded an opportunity to challenge in the criminal proceedings the propriety of the determination of probable cause for issuance of the warrant. If we do not afford him the opportunity to make that challenge, then we would, in actuality, give conclusive effect to the propriety of all arrest warrants merely because the warrant issued. We elect not to approve of procedure for determining the compliance with a constitutional mandate when that procedure is vulnerable to attack on grounds which suggest the possibility of a type of star-chamber determination, particularly when the alternative poses little additional burden on the administration of justice.94

91. Id. at 753, 543 P.2d at 619.
92. Id. at 744-45 n.4, 543 P.2d at 612 n.4.
93. Id. at 742-43, nn.1 and 2, 543 P.2d at 611 nn.1 and 2.
94. Id. at 749, 543 P.2d at 615-16.
Additionally, notwithstanding the existing remedy of collateral attack by habeas corpus, the court determined it proper to provide a hearing even in instances when a misdemeanant is arrested on a warrant.\textsuperscript{95}

As to accused felons the Court observed

that our procedures which provide for a preliminary hearing in the case of a felony charged by information fully comply with Gerstein requirements. In case of a demand for a Gerstein hearing at the time of arraignment on an information the [Superior] court need only to ascertain the fact that the accused was held to answer following a preliminary hearing [in the inferior court] and thereupon conclude that probable cause for detention exists.\textsuperscript{96}

The court further noted that, since a person accused by indictment or information of a felony may challenge the existence of probable cause by a motion to set aside the indictment or information on the ground that it had issued without probable cause, a hearing thereon would provide timely judicial determination of the existence of probable cause to detain pending trial.

However, this probable cause determination was not to be automatic; rather, it is incumbent upon defendant to move the court to make or to continue the determination. His failure to do so at the time of arraignment, with notice of his right thereto, waives that right. The arrestee should so move after bail is fixed (where, presumably, he is not released on his own recognizance) and prior to his being put to the election of posting bail.\textsuperscript{97}

At the probable cause hearing the prosecution need only to establish a prima facie case sufficient to warrant a prudent man in believing that the suspect had committed or was committing the offense charged. When arrest is effected by warrant

the probable cause finding may be made solely upon an examination of the complaint, arrest warrant and supporting affidavit.

From the face of these documents, the court may make a determination that the warrant was issued by a magistrate upon an affida-

\textsuperscript{95} Id. at 749 n.5, 543 P.2d at 616 n.5. Thus, the court observed that an accused misdemeanant held for trial in an inferior court had the right to seek a Gerstein-type determination in the superior court on habeas corpus. Rather than cause a surge of litigation in the superior courts of the state, and the court shifted the accused misdemeanants remedy to the inferior court where the principal matter was already pending.

\textsuperscript{96} Id. at 752 n.8, 543 P.2d at 617-18 n.8.

\textsuperscript{97} The most appropriate time for a judicial determination of probable cause would be at the time of arraignment or bail setting unless the parties stipulate to a later date or defendant requests a continuance. Id. at 750, 543 P.2d at 616.
vit or complaint stating specific factual circumstances justifying a determination of probable cause for arrest.98

If the arrest is effected without a warrant, or by a warrant where the supporting documents do not on their face properly establish probable cause for pre-trial detention, the court may make its finding upon a sworn complaint which incorporates by reference other factual material, such as a copy of the police report or other report which may contain hearsay. However, such reports and materials submitted must be stated upon personal knowledge of the reporting party or upon information and belief where the source of the information is demonstrated to be trustworthy.

If relevant documentation does not support probable cause for continued detention, the court may receive testimonial evidence on the issue in the presence of the defendant and his attorney. But the receipt of such testimony is merely a substitute for factual materials which could have been presented by sworn statement and, as the defendant is not entitled to challenge such factual statements by confronting and cross-examining the declarer, he likewise has no right to confront and cross-examine the witness who testifies on the issue of probable cause to detain.99

Contrary to the United States Supreme Court's interpretation in Gerstein of the United States Constitution, the California Supreme Court held that a defendant was entitled to counsel as a matter of right under the California Constitution.

Finally, the court described the consequences of such a hearing. Of course, if probable cause to detain is found, the accused must be put to his election of posting bail or remaining in custody.

If the judicial officer finds that probable cause has not been established, the defendant must be discharged from custody. However, the prosecution of the offense is not precluded thereafter since additional evidence may be obtained by time of trial. In any event, an unlawful arrest is not a bar to trial. Gerstein is concerned only with the probable cause for pretrial detention and does not purport to hold that the absence of probable cause for detention bars further prosecution of the case.100

The California Supreme Court recognized and echoed the concern of the United States Supreme Court for the impact of its decision on the criminal justice system, stating:

98. Id. at 751, 543 P.2d at 616.
99. Id. at 753, 543 P.2d at 618.
100. Id.
We emphasize that procedures approved by this opinion should not be read as exclusive of others which may be employed by magistrates and trial courts in making probable cause determination in compliance with Gerstein. Judicial administration problems in the crowded courts of our urban centers are different from those in the rural counties and may necessitate and justify differing procedures.  

Initially it should be observed the California Supreme Court, by preserving existing felony proceedings, took care not to upset the practice of criminal law. Likewise, by indicating that a prosecution may be continued in spite of a finding of no probable cause, the court designed no implicit threat on the charging function of the prosecution. The court made a notable contribution to the principal of relieving system impact when it specified that police reports are an acceptable documentation of probable cause, thereby diminishing any potential increase in secretarial staff and facilities. Typically, law enforcement in the detection of crime and arrest of suspects generates numerous official documents, e.g., arrest reports, crime reports, supplemental reports, statements of witnesses, diagrams, inventories of evidence seized, investigation summaries and other “police reports.” In utilizing these already existent documents the court avoided the necessity of expanding existing manpower and physical plant investments to produce more paper. Finally, in three points, the court sought to avoid substantial increases or shifts in the caseload borne by the trial courts of the state. Since a misdemeanant confined on a warrant could seek a probable cause determination in the superior court by a petition for a writ of habeas corpus, the supreme court shifted this caseload to the inferior court where the caseload, by virtue of the misdemeanor complaint, already existed. This concern for caseload impact thus accounts for the court’s apparent expansion of a Gerstein probable cause hearing to include cases of arrest on warrants. California Penal Code section 1204.5, in effect, prohibited a judge who had read any police reports or other information regarding the offense from presiding over the proceedings. The court avoided the possibility that this section might disqualify a judge from presiding at both a Gerstein probable cause hearing and the trial by fitting a probable cause determination within one of the exceptions of that Penal Code section. Finally, the court avoided a potentially serious movement which may have expanded the existing caseload in inferior courts when it ad-

101. Id. at 753, 543 P.2d at 619.
102. Id. at 752 n.7, 543 P.2d at 617 n.7.
mitted a state constitutional right to counsel, but denied the right to challenge, cross-examine or confront the witnesses or materials presented at a probable cause determination.

**Illinois**

In Illinois, "no person shall be held to answer for a crime punishable by death or by imprisonment in the penitentiary unless either the initial charge has been brought by indictment of a grand jury or the person has been given a prompt preliminary hearing to establish probable cause."\(^{103}\) A person who is arrested with or without a warrant is entitled to a preliminary hearing on the complaint or information if the charge is a felony. However, the individual is not entitled to a preliminary hearing if the charge is for a misdemeanor.\(^{104}\) Nor is a defendant entitled to a preliminary examination if he is indicted before such examination occurs.\(^{105}\) Of course, a defendant may waive indictment to be prosecuted on the information or complaint.\(^{106}\)

The purpose of such a preliminary hearing is to determine probable cause to hold defendant to answer; that is, to insure that a defendant is not unduly detained pending trial.\(^{107}\) The nature of a preliminary hearing is adversary, however, a limited amount of hearsay is admissible.\(^{108}\) A magistrate's suppression of evidence is not binding on the prosecution in a subsequent trial.\(^{109}\) Nor does a discharge of the defendant at a preliminary hearing bar a subsequent indictment.\(^{110}\) Thus, there appears to be no sanction for a denial of a preliminary hearing.\(^{111}\)

If probable cause to believe that the defendant committed the

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charged crime appears, he is held to answer for a grand jury indictment unless he waives such a proceeding. If probable cause is not found, the accused is discharged; however, he may still be indicted.\textsuperscript{112}

Thus it appears that the Illinois procedure suffers from the same deficiency as did California's. Like California, Illinois does not require a preliminary hearing where the defendant is charged with a misdemeanor. In \textit{People v. Miner}, Justice Stouder observed in dissent:

The majority opinion also indicates that the consequences of less serious offenses as contrasted with more serious offenses are such that a distinction based thereon, relative to a right of a preliminary hearing, is appropriate. In the first place the distinction created is not based on the seriousness of the offense charged and in the second place where the penalty may be incarceration the duration or place of confinement would appear to have little relationship to the principle that a person should not be required to answer or defend himself against baseless or unsubstantiated criminal charges.\textsuperscript{113}

Insofar as the United States Supreme Court requires a probable cause determination for all persons in custody, it appears that the Illinois practice of denying a misdemeanant a preliminary hearing may be, in part, unconstitutional. Illinois certainly need not provide misdemeanants with full probable cause adversary hearings; however, Illinois, in the wake of \textit{Gerstein}, may be required to provide accused misdemeanants who are held pending trial with, at the very least, a nonadversary probable cause determination. Such a determination may be modeled on that presently required in Florida or California.

The class of accuseds to whom a probable cause determination is afforded differs slightly between Florida and California. Florida gives such a determination to those arrested without a warrant or those who can show that the conditions of their release constitute significant restraint on their liberty. California does not provide for the latter class but does include those who are arrested on a warrant. The California model is not recommended in this aspect, because it is the product of that state's particular system, in that the California Supreme Court expressly desires not to initiate a flood of petitions for writs of habeas corpus to the superior court.\textsuperscript{114} On the other
hand, the Florida model appears to more closely approximate the spirit of Gerstein.

Florida and California also differ regarding when a probable cause determination is to be made. In Florida, the determination occurs either at the first appearance, or if the proof is not then available, within three days of the arrest; in California, it may occur either upon arraignment or at the bail setting hearing, but prior to defendant's election to post bond. The determination is automatic in Florida, whereas it occurs only on request, after notice, in California. Certainly Illinois, with the diversity prevalent between urban and downstate courts requires flexibility in settling a time for the probable cause determination. Accordingly, the rigid Florida rule requiring automatic determinations should be rejected and the California provision for determination upon request, after notice of the right thereto, adopted. Perhaps the middle ground, providing for a probable cause determination unless waived may be appropriate in that it parallels the felony procedure providing for a grand jury indictment unless waived. In any event, the Florida proviso that the determination be made within a certain period when the proofs become available is flexible, and therefor recommended.

Florida and California do not coincide in the question of what other parties may be present when the magistrate makes his determination. Florida specifically permits the magistrate to make the probable cause determination outside defendant's presence. In contrast to such an ex parte proceeding, California suggests that defendant and his attorney be present. Illinois might follow the example of the United States Supreme Court in Gerstein and provide for that approach which manifests the least impact on the local criminal justice system. In that case, an ex parte proceeding is clearly the more appealing method due to its flexibility: an ex parte proceeding may be conducted in chambers without the investment of facility and personnel that court sessions entail.

The nature of the evidence upon which the determination is made is fundamentally the same in Florida and California. Both states require that the evidence be under oath and, apparently, to provide for review, a record must be made. In one aspect, the California model is exemplary. California accepts arrest and follow-up reports written and signed by the arresting officer, under penalty of perjury, stated upon the personal knowledge of the officer or upon his information and belief where recited facts demonstrate the trustworthiness of such information. Such reports are typically prepared by the police as a matter of standard operating procedure. Utilization of these existing documents is recommended as imposing the least
additional burden on the criminal justice system.

Finally, Illinois might provide that discharge upon a finding of no probable cause to detain will not bar subsequent prosecution. Accordingly, the Florida model should serve as a pattern insofar as it provides that upon release in cases where an accusatory pleading is filed in the trial court, discharge is subject to the condition that defendant appear at all court proceedings.

CONCLUSION

Clearly system impact, in terms of projection regarding the potential effect of the lower courts' decisions on the various state criminal justice systems, influenced the Supreme Court in *Gerstein*. That the Court refused to mandate an adversary preliminary hearing in all criminal prosecutions argues that the influence was considerable. Rather, the Court fashioned relief in the form of a nonadversary probable cause determination which is sufficiently flexible to accommodate the interest of the detained accused without causing serious displacements within the diverse criminal justice systems of the states. California's response to the Court's mandate evidences the flexible quality of that accommodation.

In the future, the influence which a system impact argument may wield on the Court's disposition of an issue will vary greatly. Nevertheless, the governmental interest portion of the formula must be fully presented to the Court to assist it in striking a proper balance. Accordingly, when state law enforcement agencies are invited to file an amicus curiae brief, as in *Gerstein*, they must accept. State officials must not hesitate to present to the Court a realistic view of criminal trial practice as found in the front line trenches of their state's prosecution efforts. Governmental interest arguments must not dwell solely on dollar-cost analysis. Preferably, a system impact argument should explore the effect that granting defendant's prayer would have in such categories as the caseload burden on the components of the system, the allocation of manpower and facilities within the system, the functions performed by the participants of the system, and the practice of criminal law in the system as a whole. The argument on system impact must be presented because, as occurred in *Gerstein*, the United States Supreme Court will listen.