Florida Law Review

Volume 28 | Issue 1 Article 10

September 1975

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Recommended Citation
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CASE COMMENTS

PRETRIAL RESTRAINT HEARING: CONSTITUTIONAL RIGHT OR CONSTITUTIONAL WRONG?*

Gerstein v. Pugh, 95 S. Ct. 854 (1975)

Respondent prisoners, charged on prosecutorial informations, were held in pretrial confinement in Dade County, Florida,[1] without a judicial determination of probable cause for detention.[2] Claiming a constitutional right to such process, respondents brought a class action[3] under the Civil Rights Act[4] asking for injunctive and declaratory relief.[5] The district court ruled that both the fourth amendment and the due process clause of the fourteenth amendment require such a hearing.[6] The Fifth Circuit Court of Appeals affirmed.[7] The United States Supreme Court granted certiorari and HELD, the fourth amendment requires a judicial determination of probable cause as a prerequisite to an extended restraint on liberty following arrest.[8]

The state's right to take and retain custody of the arrestee is inherent in the

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*EDITOR'S NOTE: This case comment was awarded the *George W. Milam Award* as the outstanding case comment submitted by a Junior Candidate in the spring 1975 quarter.

1. The four respondents, held on various felony and misdemeanor counts, were not able to obtain bail. Two had been held in custody for two weeks before informations were filed. Gerstein v. Pugh, 95 S. Ct. 854, 858 n.1 (1975).

2. At the time of respondents' arrests, FLA. R. CRIM. P. 1.122 (amended 1972) seemed to call for an adversary preliminary hearing similar to that provided by FED. R. CRIM. P. 5(c) to test probable cause for arrest. 95 S. Ct. at 859. Apparently respondents did not receive such a hearing. The Florida supreme court had held that such hearing was not a prerequisite to a criminal prosecution, Sangaree v. Hamlin, 235 So. 2d 729 (Fla. 1970), and that the filing of an information or indictment settled the issue of probable cause. State *ex rel.* Hardy v. Blount, 261 So. 2d 172 (Fla. 1972). The Court found that three other avenues of probable cause determination were also unavailable or too dilatory: arraignment, habeas corpus, or a special preliminary hearing provided under FLA. STAT. §907.045 (Supp. 1970). *Id.*

3. FED. R. CIV. P. 23(b)(2). Even though named respondents had all been convicted before the case reached the Supreme Court, the case avoided mootness because it fell into a narrow class "distinctly 'capable of repetition, yet evading review.'" 95 S. Ct. at 861 n.11 *(quoting* Sosna v. Iowa, 95 S. Ct. 553, 557 (1975)).

4. 42 U.S.C. §1983 (1970).

5. The restrictions of Younger v. Harris, 401 U.S. 37 (1971), and Preiser v. Rodriguez, 411 U.S. 475 (1973), did not apply, since respondents neither attempted to enjoin state prosecution nor requested release from custody. 95 S. Ct. at 860 n.9, 859 n.6.

6. Pugh v. Rainwater, 332 F. Supp. 1107 (S.D. Fla. 1971). The court ordered immediate hearings for respondents still in custody and the submission of a plan for preliminary hearings for all future warrantless arrests. Because Florida amended its rules of criminal procedure during the course of the litigation and because a local plan was also considered by the court, two more district court opinions were handed down. 336 F. Supp. 490 (S.D. Fla. 1972) (adopted local plan); 355 F. Supp. 1286 (S.D. Fla. 1973) (ordered new Florida rules amended to require preliminary hearings for all arrestees).

7. 483 F.2d 778 (5th Cir. 1973).

8. 95 S. Ct. 854 (1975).

concept of arrest.[9] It is not clear, however, how long restraint of liberty may be legally maintained without judicial approval. Anglo-American criminal justice systems provide at least three points in pretrial procedure where the legality of the arrest and custody may be judicially determined:[10] when an arrest warrant is obtained, on first appearance, and at a preliminary hearing.[11] Nevertheless, some arrestees may be denied judicial intervention at all three stages.

Before an arrest warrant is issued, a neutral magistrate determines that the state has probable cause to believe that the accused has committed the crime,[12] thus satisfying the fourth amendment standard for a lawful arrest.[13] The fourth amendment, however, has been interpreted to permit warrantless arrests, so long as the arresting officer can later prove that probable cause existed at the time of the arrest.[14] In fact, today the judiciary is generally bypassed at the point of arrest.[15]

The two further opportunities for a judicial determination of the legality of the accused's detention, the first appearance and the preliminary hearing, may also fail to afford him this protection. Although both are almost universally required,[16] the Supreme Court has never recognized a constitutional right either to a probable cause determination at first appearance[17] or to a

9. *See* Jenkins v. United States, 161 F.2d 99, 101 (10th Cir. 1947).

10. Two additional procedures may provide a judicial determination of probable cause to arrest: a motion to suppress evidence and a writ of habeas corpus. A motion to suppress, however, does not relate the legality of the arrest to the legality of the detention. Habeas corpus, on the other hand, is directly concerned with the legality of the detention, but it is not provided as a matter of right to all arrestees. See note 62 *infra*.

11. The common law also provided for judicial intervention during the post-arrest period. As the Court noted, a judicial warrant of commitment, called a *mittimus*, was required for more than brief detention. 95 S. Ct. at 863 n.14 (*citing* 1 M. HALE, PLEAS OF THE CROWN 589-90 (1736)). A preliminary hearing was provided too, though not as a matter of right. Commentary, *The Preliminary Hearing Versus the Grand Jury Indictment: "Wasteful Nonsense of Criminal Jurisprudence" Revisited*, 26 U. FLA. L. REV. 825 (1974).

12. The standard for arrest is probable cause, defined in terms of facts and circumstances "sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense." 95 S. Ct. at 862, *quoting* Beck v. Ohio, 379 U.S. 89, 91 (1964).

13. U.S. CONST. amend. IV; Beck v. Ohio, 379 U.S. 89 (1964). "Whatever protection afforded by the [f]ourth [a]mendment against unreasonable seizures of the person by federal authorities extends equally to the states. However, the constitutional standard is quite minimal and indefinite allowing for considerable flexibility at the local level." J. COOK, CONSTITUTIONAL RIGHTS OF THE ACCUSED: PRETRIAL RIGHTS 32-33 (1972).

14. Ker v. California, 374 U.S. 23 (1963). A finding of lack of probable cause to arrest will not alter a subsequent conviction, although it may mean the suppression of evidence seized at the arrest. *See* United States v. Radford, 452 F.2d 332 (7th Cir. 1971) (improper arrest presents no constitutional issue unless defendant is prejudiced at trial).

15. Indeed, 90% of all arrests are made without warrants. J. LEGRANDE, THE BASIC PROCESSES OF CRIMINAL JUSTICE 25 (1973) *quoting* J. CREAMER, THE LAW OF ARREST, SEARCH AND SEIZURE 53 (1968). *See generally* LaFave & Remington, *Controlling the Police: The Judge's Role in Making and Reviewing Law Enforcement Decisions*, 63 MICH. L. REV. 987 (1965).

16. See McNabb v. United States, 318 U.S. 332, 342 (1943); Note, *A Constitutional Right to Preliminary Hearings for All Pretrial Detainee's* [*sic*], 48 So. CAL. L. REV. 158, 160 (1974).

17. The duty to bring the accused before a magistrate immediately after arrest is seen primarily as a means to inform him of his rights and to protect him from undesirable police

preliminary hearing.[18] Some states therefore do not require a magistrate to examine the legality of the arrest at first appearance.[19] Some also withdraw the right to a preliminary hearing in cases where an information or indictment is filed.[20] These states reason that once the decision to prosecute is made, the issue of legal custody over the arrestee is settled.[21] Thus it is possible for an accused to be held in custody until trial solely on the basis of a warrantless arrest and the prosecutor's decision to press charges.[22]

In the instant case respondents had been denied judicial review of their arrest and detention at all three stages,[23] a denial, according to respondents, of

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interrogation. *See* McNabb v. United States, 318 U.S. 332, 343; *see also* Mallory v. United States, 354 U.S. 449 (1957); United States v. Lopez, 450 F.2d 169 (9th Cir. 1971), *cert. denied*, 405 U.S. 931 (1972) (waiver of right to counsel and right to remain silent also a waiver of the requirement to be taken promptly before a magistrate).

18. It is only when the pretrial procedure may prejudice the outcome of the trial itself that constitutional protections apply. *See, e.g.*, Coleman v. Alabama, 399 U.S. 1 (1970) (failure to provide counsel at preliminary hearing where charging decision made); Whitaker v. Estelle, 509 F.2d 194 (5th Cir. 1975) (failure to take accused before magistrate is constitutional error only when defense is prejudiced); McCoy v. Wainwright, 396 F.2d 818 (5th Cir. 1968) (denial of preliminary hearing in Florida did not constitute deprivation of due process). Thus the lower court's holding that the right to a probable cause determination is constitutionally derived was "the first major judicial articulation" of this principle. Commentary, *supra* note 11, at 831.

19. LaFave & Remington, *supra* note 15, at 998-99.

20. Among those states are Florida, Arkansas, Wyoming, Montana, Connecticut, Iowa, and Washington. Brief for Petitioner at 13-14, 95 S. Ct. 854. *But see* Supplemental Brief for Respondents at 17 (only Washington would be substantially affected). Federal criminal procedure also denies preliminary hearings to defendants after an information is filed or an indictment handed down. *See* FED. R. CRIM. P. 5(c); 18 U.S.C. §3060(e) (1970). Requiring a full-scale preliminary hearing for pretrial detainees charged in informations would not substantially affect the federal criminal justice system, however. Brief for the United States as Amicus Curiae at 3. Defendants charged with felonies either receive a preliminary hearing or are indicted by a grand jury. Thus, an accused is never held solely on the prosecutor's decision to prefer charges. A defendant arrested on misdemeanor charges is rarely held in custody. Only in the District of Columbia would such a holding have affected a large number of arrestees. *Id.* at 3-4.

21. The preliminary hearing focuses not on the legality of the arrest and detention, but on the decision to bind over for trial. This is not, however, the sole function of the hearing. Other uses include preserving testimony, controlling witnesses, providing pretrial discovery, and allowing the prosecution to test its case. Note, *The Preliminary Hearing — An Interest Analysis*, 51 IOWA L. REV. 164, 167, 171 (1965). *See generally* Anderson, *The Preliminary Hearing — Better Alternatives or More of the Same?*, 35 MO. L. REV. 281 (1970); Scigliano, *The Grand Jury, the Information and the Judicial Inquiry*, 38 ORE. L. REV. 303 (1959); Weinberg & Weinberg, *The Congressional Invitation to Avoid the Preliminary Hearing: An Analysis of Section 303 of the Federal Magistrates Act of 1968*, 67 MICH. L. REV. 1361 (1969); Note, *The Function of the Preliminary Hearing in Federal Pretrial Procedure*, 83 YALE L.J. 771 (1974); Comment, *Preliminary Examination — Evidence and Due Process*, 15 U. KAN. L. REV. 374 (1967); 25 VAND. L. REV. 434 (1972); 60 VA. L. REV. 540 (1974).

22. Even where such procedures are routinely available, judicial involvement is not guaranteed. Often the "appearance of judicial control is maintained, while in fact only prosecutorial or clerical functions are performed." LaFave & Remington, *supra* note 15, at 1001.

23. See note 2 *supra*. *See also* Supplemental Brief for Respondents at 2-5 for a summary

their constitutional right to such review.[24] The lower courts identified two sources of this right, the fourteenth amendment due process clause and the fourth amendment protection against unreasonable searches and seizures.[25] In his majority opinion, however, Justice Powell limited the scope of the Supreme Court's decision to the fourth amendment issue. For Justice Powell, the pivotal issue was the legality of the arrest and detention, the standards for which are derived solely from the fourth amendment.[26] Implicit in this position is the premise that the standard for actual arrest satisfies the standard for all degrees of pretrial restraint as well.[27]

The Court notes that the only standard required by the fourth amendment for a legal arrest is the existence of probable cause.[28] Although such a determination should be made by a neutral and detached magistrate prior to the arrest, the exigencies of law enforcement have made this step preferred but not essential.[29] Thus, the court has never found an arrest illegal solely because no warrant was obtained.[30] Once the accused is in custody, however, the rationale for permitting restraint without judicial oversight ceases to exist. The interests of the state and the arrestee shift: the state has no further need to bypass a probable cause determination, while the accused's interest "increases significantly," since "[t]he consequences of prolonged detention may be more serious than the interference occasioned by arrest."[31] It is reasonable to require

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of Florida law in this area. In Florida most lesser felonies and nearly all misdemeanor prosecutions are instituted by information. 15 Crim. L. Rep. 4005 (Apr. 3, 1974).

24. Although respondents emphasized the need for a "probable cause" hearing, it is likely that they were as interested in the secondary benefits of a full preliminary hearing, such as pretrial discovery, as in the probable cause determination itself. See note 21 *supra.* It is also likely that the "probable cause" standard they felt must be met was the standard necessary to bind over, not the standard to arrest. See note 46 *infra.* Thus, while the Supreme Court seemed to be extending new constitutional protections to respondents, the hearing granted had little in common with the rights which respondents were attempting to exercise. See note 50 *infra.*

25. 332 F. Supp. at 1114; 483 F.2d at 785, 789.

26. 95 S. Ct. at 861. It should be noted, however, that the only recent case the Court cited in support of its position that the fourth amendment applies, Cupp v. Murphy, 412 U.S. 291 (1973), concerned detention without formal arrest, not post-arrest restraint.

27. For an extension of this notion, see Justice Powell's concurring opinion in United States v. Robinson, 414 U.S. 218, 237 (1973) where he said that "an individual lawfully subjected to custodial arrest retains no significant Fourth Amendment interest in the privacy of his person." Clearly he would not hold that the arrestee has lost all absolute rights to bodily privacy when a legal arrest occurs. Similarly the arrestees in the present case should not be held to have lost all rights to further procedural due process simply because the fourth amendment requirement for a lawful arrest has been satisfied. See note 50 *infra.*

28. See note 12 *supra.*

29. 95 S. Ct. at 862.

30. *Id. See, e.g.,* Beck v. Ohio, 379 U.S. 89, 96 (1964); Ker v. California, 374 U.S. 23 (1963); Draper v. United States, 358 U.S. 307 (1959); Brinegar v. United States, 338 U.S. 160 (1949).

31. 95 S. Ct. at 863. By saying that the arrestee's stake is qualitatively higher after arrest, the Court implicitly recognized the concurring judges' argument that the interest in avoiding prolonged custody is significantly different from the interest in avoiding illegal arrest, therefore requiring different protections. See text accompanying note 55 *infra.*

that the arresting officer promptly bring his evidence before a neutral and detached magistrate for a probable cause hearing before the state can enforce any extended restraint on the arrestee's liberty.[32]

Both petitioner and respondents agreed that some probable cause determination must be made after an arrest to justify further detention.[33] Respondents maintained that the intervention of a neutral magistrate is required. Petitioner, however, argued that a prosecutor's decision to press charges provides, by itself, a satisfactory determinant of probable cause[34] because of the high standard of probable cause needed to file an information, the prosecutor's ethical obligation as an officer of the court,[35] and the parallels between an information and a grand jury indictment.[36]

The Court did not find the petitioner's arguments persuasive. Since the right derives from the fourth amendment, a probable cause determination after arrest should meet the same standards required for an arrest warrant. The Court had previously held that a prosecutor is not sufficiently neutral and detached to issue such warrants.[37] His charging decision must be kept separate from the state's arrest/restraint/detention decision. While a prosecutor may press charges without judicial intervention, the state may not lawfully make any significant post-arrest restraint on a person until the judiciary has found probable cause.[38] This separation of functions enables the Court to distinguish petitioner's authority as concerning only the decision to charge, not the decision to restrain.[39] But it also seems to undermine the importance of the

32. The Court found a historical basis in the common law practice, followed in eighteenth century America, of holding preliminary examinations to determine whether there was reason to believe "the prisoner had committed a crime," although it recognized that these hearings were primarily inquisitorial in nature. *Id.* at 863-64 & n.15. Ironically, these hearings have been frequently criticized by legal writers for the very lack of procedural safeguards that the Court denied respondents in the instant case. *See, e.g.*, Weinberg & Weinberg, *supra* note 21, at 1365. See also note 11 *supra*.

33. Brief for Petitioner at 10, 15; Brief for Respondents at 2.

34. Petitioner based his argument on prior Supreme Court rulings (see notes 37 and 39 *infra*), procedural similarities with the federal system and with other states, and the Florida speedy trial rule, which provides that every person charged with a crime shall be brought to trial within 180 days. FLA. R. CRIM. P. 3.191. Brief for Petitioner at 9-18.

35. This point was made in oral argument. *See* 43 U.S.L.W. 3245 (Oct. 29, 1974).

36. Brief for Petitioner at 11-18. Perhaps a major factor in the Court's decision not to require a full adversary hearing was the threat such a hearing might pose to the grand jury system. *See generally* Commentary, *supra* note 11.

37. Shadwick v. City of Tampa, 407 U.S. 345 (1972); Coolidge v. New Hampshire, 403 U.S. 443 (1971). The Court found an earlier decision *contra*, Ocampo v. United States, 234 U.S. 91 (1914), which allowed an arrest warrant to issue solely on a prosecutor's information, inapplicable. That case concerned a statutory guarantee relevant only to the Philippines; furthermore, it was implicitly overruled by *Coolidge* and *Shadwick*, according to the Court. 95 S. Ct. at 865 n.20.

38. Thus, the prosecution may file charges even if a probable cause hearing shows the arrest to have been illegal. Moreover, a conviction will not be vacated for lack of a probable cause determination. 95 S. Ct. at 865-66.

39. Lem Woon v. Oregon, 229 U.S. 586 (1913) (information alone is sufficient to initiate a prosecution without prior examination by magistrate); Hurtado v. California, 110 U.S. 516 (1884) (prosecution by information after examination by magistrate satisfies due process without grand jury indictment). The Court also distinguished federal cases holding that there is

traditional preliminary hearing as a judicial nexus between the decision to prosecute and the decision to detain.[40]

If this decision to confer a constitutional right to an entirely new criminal proceeding does not present any major difficulty for the Court, it is, perhaps, because of the limited nature of the hearing that the Court had in mind. Since the purpose of the hearing is merely to fill the gap left by permitting warrantless arrests,[41] the probable cause determination may mirror an *ex parte* warrant hearing.[42] This procedure is quite different from the traditional preliminary hearing, which almost universally requires adversary safeguards.[43] The Court reasoned that a preliminary hearing demands greater adversary safeguards because the issue of binding the accused over for trial is important to both sides.[44] The sole issue raised at a probable cause determination, custody of the accused, is not sufficiently important to compel similar protections.[45] Furthermore, the chosen standard – probable cause to arrest – presents a simple factual question which can be determined without complex evidentiary hearings.[46]

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no constitutional right to a preliminary hearing for arrestees seeking to void a subsequent conviction. *See, e.g.*, Scarborough v. Dutton, 393 F.2d 6 (5th Cir. 1968); 25 VAND. L. REV. 434, 438 n.19.

40. *But see* Note, *A Constitutional Right to Preliminary Hearings, supra* note 16; Note, *Constitutional Limitations on the Conditions of Pretrial Detention*, 79 YALE L.J. 941, 941 n.3 (1970).

41. Respondents, however, were not interested in mirroring arrest warrant procedures. Rather, their purpose was to obtain an adversary hearing for every defendant after arrest, whether or not he was arrested on a warrant. 42 U.S.L.W. 3549 (Apr. 2, 1974).

42. For similar reasoning, see Brief for the United States as Amicus Curiae at 53-67. Although the opinion suggested that hearsay evidence will be admissible to establish probable cause, 95 S. Ct. at 868-69, one commentator suggests that permitting hearsay will negate the goal of a "fair and reliable" determination set by the Court. Rogow, *Gerstein v. Pugh – The Supreme Court Speaks*, 49 FLA. B.J. 205 (1975).

43. Authorities cited note 21 *supra*.

44. 95 S. Ct. at 866.

45. The Court did not clarify the degree of "importance" necessary to require procedural safeguards, but seemed to adhere to its traditional position that safeguards will only be required where pretrial detention procedures adversely affect the outcome of the trial. See note 18 *supra*. The Court recognized that "pretrial custody may affect to some extent the defendant's ability to assist in the preparation of his defense," but found that the probability of harm was not high enough to justify calling it a "critical stage." *Id.* at 867-68. *But see* Pugh v. Rainwater, 483 F.2d 778, 787 (5th Cir. 1973); Rankin, *The Effect of Pretrial Detention*, 39 N.Y.U.L. REV. 641 (1964); Wald, *Pretrial Detention and Ultimate Freedom: A Statistical Study*, 39 N.Y.U.L. REV. 631, 632 (1964).

46. Although the Court implied that the probable cause standard may be determined in a nonadversary setting, this is not necessarily the case. The standard (see note 12 *supra*) is highly elastic and can be applied to both past and present circumstances. Thus, on a motion to suppress evidence, a judge determines whether under the circumstances existing at the time of an arrest it was reasonable for the arresting officer to believe that the accused had committed a crime. *See* Hill v. California, 401 U.S. 797 (1971). At a traditional preliminay hearing, on the other hand, the presiding magistrate determines whether there is present reason to believe that the accused has committed a crime. See Commentary, *supra* note 11, at 828. In either case, to provide maximum constitutional protection the court should use all of the evidence presently available, including defendant's own testimony. *See* Coleman v. Burnett, 477 F.2d 1187, 1204 n.96 (D.C. Cir. 1973). In the present case the Court has limited the determination to probable cause at the time of arrest, thus conflicting with the present-time focus

Although in some cases greater procedural safeguards would make the determination more reliable, the Court argued that "[i]n most cases . . . their value would be too slight" to justify requiring them "as a matter of constitutional principle."[47]

Recognizing the variety among criminal justice systems, the Court refused to specify exactly when the proceeding must take place or who has a right to it. The determination may be made at first appearance or when bail is set. Whatever the procedure, "it must provide a fair and reliable determination of probable cause as a condition for any significant pretrial restraint on liberty,[48] and this determination must be made by a judicial officer either before or promptly after arrest."[49]

By limiting itself to the fourth amendment question, the Court avoided the major issue within the case: whether pretrial custody is itself a sufficient deprivation of liberty to require, under the fifth and fourteenth amendments, an adversary hearing.[50] In a footnote the Court advanced the traditional argument

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of the traditional preliminary hearing. It has also chosen to exclude any of the arrestee's evidence which might shed light on the circumstances surrounding the arrest. See Anderson, *supra* note 21, at 302-07 for an exploration of the various standards of probable cause needed to determine legality of arrest, legality of detention and viability of prosecution.

47. 95 S. Ct. at 867. A final reason for holding that the hearing may be nonadversary — the alleged financial threat to criminal justice systems of a constitutional right to a full-scale preliminary hearing — was mentioned only in a footnote, yet this may have been the Court's most compelling reason for deciding as it did. *Id.* at 867 n.23.

48. Release on bail is apparently a sufficiently significant "restraint" to require this determination; a simple summons to appear at trial is not. 95 S. Ct. at 869 n.26. Arguably almost any other restraint, including release on recognizance, might require a hearing. Rogow, *supra* note 42, at 205.

49. 95 S. Ct. at 868-69. This holding probably overrules Shadwick v. City of Tampa, 407 U.S. 345 (1972), which authorized the issuance of arrest warrants by municipal clerks, since the Court emphasized in the instant case that the determination must be made by a judicial officer. *See* Rogow, *supra* note 42, at 205.

50. Curiously, the Court avoided the procedural due process issues raised in such cases as Morrissey v. Brewer, 408 U.S. 471 (1972), Stanley v. Illinois, 405 U.S. 645 (1972), and Goldberg v. Kelly, 397 U.S. 254 (1970), where it had emphasized the need to provide adversary hearings prior to serious deprivations of liberty or property. Respondents argued that if adversary hearings are available before conditional liberty is taken away, as in *Morrissey v. Brewer* (parole revocation), they must be provided before absolute liberty is taken. 42 U.S.L.W. 3549, 3550 (Apr. 2, 1974). The Court distinguished *Morissey*, however, claiming that the purpose of the adversary hearing is to preserve evidence. 95 S. Ct. 867 n.22.

By limiting itself to the fourth amendment, the Court also sidestepped the holdings of such civil cases as *Stanley* and *Goldberg*. To distinguish these cases the Court relied on three arguments: criminal justice procedures are well-established and need not follow principles evolved in more recent civil cases based on the fourteenth amendment; a different balance of individual and public interests is involved; and the nonadversary hearing is adequate since it is not final. 95 S. Ct. at 869 n.27. None of these arguments is conclusive, however. The principles of procedural due process developed in such cases as *Goldberg* and *Stanley* are not new — in fact they represent an extension of criminal justice procedures and safeguards into noncriminal areas. *See* Greene v. McElroy, 360 U.S. 474 (1958). Furthermore, although the state's interest may be greater in criminal cases, so are the individual rights involved. Finally, the argument that the prisoner will have an opportunity to vindicate himself at trial is less than comforting to someone who faces three to six months in jail. The probable cause decision is final in the sense that it deprives the accused of his freedom for an extensive period. In fact,

that the fourth amendment provides all the "process that is due" for detention of suspects pending trial.[51] But the four concurring justices disagreed. The fourth amendment may establish due process standards for seizures, wrote Justice Stewart,[52] yet "this case does not involve an initial arrest, but rather the continuing incarceration of a presumptively innocent person."[53]

A further objection may be made to the majority's insistence on symmetrical pre- and post-arrest probable cause determinations. An arrest warrant hearing is necessarily *ex parte* and nonadversary since the defendant cannot be present. But this pre-arrest limitation should not preclude greater procedural safeguards, and perhaps a more stringent standard then probable cause to arrest, once the accused is in custody.[54] Indeed, the instant Court recognized that the losses occasioned by post-arrest restraints are of a different magnitude than those created by the arrest itself.[55] Thus, arrest standards should not be relied upon to protect the accused from unjust detention; fuller, more stringent safeguards are necessary.

The effectiveness of the probable cause hearing in preventing illegal arrests and in ensuring the release of those held without sufficient justication will depend on the degree to which the judiciary actively participates in the probable cause determination. Where affidavits are routinely accepted without examination of the evidence, probable cause determinations will probably be unreliable.[56] If, however, the judge carefully scrutinizes the supporting evidence, calls witnesses, and permits the accused the assistance of counsel and the opportunity to speak when it appears necessary, the hearings may very well satisfy this specific need.[57]

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in New York City it is the only incarceration that 90% of all arrestees — whether convicted or not — will ever undergo. Note, *Constitutional Limitations, supra* note 40, at 946 n.45.

51. 95 S. Ct. at 869 n.27.

52. Douglas, Brennan, and Marshall, JJ., joined in this opinion. The concurring opinion suggested that Justice Powell's statement that the hearing may be nonadversary is dictum. *Id.* at 869.

53. *Id.* at 870. *See* Note, *Constitutional Limitations, supra* note 40.

54. Since the traditional right to freedom before conviction prevents the infliction of punishment prior to conviction, the risk of nonappearance should be the only good cause for holding the accused in jail. Stack v. Boyle, 342 U.S. 1, 4 (1951).

55. 95 S. Ct. at 863.

56. For an excellent analysis of the effectiveness of the judiciary in screening illegal arrests, see LaFave & Remington, *supra* note 15.

57. These probable cause hearings may have a serious impact on both individual criminal prosecutions and on the judge-made standard of probable cause. A prior judicial determination of probable cause, such as one made at a probable cause hearing, may affect a later decision on the same question raised on a motion to suppress evidence. The Supreme Court has recognized the fallibility of judicial hindsight in finding probable cause to arrest, Beck v. Ohio, 379 U.S. 89 (1964), but it has also stressed that probable cause determinations made by issuing magistrates "should be paid great deference by reviewing courts." Spinelli v. United States, 393 U.S. 410, 419 (1969).

A more subtle impact may be felt in the way judges define probable cause in the future. Pretrial determinations of probable cause have primarily been made in the context of the exclusionary rule. Courts are often forced to make decisions about what constitutes probable cause when faced with a fact situation involving an "obviously" guilty party trying to avoid criminal prosecution. The result has inevitably been a movement toward a definition of

How will probable cause determinations affect other areas of pretrial procedure? Will they replace the prompt, full-scale preliminary hearings presently required in many jurisdictions? The answer will vary with the criminal system. In Florida, criminal procedure rules were revised after the present decision was handed down.[58] The new rules provide for a nonadversarial probable cause determination[59] within 72 hours of arrest.[60] But the full-scale preliminary hearing, which had been previously required in felony cases within four to seven days of arrest unless an information or indictment intervened, is now required only after 21 days under the same conditions.[61] Thus an important effect of the instant holding may be to slow down the filing of informations or indictments and to force the use of habeas corpus proceedings as the principal method of challenging illegal detention.[62]

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probable cause more closely related to "suspicion." *See* Barrett, *Personal Rights, Property Rights and the Fourth Amendment*, 1960 SUP. CT. REV. 46, 55 (1960). On the one hand, there is danger in the instant holding that arrests may be found legal under this fairly loose judge-made standard. On the other, requiring a judicial probable cause determination for almost every arrestee, whether or not a question of evidence is involved, may restore a stricter construction to the probable cause standard.

58. FLA. R. CRIM. P. 3.131 (amended 1975). It should be noted that the revisions are temporary.

59. The magistrate's findings may be based on sworn complaint, affidavit, deposition under oath, or, if necessary, upon testimony under oath properly recorded. *Id.*

60. The determination shall be made at the first appearance hearing (within 24 hours of arrest), FLA. R. CRIM. P. 3.130(b), "if the necessary proof is available." The implication is that police may routinely gather evidence after the arrest to present at the probable cause determination, a view which conflicts with the Supreme Court's statement that "there is no need for further investigation before the probable cause determination can be made." 95 S. Ct. at 866 n.21. A defendant released from custody before the hearing must establish that pretrial release conditions are a significant restraint on his liberty to be able to obtain such a hearing. FLA. R. CRIM. P. 3.131(a)(2). If no probable cause for arrest is found, the state may still prosecute the individual, but it may not make any restraint upon the defendant other than requiring him to appear at all court proceedings. FLA. R. CRIM. P. 3.131(a)(4).

61. *Id.* The filing of an information or indictment after the 21-day period has elapsed, however, will not replace this preliminary hearing.

62. *See* Rogow, *supra* note 42, at 206. The Court suggested that habeas corpus is the proper procedure for review of the probable cause determination, just as it was at common law. 95 S. Ct. at 864.