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Constitutional Limitations On Postarrest, Prehearing Detention

CONSTITUTIONAL LIMITATIONS ON POSTARREST, PREHEARING DETENTION

Section 1 (section 1983) of the Civil Rights Act of 1871 (the Act)[1] creates an action for damages and injunctive relief against individuals and government agencies who deprive persons of rights or immunities secured by the Constitution of the United States.[2] For a plaintiff to maintain a section 1983 action against an individual or government body,[3] the plaintiff must assert that an individual or agency, acting under the color of state law,[4]

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[1] Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13 (1871) (codified as amended at 42 U.S.C. § 1983 (1976 & Supp. V 1981)). Section 1983 provides that any person acting under the color of state law who deprives a citizen of any rights, privileges, or immunities secured by the Constitution is liable to an injured party for an action in law and equity. *See* 42 U.S.C § 1983 (1976 & Supp. V 1981). In 1874, Congress modified the Civil Rights Act of 1871 (the Act) to allow civil damage actions against those, who under the color of state law, have deprived others of rights secured by the laws of the United States. *See* Whitman, *Constitutional Torts*, 79 MICH. L. REV. 5, 5 n.2 (1980); *see also* Main v. Thiboutot, 448 U.S. 1, 4 (1980) ("and laws" language of § 1983 emcompasses claims based purely on statutory violations of federal law).

[2] *See* 42 U.S.C. § 1983 (1976 & Supp. V 1981). Since state courts frequently were reluctant to enforce state law due to prejudice, passion, neglect, or intolerance, Congress passed the Act to afford aggrieved parties a federal remedy against deprivations of their constitutional rights in federal court. *See* Monroe v. Pape, 365 U.S. 167, 171-85 (1961) (in-depth analysis of congressional debates on Civil Rights Act), *overruled in part*, Monell v. Department of Social Servs., 436 U.S. 658 (1978); Mitchum v. Foster, 407 U.S. 225, 239 (1972) (§ 1983 interposes federal courts between states and people as guardian of people's federal rights); *see also* 28 U.S.C. § 1343(3) (1976 & Supp. V 1981) (§ 1983's jurisdictional counterpart). *See generally* S. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION, §§ 1.01-1.21 (1st ed. 1979) (explanation of § 1983 causes of action); Whitman, *supra* note 1, at 5 (discussion of § 1983); *Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133 (1977) (survey of § 1983 actions).

[3] *See* Monell v. Department of Social Servs., 436 U.S 658, 690-91 (1978) (cities, counties, and local government entities are suitable defendants in § 1983 actions); NAHMOD, *supra* note 2, § 1.08 (natural persons, corporate entities, and associations are "persons" within the meaning of § 1983). *But see id.* (eleventh amendment operates to bar § 1983 actions against states and state agencies); *see also* U.S. CONST. amend. XI (citizens may not bring civil actions against any state of the United States). *See generally* NAHMOD, *supra* note 2, § 7.02 (legislators are immune from liability for damages if acting in traditional legislative area); *id.* at § 7.06 (judges have absolute immunity for damages under § 1983); *id.* at § 7.10 (prosecutors are immune from liability for damages if acting within scope of duties in initiating and pursuing criminal prosecution under § 1983).

[4] *See* Adickes v. S.H. Kress & Co., 398 U.S. 144, 152, 163 (1970) (color of law and state action are same within meaning of § 1983). When a state employee acting on behalf of state and pursuant to state authority deprives a citizen of a constitutional right, the action is state action within the meaning of section 1983. *See* NAHMOD, *supra* note 2, § 2.04 (damages or injunctive relief are available to plaintiff if state employee deprives plaintiff of constitutional rights under claimed authority of state law). Constitutional deprivations of a citizen resulting from abuse of an official position by a state employee constitute an action taken under the color of law within section 1983. *See* Monroe v. Pape, 365 U.S. 167, 170, 186-87

violated the plaintiff's constitutional rights.[5] The identification of constitutionally impermissible conduct, therefore, is crucial in determining whether an aggrieved party is able to state a cause of action under section 1983.[6]

In *Gerstein v. Pugh*,[7] the Supreme Court held that the fourth amendment[8] requires a judicial determination of probable cause as a prerequisite to extended postarrest detention of an arrestee.[9] The Court,

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(1961) (illegal search and seizure by Chicago police constituted action under color of state law), *overruled in part*, Monell v. Department of Social Servs., 436 U.S. 658 (1978).

[5] *See* 42 U.S.C. § 1983 (1976 & Supp. V 1981). To establish a prima facie section 1983 cause of action, a plaintiff must prove that the defendant's conduct was a cause in fact of the plaintiff's constitutional deprivation. *See* NAHMOD, *supra* note 2, §§ 2.01, 3.15 (language of § 1983 requires causal relationship between defendant's conduct and plaintiff's constitutional deprivation). Since Congress enacted the Act pursuant to section 5 of the fourteenth amendment, only deprivations of citizens' fourteenth amendment rights are vindicable under section 1983. *See* NAHMOD, *supra* note 2, § 2.01. Deprivations of constitutional rights that will support § 1983 cause of action include violations of fourteenth amendment rights standing alone, violations of Bill of Rights that due process clause has incorporated into fourteenth amendment, and violations of due process that Constitution does not explicitly enumerate. *Id.*; *see also* U.S. CONST. amend. XIV § 5 (fourteenth amendment grants Congress wide powers to enforce its provisions).

[6] *See* NAHMOD, *supra* note 2, § 2.01 (plaintiff must prove that defendant's conduct was cause in fact of plaintiff's fourteenth amendment deprivation); *see also* Estelle v. Gamble, 429 U.S. 97, 104-05 (1976) (delibrate indifference shown by prison officials towards prisoner's medical needs will support § 1983 cause of action for violation of prisoner's eighth amendment rights against cruel and unusual punishment); Navarette v. Enomoto, 536 F.2d 277, 279 (9th Cir. 1976) (prison authorities' intentional interference with first amendment right of inmate to send mail supports § 1983 cause of action), *rev'd on other grounds sub nom*, Procunier v. Navarette, 434 U.S. 555 (1978); Jenkins v. Averett, 424 F.2d 1228, 1232 (4th Cir. 1970) (plaintiff who sustains injuries arbitrarily inflicted by police officer has § 1983 claim against officer for deprivation of fourth amendment rights); Hardwick v. Hurley, 289 F.2d 529, 529-31 (7th Cir. 1961) (plaintiff has stated § 1983 cause of action when complaint avers that officer beat plaintiff in attempt to force plaintiff to incriminate himself in violation of his fifth amendment rights). *See generally Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133 (1977) (survey of § 1983 actions).

[7] 420 U.S. 103 (1975). In *Gerstein v. Pugh*, the issue before the Supreme Court was whether the Constitution entitles a person arrested and held for trial under a prosecutor's information to a judicial determination of probable cause for pretrial restraint of liberty. *Id.* at 105; *see infra* text accompanying notes 15 & 16 (discussion of facts in *Gerstein*); notes 17-19 (discussion of district court and circuit court holdings in *Gerstein*); notes 9, 20-25 (discussion of Supreme Court analysis in *Gerstein*).

[8] U.S. CONST. amend. IV. The fourth amendment to the Constitution provides that "the right of the people to be secure in their persons . . . against unreasonable . . . seizures, shall not be violated, and no Warrants shall issue but upon probable cause . . ." *Id.*

[9] *See* 420 U.S. at 114. In *Gerstein*, the Supreme Court balanced the government's interest in detecting and preventing crime against an individual's interest in his freedom of movement and determined that the interests of an individual once in custody are superior to the government's interests. *See id.* (arrestee's need for neutral determination of probable cause increases while need for untampered police activity decreases). The *Gerstein* Court explained that prolonged pretrial confinement frequently has unfortunate consequences for an arrestee. *See id.* (pretrial confinement may jeopardize suspect's job, familial relationships and economic well-being); *see also* L. KATZ, JUSTICE IS THE CRIME 56 (1972) (prolonged

however, explained that postarrest probable cause hearings need not be adversarial.[10] The *Gerstein* Court further held that violations of an arrestee's fourth amendment right to probable cause hearings will not subject the arrestee's criminal conviction to appellate reversal.[11] The failure of a law enforcement officer promptly to present an arrestee before a magistrate to determine whether probable cause exists to detain an arrestee, however, may support an action under section 1983.[12]

Although the Supreme Court has not addressed directly whether the Constitution limits the permissible duration of postarrest detention prior to the required probable cause hearing,[13] the *Gerstein* Court necessarily

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detention of arrestee prior to trial is disastrous). Since the consequences of pretrial confinement are quite severe, the *Gerstein* Court held that the fourth amendment requires a neutral and detached determination of probable cause prior to extended postarrest detention. *See id.* (result has common-law support). *See generally* Comment, *Pretrial Restraint Hearing: Constitutional Right of Constitutional Wrong*, 28 U. FLA. L. REV. 214 (1975) [hereinafter cited as *Pretrial Restraint Hearing*] (*Gerstein* case comment).

[10] *See infra* note 21 (discussion of *Gerstein* holding that probable cause determination need not be adversarial).

[11] *See* 420 U.S. at 119. In *Gerstein*, the Supreme Court explained that appellate courts should not vacate a conviction if law enforcement officers detained a defendant pending trial without a determination of probable cause for the confinement. *Id.*; *see* Frisbie v. Collins, 342 U.S. 519, 522 (1952) (abduction of defendant by state officers for purpose of securing him for trial will not invalidate his conviction under fourteenth amendment due process).

[12] *See infra* text accompanying notes 102-08 (language in *Gerstein* is basis for fourth amendment prohibition against postarrest, prehearing detention of unreasonable duration). If a plaintiff can assert a deprivation of a due process right by an individual acting under the authority of state law, he will be able to state a section 1983 cause of action. *See* 42 U.S.C. § 1983 (1976 & Supp. V 1981); *see also supra* note 5 (language of § 1983 requires causal relationship between plaintiff's injury and defendant's conduct).

The fourth amendment prohibits the arrest of an individual upon less than probable cause. *See* Dunaway v. New York, 442 U.S. 200, 216 (1979) (seizure and transportation of individual for interrogation without probable cause was indistinguishable from arrest and therefore illegal). An arrest lacking an appropriate warrant or without probable cause generally constitutes a violation of due process vindicable under § 1983. Lucero v. Donovan, 354 F.2d 16, 19-21 (9th Cir. 1965) (alleged unlawful arrest will support § 1983 cause of action if arresting officer acted under color of state law and if arrest subjected arrestee to deprivation of rights, privileges, or immunities secured by Constitution); *see* Anderson v. Haas, 341 F.2d 497, 499 (3d Cir. 1965) (federal law determines constitutional validity of arrest in § 1983 actions); Nesmith v. Alford, 318 F.2d 110, 115, 121 (5th Cir. 1963) (arrest for legal conduct deemed offensive is illegal and vindicable under § 1983).

[13] *See* Fisher v. Washington Metropolitan Area Transit Auth., 690 F.2d 1133, 1139 (4th Cir. 1982); *see also* Michigan v. Mosley, 423 U.S. 96, 118 n.6 (1975) (Brennan, J., dissenting) (question of whether Constitution limits length of time police may detain suspect without arraignment is open question); Owen, *A Hard Look at the Military Magistrate Pretrial Commencement Hearing*: Gerstein *and* Courtney *Revisited*, 88 MIL. L. R. 3, 26 (1980) (Supreme Court has not stated specific constitutional limitation on length of time police may detain suspect without presentation before judicial officer).

[14] *See* 420 U.S. at 113-14. In *Gerstein*, the Supreme Court explained that a policeman's on-the-scene determination of probable cause permits a brief period of detention to take administrative steps incident to arrest. *See id.* The court further explained that the fourth amendment requires a judicial determination of probable cause prior to extended pretrial

touched upon the issue when analyzing the relationship between a judicial probable cause hearing and a police officer's ad hoc probable cause determination.[14] In *Gerstein*, a Florida prosecutor filed an information pursuant to Florida arrest procedure charging Pugh with robbery and carrying a concealed weapon.[15] Pugh brought a section 1983 class action against Dade County officials alleging that Florida arrest procedure violated his constitutional rights because the procedure did not afford Pugh a judicial determination of probable cause for his arrest and postarrest detention.[16] The District Court for the Southern District of Florida ordered the defendants to provide Pugh an immediate probable cause hearing prior to further detention.[17] The district court also ordered county officials to submit a plan providing probable cause hearings in all cases instituted by a prosecutor's information.[18] The Fifth Circuit Court of Appeals affirmed the district court holding on appeal.[19]

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confinement. *See id.* at 114; *see also supra* text accompanying notes 9, 20-25 (discussion of Supreme Court's analysis in *Gerstein*). The Court's analysis implies a fourth amendment limitation on permissible duration of postarrest, prehearing detention. *See* Fisher v. Washington Metropolitan Area Transit Auth., 690 F.2d 1133, 1140-41 (4th Cir. 1982) (violations of arrestees' right against postarrest, prehearing detention of unreasonable duration are determined on case-by-case basis); Sanders v. City of Houston, 543 F. Supp. 694, 699-702 (S.D. Tex. 1982) (*Gerstein* language provides basis for fourth amendment prohibition against postarrest, prehearing detention of unreasonable duration). Lively v. Cullinane, 451 F. Supp. 1000, 1004 (D.D.C. 1978) (police can delay probable cause hearing only for time necessary to process arrestee); *see also* Owen, *supra* note 13, at 24 (prompt presentation of arrestee is fundamental right guaranteed by fourth amendment).

The fourth amendment prohibits the arrest of an individual on less than probable cause. *See* Brown v. Illinois, 422 U.S. 590, 592, 602 (1975) (arrest made for investigatory purposes on less than probable cause is unconstitutional). The probable cause standard for an arrest is the facts and circumstances sufficient to persuade a reasonable man that a suspect has committed or is committing a crime. *See* Beck v. Ohio, 370 U.S. 89, 91 (1964). In *Gerstein*, the Supreme Court explained that the probable cause analysis for arrest and postarrest detention are identical. *See* 420 U.S. at 120. *See generally*, 1 W. LAFAVE, SEARCH AND SEIZURES § 3.1 (1st ed. 1978) (historical development of fourth amendment probable cause requirement).

[15] *See* 420 U.S. at 105 n.1; *see also* FLA. STAT. ANN. § 904.01 (West 1975) (authorized initiation of noncapital prosecutions by direct information without prior preliminary hearing).

[16] *See* Pugh v. Rainwater, 332 F. Supp. 1107, (S.D. Fla. 1971). In *State ex rel Hardy v. Blount*, the Florida Supreme Court held that the filing of an information by a prosecutor foreclosed the suspect's right to a preliminary hearing. *See* 261 So.2d 172, 173-74 (Fla. 1972). Since Florida procedure provided no review by a judicial officer as to the probable cause for arrest and detention, the police, therefore, could have detained a person charged by information for a substantial period solely on the decision of a prosecutor. *See* 332 F. Supp. at 1109.

[17] *See* 332 F. Supp. at 1114-15. In *Pugh*, the district court held that the fourth and fourteenth amendments require a jurdicial determination of probable cause in direct information cases. *See id.*

[18] *See id.* at 1116.

[19] *See* Pugh v. Rainwater, 483 F.2d 778, 778-89 (5th Cir. 1973) (circuit court modified district court decision in minor particulars and suggested that hearing provided by amended Florida rules was acceptable if provided to all defendants in custody pending trial); *see also Pretrial Restraint Hearing*, *supra* note 9, at 214 nn.6 & 7 (discussion of *Pugh* appellate history).

Although the Supreme Court affirmed the Fifth Circuit's holding that the fourth amendment requires a judicial determination of probable cause prior to extended postarrest detention,[20] the Court refused to extend adversary safeguards to the probable cause determination.[21] The *Gerstein* Court explained that a probable cause hearing by a detached and neutral magistrate must follow a police officer's on-the-scene assessment of probable cause for arrest since a police officer's commitment to zealous law enforcement frequently is inconsistent with constitutional safeguards.[22]

In *Pugh*, the district court handed down two more decisions before the circuit court considered an appeal. *See* 533 F. Supp. 1286, 1289 (S.D. Fla. 1973) (ordered new Florida rules of criminal procedure amended to require preliminary hearing for arrestees); 336 F. Supp. 490, 491 (S.D. Fla. 1972) (adopted local plan that included imposition of adversary safeguards on preliminary hearing).

[20] *See* 420 U.S. at 114; *see also supra* note 9 (Supreme Court analysis in *Gerstein*).

[21] *See* 420 U.S. at 120. In *Gerstein*, the Court determined that adversary safeguards are not essential for the probable cause determination required by the fourth amendment. *See id.* at 119-20 (adversary safeguards include counsel, confrontations, cross examination, and compulsory process for witnesses). The *Gerstein* Court explained that the lesser consequences of a probable cause determination justify the use of an informal procedure. *See id.* The Court explained that a reasonable doubt standard for postarrest detention does not require difficult resolutions of conflicting evidence that a higher standard of proof requires. *See id.* at 121. The *Gerstein* Court, therefore, held that an *ex parte* determination of probable cause is reliable, and that adversary safeguards at probable cause determinations are not mandatory. *See id.* at 120. *But see* 420 U.S. at 127 (Stewart, J., concurring) (traditional requirements of due process are applicable in context of pretrial detention); Berdon, *Liberty and Property Under the Procedural Due Process Clause: The Requirement of an Adversary Hearing to Determine Probable Cause*, 53 CONN. B. J. 31, 44 (1979) (any deprivation of liberty triggers procedural safeguards for adversary hearing); Comment, *Criminal Procedure-Filing by Information: Determination of Probable Cause Before Extended Restraint of Liberty*, Gerstein v. Pugh, 51 WASH. L. REV. 425, 426-27 (1976) [hereinafter cited as *Filing By Information*] (*Gerstein* Court ignored fact that fourteenth amendment provides independent safeguards for individuals detained during pretrial stage of criminal prosecution).

In *Gerstein*, the Court also held that the probable cause determination was not a critical stage during prosecution that required appointment of counsel. *See* 420 U.S. at 122; *see also* Coleman v. Alabama, 399 U.S. 1, 7-10 (1970) (Alabama preliminary hearing used to determine whether evidence justifies going to trial under information, or presenting case to grand jury is critical stage in prosecution that requires appointment of counsel); United States v. Wade, 388 U.S. 218, 236-38 (1967) (presence of counsel at identification line-up promotes fairness at confrontation and full hearing at trial and, therefore, is critical stage requiring appointment of counsel). Since the failure to appoint counsel for probable cause hearing will not prejudice defendant's right to a fair hearing at trial, no sixth amendment right to counsel attaches. *See* 420 U.S. at 122-23. *See generally* Powell v. Alabama, 287 U.S. 45, 69 (1932) (person accused of crime requires counsel at every step in proceedings against him); U.S. CONST. amend. VI (accused shall have assistance of counsel for his defense in all criminal prosecutions).

[22] *See* 420 U.S. at 112-13.. In *Gerstein*, the Supreme Court explained that factual inferences drawn by a detached and neutral magistrate frequently differ from factual inferences drawn by an officer engaged in the enterprise of ferreting out crime. *Id.* (citing Johnson v. United States, 333 U.S. 10, 13-14 (1948)); *see* Coolidge v. New Hampshire, 403 U.S. 443, 449-53 (1971) (prosecuting attorney may not determine whether probable cause for arrest and detention exists since prosecutor's responsibility to law enforcement is inconsistent with constitutional role of neutral and detached magistrate); Aguilar v. Texas, 378 U.S.

The Court stated that a police officer's ad hoc determination of probable cause provides legal justification for arresting a criminal suspect and detaining the suspect a brief period to take administrative steps incident to arrest.[23] The *Gerstein* Court also explained that judicial officers must make probable cause determinations either before or promptly after arrest.[24] The Court's discussion of the relationship between a police officer's ad hoc probable cause determination and a judicial probable cause hearing is the foundation on which federal courts have recognized that the Constitution limits the duration of postarrest detention prior to a judicial probable cause determination.[25]

Federal courts have had few opportunities to consider whether the Constitution places limitations on the duration of postarrest, prehearing detention.[26] Prehearing police detention is immune from appellate scrutiny

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108, 111 (1964) (neutral and detached magistrate may not serve as rubber stamp for police). The *Gerstein* Court held that postarrest judicial review of probable cause for arrest and detention maximizes individual liberty without imposing undue restraints on law enforcement officers. *See* 420 U.S. at 113.

[23] *See* 420 U.S. at 113-14; *see also* Terry v. Ohio, 392 U.S. 30-31 (1969) (fourth amendment permits limited frisk of individual when suspicious behavior of individual justifies officer in believing that individual is armed and presently dangerous).

[24] 420 U.S. at 125. In *Gerstein*, the Court recognized the right of the states to develop their own probable cause procedures within their individual systems of criminal procedure. *See id.* at 123. The *Gerstein* Court explained that probable cause procedures adopted by the states are immune from judicial scrutiny if the procedures meet the threshold requirement of the fourth amendment. *See id.* at 123-25 (magistrate must make judicial determination of probable cause promptly after arrest and prior to significant pretrial restraint of liberty). The states have adopted probable cause procedures consistent with the requirements mandated by *Gerstein*. *See* CAL. PENAL CODE § 849 (West 1970) (providing for bringing arrestee before magistrate "without unnecessary delay"); ARK. STAT. ANN. § 43-601 (1977) (providing for bringing arrestee before magistrate "forthwith"); GA. CODE ANN. § 27-212 (1978) (requiring presentation of arrestee before magistrate within 24 hours). *See generally* Owen, *supra* note 13, at 26-28 n.58 (list of state presentation statutes).

[25] *See* Fisher v. Washington Metropolitan Area Transit Auth., 690 F.2d 1133, 1140-41 (4th Cir. 1982) (citing *Gerstein*) (violations of arrestees' right against postarrest, prehearing detention of unreasonable duration are determined on case-by-case basis); Sanders v. City of Houston, 543 F. Supp. 694, 699-702 (S.D. Tex. 1982) (*Gerstein* language provides basis for fourth amendment prohibition against postarrest, prehearing detention of unreasonable duration); Lively v. Cullinane, 451 F. Supp. 1000, 1004 (D.D.C. 1978) (delay of probable cause hearing beyond time necessary to process arrestee violates fourth amendment); *see also* Owen, *supra* note 13, at 24 (prompt presentation of arrestee to determine probable cause for detention is fundamental right guaranteed by fourth amendment).

[26] *See* 690 F.2d at 1139 n.7. In *Fisher*, the court explained that opportunities to consider whether the Constitution forbids postarrest, prehearing detention of unreasonable duration structurally had been limited until the revitalization of § 1983. *See id.; see* NAHMOD, *supra* note 2, § 2.02 (§ 1983 remained in dormant state from time of enactment until Supreme Court's holding in Monroe v. Pape, 365 U.S. 167 (1961), because of restrictive application of state action doctrine, narrow reading of privileges and immunities clause, and reluctance of courts to incorporate Bill of Rights into fourteenth amendment); *see also supra* note 2 (discussion of § 1983 of Civil Rights Act).

In *Monroe v. Pape*, the Supreme Court broadly extended the scope of section 1983. *See* 365 U.S. 167, 183 (1961), *overruled in part*, Monell v. Department of Social Servs., 436 U.S.

in direct and collateral attacks on a defendant's conviction.[27] Courts, therefore, only address the issue of whether the Constitution imposes durational limitations on postarrest, prehearing detention in section 1983 actions that directly challenge the duration of postarrest, prehearing custody.[28] When plaintiffs have presented the issue in section 1983 actions, federal courts have recognized that the Constitution limits the duration of postarrest, prehearing detention.[29] Federal courts, however, have developed distinct analyses when determining the basis for a constitutional limitation on permissible duration of postarrest, prehearing detention.[30] For example, the Fourth and Fifth Circuits have held that

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658 (1978); *see also* NAHMOD, *supra* note 2, § 2.02 (*Monroe* is seminal case construing § 1983). In *Monroe*, city police officers entered plaintiff's home without warning and forced the occupants to stand naked while the officers ransacked the house. *See* 365 U.S. at 169. City policemen arrested the plaintiff and released him without filing any charges against him. *See id.* The Seventh Circuit affirmed the district court's holding dismissing plaintiff's § 1983 action for violations of plaintiff's fourth amendment rights because plaintiff failed to allege an actionable constitutional deprivation. *See* 272 F.2d 365, 366 (7th Cir. 1959).

The issue before the Supreme Court in *Monroe* was whether Congress, in enacting § 1983, intended to provide a remedy to persons deprived of constitutional rights, privileges or immunities by an official's abuse of his authority. *See* 365 U.S. at 172. The *Monroe* Court held that exercise of police authority in a manner inconsistent with state law still constitutes action taken under color of state law. *See id.* at 183; *see also* 42 U.S.C. § 1983 (1976 & Supp. V 1981) (plaintiff must allege constitutional deprivation by person acting under color of state law to maintain § 1983 action). The *Monroe* court held that the plaintiff properly asserted a § 1983 cause of action because the city police officers had violated plaintiff's fourth amendment rights. *See* 365 U.S. at 187. *See generally*, Comment, *Constitutional Law: "Under Cover Of" Law and the Civil Rights Act*, 1961 DUKE L.J. 452 (1961) (discussion of *Monroe* case).

[27] *See* 690 F.2d at 1139 n.7; *see also* 420 U.S. at 119 (illegal arrest or detention does not void valid conviction). In *Fisher*, the Fourth Circuit explained that appellate courts cannot address whether the Constitution imposes direct limitations on permissible duration of postarrest, prehearing detention in criminal appeals unless the defendant claimed that evidence acquired during postarrest, prehearing confinement offended the fourth amendment exclusionary rule. 690 F.2d at 1139 n.7; *see* Weeks v. United States, 232 U.S. 383, 397-98 (1914) (fourth amendment bars use of evidence secured through illegal search and seizure); State v. Phelps, 297 N.W.2d 769, 774 (N.D. 1980) (exclusionary rule renders inadmissible all evidence obtained in searches and seizures violative of fourth amendment); *see also* Mapp v. Ohio, 367 U.S. 643, 655 (1961) (fourth amendment exclusionary rule is applicable to states through fourteenth amendment due process clause).

[28] *See* 690 F.2d at 1139 n.7.

[29] *See id.* at 1140-41 (reasonableness requirement of fourth amendment limits duration of postarrest, prehearing detention); Sanders v. City of Houston, 543 F. Supp. 694, 702-03 (S.D. Tex. 1982) (Constitution imposes limitations on permissible duration of ostarrest, prehearing detention); Lively v. Cullinane, 451 F. Supp. 1000, 1004 (D.D.C. 1978) (delay of probable cause hearing beyond time necessary to process arrestee violates fourth amendment).

[30] *See infra* text accompanying notes 49-53, 59 & 60 (Fourth and Fifth Circuits have recognized that fourth amendment imposes limitations upon permissible duration of postarrest, prehearing detention); notes 69, 78-80 (Third Circuit implicitly has recognized that fourteenth amendment due process limits duration of arrestee's prehearing custody). *But see infra* note 58 (one line of Fifth Circuit cases has refused to recognize that Constitution places durational limits on postarrest, prehearing detention).

the fourth amendment, made applicable to the states through the fourteenth amendment,[31] precludes postarrest, prehearing detention of unreasonable duration.[32] The Third Circuit, however, has suggested that the fourteenth amendment due process clause, independent of the fourth amendment, imposes limitations on the duration of postarrest custody prior to a probable cause hearing.[33]

In *Fisher v. Washington Metropolitan Area Transit Authority*,[34] the Fourth Circuit held that the fourth amendment directly imposes limits on the permissible duration of postarrest, prehearing detention.[35] In *Fisher*, a Washington, D.C. transit officer arrested Fisher for violating a local ordinance that prohibits eating on Washington Metropolitan Area Transit Authority (WMATA) trains.[36] After arresting Fisher, the officer requested transportation from the Arlington County Police to carry Fisher to the Arlington County Police Station.[37] At the stationhouse, a duty officer instructed the arresting officer to obtain a warrant from a magistrate located in a nearby office.[38] After securing the arrest warrant and serving the warrant on Fisher, the arresting officer read Fisher her *Miranda* rights.[39] The arresting officer presented her to a booking officer for further administrative proceedings.[40] The arresting officer then departed to go about his regular duties.[41] Fisher brought a section 1983 action against WMATA and the arresting officer for alleged constitutional violations in-

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[31] *See* Mapp v. Ohio, 367 U.S. 643, 655 (1961) (overruling Wolf v. Colorado, 338 U.S. 25 (1949)) (prohibition against unreasonable searches and seizures under fourth amendment is applicable to states through fourteenth amendment).

[32] *See infra* text accompanying notes 34-57 (discussion of Fourth Circuit decision in Fisher v. Washington Metropolitan Area Transit Auth., 690 F.2d 1133 (4th Cir. 1982); notes 59-68 (discussion of Sanders v. City of Houston, 543 F. Supp. 694 (S.D. Tex. 1982)).

[33] *See infra* text accompanying notes 69-80 (discussion of Patzig v. O'Neil, 577 F.2d 841 (3d Cir. 1978)).

[34] 690 F.2d 1133 (4th Cir. 1982).

[35] *See id.* at 1140 (reasonableness requirement of fourth amendment operates past initial seizure and limits permissible duration of postarrest, prehearing detention); *see also infra* text accompanying notes 49-53 (discussion of *Fisher* court's analysis).

[36] *See* 690 F.2d 1135.

[37] *See id.* at 1136.

[38] *See id.*

[39] *See id.* In *Miranda v. Arizona*, the Supreme Court held that statements made by a defendant at a custodial interrogation are inadmissible unless enforcement officers inform a defendant of his constitutional rights prior to interrogation. *See* 384 U.S. 436, 478-79 (1966). Prior to a custodial interrogation, the fifth amendment guarantee against self incrimination requires that enforcement officers advise an interrogatee of his rights to remain silent, to know that the prosecution will use anything he says against him, to have counsel present, and to waive such rights only by voluntary choice. *See id.* at 467-73. *See generally, The Supreme Court, 1965 Term.* 80 HARV. L. REV. 91, 205 (1966) (*Miranda* does not address what constitutes valid waiver).

[40] *See* 690 F.2d at 1136.

[41] *See id.* at 1141.

cident to Fisher's arrest and detention.[42] At trial, the district court ordered directed verdicts for the defendants.[43]

On appeal, Fisher contended that the failure of the arresting officer to bring her immediately before a committing officer pursuant to a Virginia statute[44] constituted a per se violation of her constitutional rights.[45] Fisher, therefore, argued that the deprivation of her constitutional rights was vindicable under section 1983.[46] The Fourth Circuit summarily rejected Fisher's argument explaining that police conduct violative of a state statute does not amount to an automatic violation of the Constitution.[47] The *Fisher* court further explained that Fisher's reliance on the Virginia presentment statute for determining the constitutionality of the arresting officer's conduct was inappropriate since a determination of the constitutional validity of arrest and detention prior to a probable cause hearing requires a fourth amendment analysis.[48]

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[42] *See id.* at 1137; *see also* 42 U.S.C. § 1983 (1976 & Supp. V 1981) (deprivation of individual's due process rights by persons acting under color of law is condition precedent to § 1983 cause of action). *See generally* NAHMOD, *supra* note 2, §§ 2.01, 3.02 (plaintiff must demonstrate that defendant's conduct was cause of plaintiff's constitutional deprivation).

[43] *See* 690 F.2d at 1137. In *Fisher*, the district court denied Fisher's motion for summary judgment against WMATA and the arresting officer on her unconstitutional detention claim. *See id.* at 1137 n.2. The district court also denied Fisher's request for directed verdict. *See id.*

[44] *See* VA. CODE § 19.2-74 (1975). The applicable Virginia statute in *Fisher* requires an arresting officer to take the name and address of a misdemeanant arrested for violating a county, town, or city ordinance. *Id.* An arresting officer then must issue a summons notifying an arrestee to appear at a specified time and place. *Id.* If an arresting officer believes that an arrestee will disregard a summons issued under a Virginia statute, an arresting officer shall take any arrestee forthwith before the nearest or most accessible judicial officer. *Id.* The judicial officer shall determine whether probable cause exists that an arrestee will disregard a summons. *Id.* The judicial officer has descretion to issue a summons or warrant. *Id.*

[45] *See* 690 F.2d at 1137. In *Fisher*, Fisher argued that the arresting officer failed to take her "forthwith" before the nearest judicial officer pursuant to Virginia law. *See id.*

[46] *See id.*

[47] *See* 690 F.2d at 1138 (citing Street v. Surdyka, 492 F.2d 368 (4th Cir. 1974)) (officer's violation of Maryland law recognizing that probable cause does not authorize warrantless arrest of misdemeanant may impose common-law liability for false arrest but, § 1983 does not provide remedy for common-law tort); *see also* Anderson v. Nosser, 438 F.2d 183, 196 (5th Cir. 1971) (unreasonable delay in presenting arrestee before magistrate may support state action for false imprisonment but presentment delay will not support § 1983 action since presentment delay does not violate constitutional rights), *modified en banc*, 456 F.2d 835, *cert. denied*, 409 U.S. 848 (1972).

[48] *See* 690 F.2d at 1138 (citing Gerstein v. Pugh, 420 U.S. 103, 111 (1974)). In *Fisher*, the court held that Fisher's § 1983 claim alleging an unconstitutional postarrest detention exists in the fourth amendment because the standards and procedures for arrest and detention have been derived from the fourth amendment. *See* 690 F.2d at 1138. In *Gerstein*, the Court stated that the fourth amendment's balance between public and individual interests defines the due process for seizures of persons including the detention of suspects awaiting trial. *See* 420 U.S. at 125 n.27. *But see* Berdon, *supra* note 21, at 41 (sole concern

Relying on dicta in *Gerstein v. Pugh*,[49] the *Fisher* court found that the fourth amendment precludes postarrest, prehearing detention of unreasonable duration.[50] The *Fisher* court held that the reasonableness requirement of the fourth amendment limits the permissible duration of postarrest, prehearing incarceration.[51] The *Fisher* court held that the reasonableness standard of the fourth amendment is implicit in the *Gerstein* Court's statement that a law enforcement officer's ad hoc probable cause determination provides a legal basis for a brief period of detention of an arrestee to perform the administrative steps incident to arrest.[52] Since the Supreme Court in *Gerstein* also held that the fourth amendment requires a judicial determination of probable cause prior to extended postarrest restraint of liberty, the *Fisher* court decided that the reasonableness requirement of the fourth amendment imposes limitations on the permissible duration of postarrest, prehearing custody.[53]

After recognizing that the fourth amendment prohibits postarrest, prehearing detention of unreasonable duration, the *Fisher* court presented a general standard for courts to apply when determining the constitutional validity of postarrest detention prior to the required probable cause hearing.[54] Since the administrative steps incident to a particular arrest will vary with logistical circumstances, factual exigencies, and prosecutorial procedures, the *Fisher* court held that the fourth amendment reasonableness standard for determining the constitutionality of postarrest, prehearing detention only is applicable on a case-by-case basis.[55] The

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of fourth amendment is initial seizure of person or property); *Filing By Information*, *supra* note 21, at 426 (fourth amendment analysis is inappropriate to consideration of postarrest, prehearing detention).

[49] 420 U.S. 103 (1975).

[50] *See* 690 F.2d at 1140.

[51] *See id.*; *see also infra* text accompanying notes 52 & 53 (*Fisher* court relied on *Gerstein* Court's analysis of relationship between judicial probable cause determination and policeman's ad hoc assessment of probable cause to determine that reasonableness standard of fourth amendment governs duration of postarrest, prehearing detention).

[52] *See* 690 F.2d at 1140.

[53] *See id.* (citing *Gerstein*). In *Fisher*, the court adopted a substantial excerpt of the *Gerstein* analysis that displayed respect for the compromise between state interest in law enforcement and the individual's right to be secure in his person. *See id.*; *see also supra* note 9 (discussion of *Gerstein* balancing analysis). Once a suspect is in custody, the interests of the state subside relative to those of the arrestee. *See* 690 F.2d at 1140 (citing *Gerstein*) (danger that suspect will escape or commit further crime no longer exists during postarrest detention while impact of pretrail confinement upon arrestee frequently is catastrophic). *See generally* KATZ, *supra* note 9, at 51-62 (interference caused by arrest and postarrest detention impinges upon arrestee's dignity, reputation, and his right to be from arbitrary actions by state).

[54] *See* 690 F.2d at 1140; *see also infra* text accompanying notes 55-57 (totality of circumstances determines constitutionality of postarrest, prehearing detention).

[55] *See* 690 F.2d at 1140; *see also* Sanders v. City of Houston, 543 F. Supp. 694, 701 (S.D. Tex. 1982) (circumstances of each case determine constitutionality of postarrest, prehearing detention); Lively v. Cullinane, 451 F. Supp. 1000, 1005 (D.D.C. 1978) (only strong showing that presentation delay is administratively necessary will excuse delay); Dommer v.

Fisher court decided that the question of whether postarrest, prehearing detention violates the fourth amendment prohibition against detention of unreasonable duration requires an analysis of the nature of, and reasons for, delay in presenting an arrestee before a magistrate to determine probable cause for detention.[56] Applying the fourth amendment reasonableness standard to the facts of the case in *Fisher*, the court concluded that Fisher's section 1983 claim against the arresting officer failed because the arresting officer did not detain Fisher beyond the brief period of detention necessary to take the administrative steps incident to arrest.[57]

The *Fisher* court's holding that the fourth amendment imposes limitations on permissible duration of postarrest, prehearing detention is con-

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Hatcher, 427 F. Supp. 1040, 1045 (N.D. Ind. 1977) (holding arrestees for investigation more than 24 hours before probable cause determination deprives arrestees of rights guaranteed by fourth amendment), *modified*, 653 F.2d 289 (1981). *See generally infra* text accompanying notes 59-68 (discussion of *Sanders*).

[56] *See* 690 F.2d at 1140-41. In *Sanders v. City of Houston*, the District Court for the Southern District of Texas explained that federal decisions construing rule 5(a) of the Federal Rules of Criminal Procedure are helpful in determining whether police delay and procedures incident to arrest are reasonable within the meaning of the fourth amendment. *See* 543 F. Supp. 694, 699-701 (S.D. Tex. 1982) (similarity between unreasonable delay language of rule 5(a) and prompt presentation requirement prior to extended pretrial confinement in *Gerstein* permits instructive analogy). Under rule 5(a), federal officers must bring arrestees before a federal magistrate without unnecessary delay. *See* FED. R. CRIM. P. 5(a); *see also* Jaben v. United States, 381 U.S. 214, 218 (1965) (Federal Rules of Criminal Procedure require determination of probable cause at first appearance). Since evidence obtained during periods of prolonged detention in violation of rule 5(a) is inadmissible in federal court, federal courts have had ample opportunity to comment upon what constitutes unnecessary delay under rule 5(a). *See* McNabb v. United States, 318 U.S. 332, 341-43 (1943) (Supreme Court invokes supervisory powers to exclude evidence obtained during prolonged period of postarrest, prehearing detention to adequately enforce congressional requirement of prompt presentment before magistrate); Mallory v. United States, 354 U.S. 449, 453 (1957) (reaffirming *McNabb*); *see also* United States v. Brown, 459 F.2d 319, 325 (5th Cir. 1971) (questioning of suspect prior to presentation before magistrate is not unnecessary delay under rule 5(a)), *cert. denied*, 409 U.S. 864 (1972); United States v. Mayes, 417 F.2d 771, 772 (9th Cir. 1969) (per curiam) (unnecessary delay exists when magistrate is available and no justification for detention exists); Granza v. United States, 377 F.2d 746, 749 (5th Cir. (taking writing samples does not constitute unnecessary delay under rule 5(a)), *cert. denied*, 389 U.S. 939 (1967); United States v. D'Argento, 373 F.2d 307, 313 (7th Cir. 1967) (fingerprinting and photographing does not constitute unnecessary delay under rule 5(a)). *See generally* Hogan & Snee, *The* McNabb-Mallory *Rule: Its Rise, Rationale and Rescue*, 47 GEO. L.J. 1 (1958) (appraisal of *McNabb-Mallory* rule soon after Supreme Court's decision in Mallory v. United States); Note, *The Ill-Advised State Court Revival of the* McNabb-Mallory *Rule*, 72 J. CRIM. L. &. CRIMINOLOGY 204 (1981). (criticizing state revival of McNabb-Mallory rule as excluding voluntary confessions).

[57] *See* 690 F.2d at 1141. In *Fisher*, the Fourth Circuit held that the evidence showed that the arresting officer acted as expeditiously as the circumstances reasonably permitted. *See id.*; *see also supra* text accompanying notes 36-43 (discussion of facts in *Fisher*). The *Fisher* court held that the arresting officer promptly arranged for arrestee's transportation to the Arlington County Police Station. *See* 690 F.2d at 1141. The arresting officer further procured an arrest warrant and served the warrant on arrestee in a fashion within his authorized duties. *See id.*

sistent with Fifth Circuit cases that have addressed the issue since *Gerstein*.[58] For example, in *Sanders v. City of Houston*,[59] the District Court for the Southern District of Texas held that language employed by the *Gerstein* Court provides that basis for a fourth amendment prohibition against postarrest, prehearing detention of unreasonable duration.[60] In *Sanders*, the plaintiff brought a section 1983 class action against the City

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[58] *See* McGill v. Parsons, 532 F.2d 484, 486 (5th Cir. 1976) (fourth amendment requires that probable cause hearing occur within reasonable time); Sanders v. City of Houston, 543 F. Supp. 694, 699-702 (*Gerstein* language provides basis for fourth amendment prohibition against postarrest, prehearing detention of unreasonable duration). In *McGill*, the Fifth Circuit reinstated a trial court order that set definite guidelines on how long the police could detain an arrestee arrested without a warrant before according him a probable cause hearing before a state magistrate. *See* 532 F.2d at 485, 486 n.2 (probable cause hearing must occur within reasonable time not to exceed 24 hours). In *McGill*, the plaintiff brought a § 1983 class action alleging that the duration of his postarrest detention prior to a probable cause determination violated his constitutional rights. *See id.* at 485-87 (plaintiff alleged violations of fifth, sixth, seventh and fourteenth amendment rights). Although the *McGill* court was reluctant to establish any definite time limits beyond which an arrestee could not be held without presentation before a magistrate for determination of probable cause, the court held that the plaintiff did assert the deprivation of a constitutional right within the meaning of *Gerstein* and the fourth amendment. *See id.*; *see also infra* text accompanying notes 59-68 (discussion of Sanders v. City of Houston, 543 F. Supp. 694 (S.D. Tex. 1982)).

One line of Fifth Circuit cases has maintained that the Constitution imposes no direct limitations on the permissible duration of postarrest, prehearing detention. *See* Anderson v. Nosser, 438 F.2d 183, 196 (5th Cir. 1971) (unreasonable or unnecessary delay in determining probable cause for arrest and detention will not support § 1983 cause of action), *modified en banc*, 456 F.2d 835, *cert. denied*, 409 U.S. 848 (1972); *see also* Rheaume v. Texas Dept. of Public Safety, 666 F.2d 925, 929 (5th Cir.) (per curiam) (dictum citing *Anderson*) (right of immediate hearing before magistrate is not of constitutional dimension), *cert. denied*, 102 S. Ct. 3484 (1982); Perry v. Jones, 506 F.2d 778, 781 (5th Cir. 1975) (failure immediately to present arrestee before magistrate is not denial of due process). In *Anderson*, the court refused to recognize any constitutional limitations on postarrest, prehearing detention absent further guidance from the Supreme Court. *See* 438 F.2d at 196, 172. Since *Anderson*, however, Supreme Court language in *Gerstein* suggests that the Constitution imposes durational limitations on postarrest, prehearing detention. *See* Fisher v. Washington Area Metropolitan Area Transit Auth., 690 F.2d 1133, 1139-40 (4th Cir. 1982) (citing *Gerstein*) (fourth amendment reasonableness standard limits duration of postarrest detention prior to probable cause determination); Sanders v. City of Houston, 543 F. Supp. 694, 699-701 (S.D. Tex. 1982) (citing *Gerstein*) (circumstances of each case determine constitutionality of duration of postarrest, prehearing detention). Lively v. Cullinane, 451 F. Supp. 1000, 1005 (D.D.C. 1978) (citing *Gerstein*) (only strong showing that presentation delay is administratively necessary will excuse delay under fourth amendment). Consistent with the Fifth Circuit's previous reluctance to recognize limitations upon the duration of postarrest, prehearing detention absent further guidance from the Supreme Court, the *Sanders* court acknowledges that the *Gerstein* opinion mandates a constitutional prohibition against postarrest, prehearing detention of unreasonable duration. *See infra* text accompanying notes 59-68 (discussion of *Sanders* court analysis and holding that fourth amendment imposes limitations on permissible duration of postarrest, prehearing detention).

[59] 543 F. Supp. 694 (S.D. Tex. 1982).

[60] *See id.* at 699-702.

of Houston claiming that police department policy authorizing police to detain arrestees on investigative hold[61] before probable cause hearings violates arrestees' fourth and fourteenth amendment rights.[62] Since the *Gerstein* court decided that the fourth amendment requires a judicial determination of probable cause prior to an extended restraint of liberty, the *Sanders* court construed "extended" to determine the constitutionality of the Houston investigative hold procedure.[63]

Relying on the *Gerstein* decision, the *Sanders* court explained that a police officer's ad hoc assessment of probable cause for arrest permits a brief period of detention to take administrative steps incident to arrest, and that a magistrate must determine probable cause for arrest and postarrest detention before or promptly after arrest.[64] The *Sanders* court decided that the failure of an arresting officer promptly to present an arrestee for a probable cause hearing constitutes an extended restraint on the liberty of the arrestee within the meaning of *Gerstein* unless the performance of an administrative procedure incident to arrest excuses the delay.[65] The *Sanders* court suggested that courts must balance state and individual interests to determine whether police procedures prior to arrest are administrative steps incident to arrest.[66] Relying on the traditional power of federal courts to supervise the administration of criminal justice, the *Sanders* court held that postarrest, prehearing detention is impermissible if an arresting officer fails to bring an arrestee before a magistrate to determine probable cause within twenty-four hours of arrest.[67] Although postarrest, prehearing detention may be constitutional under the fourth amendment analysis adopted by the *Sanders* court, the *Sanders* decision

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[61] *See id.* at 697. Investigative hold refers to Houston investigatory arrest policy that encourages police to "wrap up" loose ends of investigation after arrest but before probable cause hearing. *Id.*

[62] *See id.* at 696-97. In *Sanders*, the court made detailed findings of fact based upon police records and testimony. *See id.* The evidence exposed an unwritten rule in the Houston Police Department permitting police to detain a suspect as long as seventy-two hours before a judicial determination of probable cause for detention. *See id.* at 697.

[63] *See id.* at 700-01.

[64] *See id.* at 699-702 (citing *Gerstein*).

[65] *See id.* at 700-01. In *Sanders*, the court explained that the Constitution dictates that the interests of an arrestee once in custody are paramount and cannot be undercut by arbitrary or protracted police procedures. *See id.* at 700-01; *see also* Lively v. Cullinane, 451 F. Supp. 1000, 1005 (D.D.C. 1978) (balancing weighs so heavy in favor of detained arrestee that police can justify delay before presentation only by showing delay was administratively necessary).

[66] *See* 543 F. Supp. at 700-01 (determination of what constitutes extended detention will vary with circumstances). In *Sanders*, the court explained that cases construing rule 5(a) of Federal Rules of Criminal Procedure provide guidance for determining what postarrest, prehearing procedures are administrative steps incident to arrest within the meaning of *Gerstein*. *See id.* at 699; *see supra* note 56 (discussion of cases construing rule 5(a) of Federal Rules of Criminal Procedure as guide for understanding *Gerstein*).

[67] *See* 543 F. Supp. at 701-703.

also indicates that the Southern District of Texas will not tolerate postarrest, prehearing delay of more than twenty-four hours.[68]

Although few other courts have considered whether there exist constitutional limitations on permissible duration of postarrest detention prior to a probable cause hearing, the Third Circuit has suggested that the due process clause of the fourteenth amendment, independent of the fourth amendment, provides a basis for section 1983 actions.[69] In *Patzig v. O'Neil*,[70] a Philadelphia police officer arrested Patzig for driving while intoxicated at 4:30 a.m.[71] The arresting officer took Patzig to a local police station.[72] At 5:55 a.m., an officer transported Patzig to the Philadelphia Police Administration Building for a breathalyzer test and a brief medical examination to determine Patzig's blood-alcohol level.[73] Although the tests proved inconclusive, officers removed Patzig to a detention cell with two women pending Patzig's arraignment before a magistrate.[74] At approximately 9:30 a.m., a police matron moved Patzig to a previously unoccupied cell where the matron later found Patzig hanging dead by her belt.[75] The decedent's parents instituted a section 1983 action against numerous police supervisors, officers, and matrons alleging that the delay in taking Patzig before a magistrate violated Patzig's due process rights.[76] At trial, the district court granted the defendant's motion for a directed verdict at the end of the plaintiffs' case.[77]

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[68] *See id.*

[69] *See infra* text accompanying notes 70-80 (discussion of Third Circuit decision in Patzig v. O'Neil, 577 F.2d 841 (3d Cir. 1978)). In *Patzig v. O'Neil*, the Third Circuit did not elaborate on the nature of the fourteenth amendment prohibition against postarrest, prehearing detention of unreasonable duration. *See* 577 F.2d 841, 846-47 (3d Cir. 1978). Although the *Patzig* court found no due process violation in the instant case, the court assumed that the due process clause imposes limitations on permissible duration of postarrest, prehearing detention. *See id.* The unqualified assumption that the due process clause limits the duration of postarrest, prehearing detention leaves the precise basis for the constitutional protection unidentified in the Third Circuit. *See infra* text accompanying note 86 (constitutional limitation on duration of postarrest, prehearing detention may exist in fourth amendment, made applicable to states through fourteenth amendment, or in fourteenth amendment due process clause, independent of fourth amendment).

[70] 577 F.2d 841 (3d Cir. 1978).

[71] *See id.* at 845.

[72] *See id.*

[73] *See id.*

[74] *See id.* Under Pennsylvania law, when an officer arrests a defendant without a warrant, an arresting officer shall present defendant before an issuing authority without unnecessary delay for an immediate preliminary arraignment. *See* PA. R. CRIM. P. 130(a) (Purdon 1982). In *Commonwealth v. Eaddy*, the Pennsylvania Supreme Court explained that rule 130 assures an independent review of facts and circumstances alleged to provide probable cause for arrest. 472 Pa. 409, 372 A.2d 759, 760 (1977).

[75] *See* 577 F.2d at 845.

[76] *See id.* at 845-46; *see also* 42 U.S.C. § 1983 (1976 & Supp. V 1981) (plaintiff must allege deprivation of fourteenth amendment right by person acting under state law to state § 1983 cause of action).

[77] *See* 577 F.2d at 847. In *Patzig*, the district court granted defendants' motion for

On appeal, the Third Circuit affirmed the district court's order granting defendant's directed verdict against plaintiffs' claim that the officers' failure to bring Patzig before a magistrate after five hours of detention violated Patzig's due process rights under the fourteenth amendment.[78] The *Patzig* court held that a directed verdict for the defendants was appropriate since confinement for five hours pending arraignment before a magistrate does not, without more, constitute a deprivation of due process rights.[79] Although implicitly recognizing that the fourteenth amendment's due process clause prohibits detentions of unreasonable duration, the *Patzig* court refused to elaborate on what circumstances would support a section 1983 action for postarrest, prehearing detention of unreasonable duration.[80]

Although the Constitution imposes direct limitations on permissible duration of postarrest, prehearing detention, the question remains whether the fourteenth amendment due process clause or the fourth amendment reasonableness requirement provides the basis for the prohibition against postarrest, prehearing custody of unreasonable duration.[81] In *Patzig v. O'Neil*,[82] the Third Circuit assumed that the fourteenth amendment due process clause limits the duration of postarrest, prehearing detention.[83] The court, however, held that a five hour delay in bringing an arrestee before a magistrate for a probable cause hearing did not violate the arrestee's fourteenth amendment due process rights.[84] Since the *Patzig* court failed to elaborate on the nature of the constitutional protection,[85] the Third

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directed verdict pursuant to rule 50(a) of Federal Rules of Civil Procedure. *See id.*; *see also* FED. R. CIV. P. 50(a) (order of court granting motion for directed verdict is effective without assent of jury).

[78] *See* 577 F.2d at 847. In *Patzig*, the Third Circuit held that the failure of enforcement officers to bring Patzig before a magistrate prior to her suicide did not constitute unnecessary delay. *See id.*; *see also supra* note 74 (discussion of rule 130(a) of Pennsylvania Rules of Criminal Procedure requiring presentation of arrestee before magistrate without unnecessary delay).

[79] *See* 577 F.2d at 846.

[80] *See id.* The *Patzig* court's implicit assumption that the fourteenth amendment's due process clause imposes limits on the duration of postarrest, prehearing detention is consistent with district courts that have addressed the issue. *See* Daly v. Pederson, 278 F. Supp. 88, 94-95 (D. Minn. 1967) (plaintiff failed to state § 1983 claim since arraignment of plaintiff was reasonably prompt under fourteenth amendment due process); Sopp v. Gehrlein, 232 F. Supp. 881, 884 (W.D. Pa. 1964) (failure of arresting officer to bring plaintiff before magistrate within six hours of arrest did not support § 1983 claim because six hour delay is not per se violation of due process rights).

[81] *See supra* text accompanying notes 49-53 (discussion of fourth amendment analysis in *Fisher*); notes 60, 63-65 (discussion of *Sanders* analysis); notes 78-80 (discussion of *Patzig* court's assumption that due process limits duration of postarrest, prehearing detention).

[82] 577 F.2d 841 (3d Cir. 1978).

[83] *See* Patzig v. O'Neil, 577 F.2d 841, 846-47 (3d Cir. 1978); *see also supra* text accompanying notes 78-80 (discussion of *Patzig* court's assumption that due process considerations impose limitations on permissible duration of postarrest, prehearing detention).

[84] *See* 577 F.2d at 846-47.

[85] *See id.* (court assumed that due procxess clause limits duration of postarrest, prehearing detention without finding violation of that right in case before bench).

Circuit did not determine whether the constitutional prohibition against extended postarrest, prehearing detention exists in the fourth amendment reasonableness standard, made applicable to the states through the fourteenth amendment, or in the fourteenth amendment due process clause, independent of the fourth amendment.[86]

A constitutional limitation on the duration of postarrest, prehearing detention based solely on the fourteenth amendment due process clause misinterprets *Gerstein* and departs from the majority view enunciated in *Fisher v. Washington Metropolitan Area Transit Authority*[87] and *Sanders v. City of Houston*.[88] In *Gerstein*, the Supreme Court explained that the fourth amendment traditionally defines the "process that is due" for seizures of persons including the detention of arrestees pending trial.[89] Since the *Gerstein* Court suggested that the reasonableness requirement of the fourth amendment extends beyond arrest to govern postarrest detention up until the required probable cause hearing, a fourteenth amendment analysis for determining the constitutionality of postarrest, prehearing detention is inappropriate.[90] After a postarrest probable cause determination, however, the conditions and the duration of pretrial restraints on liberty fall under the fourteenth amendment due process clause.[91]

A fourteenth amendment due process analysis requires procedural safeguards unnecessary to a detached and neutral determination of probable cause.[92] The *Gerstein* Court explained that a probable cause hearing

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[86] *See supra* note 69 (unqualified assumption that due process clause limits duration of postarrest, prehearing detention leaves precise basis for constitutional protection unidentified in Third Circuit).

[87] 690 F.2d 1133 (4th Cir. 1982).

[88] 543 F. Supp. 694 (S.D. Tex. 1982); *see infra* text accompanying notes 89 & 90 (fourth amendment, not fourteenth amendment, determines process that is due arrestee at probable cause determination); notes 92-101 (fourteenth amendment due process safeguards do not attach to probable cause hearing because fourth amendment is basis for constitutional right to probable cause hearing prior to extended postarrest detention); *see also supra* text accompanying notes 9, 20-25 (discussion of *Gerstein* analysis); 49-53 (discussion of *Fisher* holding that fourth amendment prohibits postarrest, prehearing detention of unreasonable duration); 60, 63-65 (discussion of *Sanders* holding that fourth amendment limits permissible duration of postarrest detention prior to probable-cause hearing). *See generally supra* note 102 (list of courts that have recognized constitutional limitation on duration of postarrest, prehearing detention).

[89] *See* 420 U.S. at 125 n.27.

[90] *See* 690 F.2d at 1140 n.10 (timeliness of probable cause determination by judicial officer is matter of constitutional right under fourth amendment).

[91] *See id.*; *see also* Bell v. Wolfish, 441 U.S. 520, 533 (1979) (dicta) (due process clause protects detainee from certain conditions and restrictions during pretrial detention).

[92] *See* 420 U.S. at 119-20 (adversary safeguards including rights to counsel, confrontation, and cross examination are not essential for probable cause determination required by fourth amendment); *see also* Armstrong v. Manzo, 380 U.S. 545, 552 (1965) (due process requires opportunity to be heard). *See generally*, Comment, *Pretrial Detainees Have a Fourth Amendment Right to a Nonadversary Judicial Determination of Probable Cause*, 10 VAL. U.L.

need not be adversarial because a probable cause hearing is not a critical stage in the prosecution that requires the presence of counsel.[93] The *Gerstein* Court suggested that the complex nature of criminal procedure and the historical development of the probable cause requirement distinguish recent Supreme Court decisions forbidding *ex parte* orders affecting individual property rights.[94]

Although extending adversary safeguards to the probable cause hearing may minimize the risk of probable cause determinations based on suspicion or bias, an adversarial probable cause hearing would encroach on the arrestee's rights against postarrest, prehearing detention of unreasonable duration.[95] Under a fourteenth amendment analysis, an imposition of due process safeguards would provide an arrestee notice and the opportunity to be heard.[96] An arrestee would have to retain counsel and summon witnesses in order to establish a lack of probable cause for further detention.[97] A probable cause hearing requiring adversary safeguards would make prompt postarrest determinations of probable cause impossible.[98] Imposing due process guarantees on probable cause hearings would cause longer periods of postarrest detention.[99] As a practical matter, therefore, the prohibition against postarrest, prehearing detention of unreasonable duration cannot fall within fourteenth amendment due process requirements because due process requires procedural safeguards that work against the prohibition against postarrest, prehearing detention of unreasonable duration.[100] The fourth amendment, however, adequately assures an arrestee a prompt probable cause hearing because the refusal of the *Gerstein* Court to extend adversary safeguards to prob-

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REV. 199, 213 (1975) [hereinafter cited as *Judicial Determination of Probable Cause*] (due process clause of fifth amendment may mandate extension of adversary safeguards to probable cause determination).

[93] *See supra* note 21 (discussion of *Gerstein* holding that probable cause determination does not require adversary safeguards and that probable cause determination is not critical stage that requires appointment of counsel).

[94] *See* 420 U.S. at 125 n.27; *see also* North Georgia Finishing, Inc. v. Di Chem, Inc., 419 U.S. 601, 606-08 (1975) (fourteenth amendment requires adversary hearing to determine probable cause before or shortly after deprivation of individuals property); Sniadach v. Family Finance Corp., 395 U.S. 337, 430-42 (1969) (garnishment of wages by creditor without prior right to be heard violates procedural due process). *See generally* Berdon, *supra* note 21, at 31. (Judge Berdon objects to fact that protection of person's property requires more process than protection of person's liberty before conviction after decision in *Gerstein v. Pugh*).

[95] *See infra* text accompanying notes 96-100 (extending adversary safeguards to probable cause hearing would increase duration of postarrest, prehearing detention because detainees would spend longer periods in detention awaiting procurement of procedural safeguards).

[96] *See* Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

[97] *See Judicial Determination of Probable Cause*, *supra* note 92, at 214.

[98] *See id.*

[99] *See id.* (longer periods of postarrest detention contribute to general pretrail delay).

[100] *See supra* text accompanying notes 98 & 99 (procurement of procedural safeguards extends duration of postarrest, prehearing detention).

able cause hearings avoids destructive competition between constitutional rights.[101]

The Constitution imposes limitations on permissible duration of postarrest, prehearing detention.[102] Relying on *Gerstein v. Pugh*,[103] the decisions in *Fisher v. Washington Metropolitan Area Transit Authority*[104] and *Sanders v. City of Houston*[105] are the clearest and most recent decisions addressing the issue of whether the Constitution limits the duration of postarrest detention prior to the required probable cause hearing.[106] Basing the constitutional prohibition against postarrest, prehearing detention on the reasonableness standard of the fourth amendment, the courts have held that an officer's ad hoc assessment of probable cause permits brief custodial detention to allow enforcement officers to take administrative steps incident to arrest.[107] The courts' adoption of a fourth amendment analysis for determining the constitutionality of postarrest, prehearing detention strikes a necessary balance between the recognition of individual liberty and the Supreme Court's reluctance to extend adversary safeguards to probable cause hearings.[108]

If an arrestee can demonstrate that an individual acting under color of state law violated his fourth amendment right against postarrest, prehearing detention of unreasonable duration, the arrestee will prevail

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[101] *See id.*

[102] *See* Owen, *supra* note 13, at 24 (prompt presentation is fundamental right guaranteed by Constitution); *see also* Fisher v. Washington Metropolitan Area Transit Auth., 690 F.2d 1133, 1139-40 (4th Cir. 1982) (fourth amendment limits duration of postarrest, prehearing detention); Patzig v. O'Neil, 577 F.2d 841, 846-47 (3d Cir. 1978) (due process limits duration of postarrest, prehearing detention); McGill v. Parsons, 532 F.2d 484, 485-87 (5th Cir. 1976) (dicta) (fourth amendment imposes limitations on postarrest detention prior to probable cause hearing); Brown v. Fauntleroy, 442 F.2d 838, 839 (D.C. Cir. 1971) (citing Cooley v. Stone, 414 F.2d 1213, 1213 (D.C. Cir. 1969)) (per curiam) (fourth amendment prohibits penal custody by state without prompt judicial determination of probable cause); Lively v. Cullinane, 451 F. Supp. 1000, 1005 (D.D.C. 1978) (only strong showing that presentation delay is administratively necessary will excuse delay under fourth amendment); Dommer v. Hatcher, 427 F. Supp. 1040, 1045 (N.D. Ind. 1977) (holding arrestees for investigation more than 24 hours deprives arrestees of rights guaranteed by fourth amendment), *modified*, 653 F.2d 289 (1981).

[103] 420 U.S. 103 (1975).

[104] 690 F.2d 1133 (4th Cir. 1982).

[105] 543 F. Supp. 694 (S.D. Tex. 1982).

[106] *See supra* notes 49-53 (discussion of *Fisher* analysis); notes 60, 63-65 (discussion of *Sanders* analysis).

[107] *See* Fisher v. Washington Metropolitan Area Transit Auth., 690 F.2d 1133, 1140 (4th Cir. 1982) (case-by-case analysis determines validity of postarrest, prehearing delay); Sanders v. City of Houston, 543 F. Supp. 694, 703, 705 (S.D. Tex. 1982) (police can delay probable cause hearing only for time necessary to process arrestee).

[108] *Compare supra* text accompanying notes 49-53 (discussion of *Fisher* holding that fourth amendment imposes limitations on permissible duration of postarrest, prehearing detention) *and* notes 60, 63-65 (discussion of *Sanders* holding that fourth amendment limits duration of postarrest, prehearing detention) *with supra* note 21 (analysis of *Gerstein* Court's refusal to extend adversary safeguards to probable cause determination).

in a section 1983 action.[109] Federal courts, however, have not awarded monetary damages in section 1983 actions alleging deprivations of arrestees' right against postarrest, prehearing detention of unreasonable duration.[110] The failure of federal courts to grant monetary damages in such section 1983 actions reflects the limited opportunity federal courts have had to address whether the Constitution imposes limitations on duration of postarrest, prehearing detention.[111] As practioners become aware that the fourth amendment places limits on permissible duration of postarrest, prehearing detention, federal courts will hear an increased number of section 1983 actions based on violations of that right.

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[109] *See* 42 U.S.C. § 1983 (1976 & Supp. V 1981) (plaintiff must allege deprivation of fourteenth amendment right by person acting under color of state law to state § 1983 cause of action).

[110] *See* Fisher v. Washington Metropolitan Area Transit Auth., 690 F.2d 1133, 1141 (4th Cir. 1982) (plaintiff's evidence failed to demonstrate deprivation of constitutional right against postarrest, prehearing detention of unreasonable duration); Patzig v. O'Neil, 577 F.2d 841, 846-47 (3d Cir. 1978) (five hour detention, without more, does not violate due process). The federal courts have issued injunctions against police arrest procedures deemed violative of the constitutional prohibition against postarrest, prehearing detention of unreasonable duration. *See* Sanders v. City of Houston, 543 F. Supp. 694, 705 (S.D. Tex. 1982); Lively v. Cullinane, 451 F. Supp. 1000, 1005 (D.D.C. 1978); Dommer v. Hatcher, 427 F. Supp. 1040, 1043 (N.D. Ind. 1977), *modified*, 653 F.2d 289 (1981).

[111] *See supra* text accompanying notes 26-28 (courts only address issue of whether Constitution imposes durational limitations on postarrest, prehearing detention in § 1983 actions that directly challenge duration of postarrest, prehearing custody).