




10-1974

## Gerstein v. Pugh

Lewis F. Powell Jr.

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(Both parties concede the case is worthy of a grant)  
**DISCUSS**

In 73-477.

CA5 held that the Court requires that arrestees held for trial under an information filed by the state's atty. must, ~~per~~ without undue delay, be given a preliminary hearing.

This is not the rule in most states & this Ct. has never suggested that the Court requires a state to follow this procedure.

Grant gag

Preliminary Memo

Conf. Nov. 30, 1973  
List 1, sheet 4

No. 73-477

GERSTEIN (Fla's state atty)  
V.

Cert. to CA 5  
(Brown, Tuttle, Ingraham)  
Federal/1983

Timely

PUGH

No. 73-5542

PUGH

V.

GERSTEIN

} Could deny or hold

(same as above)

I think I would go a head and grant both but you might deny 5542 as the cert with author suggest.

Gerstein, a Fla. state's attorney, <sup>seeks</sup> review in 73-477 of a decision of CA 5 which held that the Constitution requires that arrestees held



for trial on informations filed directly by the state attorney must, without reasonable delay, be given a preliminary hearing before a judicial officer. In 73-5542, certain Fla. prisoners (resps. in 73-477) seek review of that portion of the CA 5 judgment which held that a possible six-day lapse between information and preliminary hearing was permissible.

2. FACTS: Resps in 73-477, certain prisoners (including alleged felons and misdemeanants) awaiting trial in the state courts of Fla., filed a class action in the SD Fla. (J. King) seeking declaratory and injunctive relief (42 U.S.C. 1983) that a preliminary hearing before a committing magistrate on probable cause after arrest and before trial was required by the Fourth and Fourteenth Amendments. Resps asked the court to compel petr, the state attorney in Dade County, Fla., to grant such preliminary hearings or to declare that resps were entitled to such a hearing.

Persons arrested for felonies and most misdemeanors in Dade County, Fla. are routinely taken to the Metropolitan jail. Aside from "capital" cases, Fla. law provides that all cases may be commenced by the filing of an information by the prosecuting attorney under oath or by grand jury indictment, or by presentment to a justice of the peace for issuance of an arrest warrant. Fla. statutes also provide that after arrest, with or without warrant, the officer shall take the arrestee before a magistrate without unnecessary delay. The Fla. judiciary has consistently held that such hearings are not required where the state prosecutes by the filing of an information certifying



probable cause for arrest. Fla. law provides for arraignment "before trial" and the average period between arrest and arraignment in Fla. was found by the DC to be 10 to 15 days.

In its final order of Oct. 12, 1971, the DC found that under the Fourth and Fourteenth Amendments, "arrested persons, whether or not released on bond, have the constitutional right to a judicial hearing on the question of probable cause." The DC then directed the state attorney to submit a plan of implementation; a plan submitted by the Dade County Sheriff, Wilson Purdy, was substantially adopted by the court. The elaborate Purdy Plan (App. 47-54) required that arrestees be taken before a committing magistrate within three hours of arrest for appointment of counsel if indigent, advisement of constitutional rights, and the setting of a preliminary hearing date. Pending appeal to CA 5, the judiciary of Dade County established its own system of committing magistrates in felony cases. Soon thereafter, however, the Fla. SCT adopted amendments to the Fla. rules of criminal procedures, effective Feb. 1, 1973. Rule 3.131(a) provides that "a defendant, unless charged on an information or indictment, has the right to a preliminary hearing on any felony charge against him." CA 5 then directed the DC to hold a hearing to determine the constitutional validity of the new rules as opposed to the elaborate Purdy Plan, as amended by DC order. The DC found constitutional violations in numerous aspects of the new rules; the decision was affirmed by CA 5 (reasoning of DC and CA discussed below).



3. DECISION OF CA 5:

(a) On appeal, the CA 5 held that since the relief sought was not "against any pending or future court proceedings as such," citing Fuentes v. Shevin, 407 U.S. 67, 71 n.3, the abstention doctrine of Younger v. Harris, 401 U.S. 37 is inapplicable. The court indicated that its assertion of jurisdiction would not affect the pending prosecution of the prisoners but would only require a preliminary hearing for those members of the class who had not already been tried. The CA recognized that the resps could "have filed suit in state court for a declaratory judgment and other equitable relief," but said that such a procedure would require a second state court proceeding to adjudicate a federal claim not based on the merits of the defenses to the state criminal actions. The CA said that Younger has never been interpreted to require a federal court to abstain where the federal claim could not be "adjudicated in a single pending or future state proceeding and we decline to so apply it now." The CA therefore said it need not consider whether the instant case comprised an "exception" to Younger (it should be noted that the court in effect indicated that the Younger exceptions of irreparable injury and inadequate state remedy were satisfied -- this is what the DC said).

(b) CA 5 held that the Fourth and Fourteenth Amendments require that arrestees charged by information in Fla. be afforded preliminary hearings without unnecessary delay (thus holding the new rules unconstitutional). The court distinguished the decisions in Hurtado v. Cal.,



110 U.S. 516; Lem Woon v. Oregon, 229 U.S. 586; Ocampo v. U.S., 234 U.S. 91; and Beck v. Washington, 369 U.S. 541 as dealing only with absence of a procedure for the determination of probable cause prior to arrest, as opposed to afterwards. The court found that Fla.'s denial of a "probable cause" hearing after arrest but before arraignment is constitutionally impermissible because it permits the prosecuting attorney to certify the existence of probable cause by <sup>filing</sup> ~~finding~~ an information, and he is not sufficiently detached to make this decision. Citing McNabb v. U.S., 318 U.S. 332; Coolidge v. NH, 403 U.S. 443; Morrissey v. Brewer, 408 U.S. 471; Shadwick v. Tampa, 407 U.S. 345 for the proposition that a person required to determine probable cause must be neutral and detached. The CA said that its prior decisions to the effect that an arrestee proceeded against by information has no constitutional right to a preliminary hearing (Jackson v. Smith, 435 F.2d 1284; Scarborough v. Dutton, 393 F.2d 6) were distinguishable because they dealt with whether the absence of a preliminary hearing was a denial of constitutional rights which would vitiate the subsequent conviction. Here, says CA 5, it is dealing with a question of the validity of a present confinement.

(c) The CA finally directed its attention to the remaining portion of the amended rules of criminal procedure in Florida, and agreed with the DC's findings. It found that the new rules violated equal protection in that they disallowed preliminary hearings for



misdemeanants, citing Argersinger v. Hamlin, 407 U.S. 25. It found that the State had failed to justify the distinction in the new rules between the time between arrest and preliminary hearing for capital and life offenses (7 days) and all other cases (4 days) and that it too was violative of equal protection. As to the provision in the rules that where the time period between arrest and preliminary hearing is less than seven days, Saturdays, Sundays and holidays are <sup>to be</sup> excluded, the CA refused to decide whether six days delay would be unconstitutional as opposed to four days, since no prisoner among the class "argues that he has been accorded a preliminary hearing more than four but less than six days after his arrest."

4. CONTENTIONS: Petr state attorney in 73-477 argues that the federal courts should have abstained. He also argues that the decisions of this Court in Hurtado, Lem Woon, Ocampo, and Beck control and require reversal here. Petr argues that many states permit the charging of crimes by information without a preliminary hearing. Petr argues that the charging by the prosecutor by information is as sufficient a determination of probable cause as the charging by the grand jury. Petrs also cite conflict with numerous circuits which have determined that the absence of preliminary hearings does not constitute a constitutional violation.

Note → In response, the resps urge that the decision below was correct. Recognizing that the decision will produce turmoil in Fla. and that it decides a constitutional issue never decided by this Court, resps state that they therefore "do not oppose certiorari."



In 73-5542, a cross-petition to the petition in 73-477, resps (as petrs therein) argue that the CA's toleration of the four day period for preliminary hearing is also a constitutional violation.

5. DISCUSSION: The petition in 73-5542 should, in my opinion be denied, since it raises a question subsumed by the petition in 73-477. The Younger issue is somewhat unusual since these are state prosecutions pending; but the action of the CA does not appear to affect those proceedings. The resolution of Steffel v. Thompson, argued this week, could conceivably shed some light here. The most important issue is the holding as to the requirements of preliminary hearings. This Court has never held that the Constitution requires a preliminary hearing, and this has also been the consistent view of the federal courts. (See cases in n. 113-14 to FRCrP 5, 18 U.S.C.A.) FRCrP provides for a preliminary hearing for federal prisoners before a committing magistrate, but it has not been suggested that this is a constitutional requirement. E.g. McNabb v. United States, 318 U.S. 332; Mallory v. United States, 354 U.S. 449. The line of cases leading to Beck, to the effect that a State may dispense with a grand jury and charge by information if it chooses, does not, as the CA correctly suggests, deal with the <sup>absence</sup> ~~failure~~ of <sup>a</sup> ~~A~~ probable cause <sup>determination</sup> by a neutral magistrate after arrest. The decision here is obviously a far-reaching one, and, in my opinion, merits consideration by this Court.

There is a response.



*Deny or Hold for*

No. 73-5542

PUGH

V.

GERSTEIN

Cert. to CA 5  
(Brown, Tuttle, Ingraham)  
Federal/1983

Timely

See memo for No. 73-477.

11/14/73

Buxton



Court	Argued	Submitted	Voted on	Assigned	Announced	No. 73-477
	19...	19...	19...	19...	19...	

RICHARD E. GERSTEIN, STATE ATTORNEY FOR ELEVENTH JUDICIAL  
OF FLORIDA, Petitioner

vs.

ROBERT PUGH, ET AL.

9/12/73 Cert. filed.

*Grant*

*Brennan  
thought this was  
held for 5 steps -*

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		AB- SENT	NOT VOT- ING
		G	D	N	POST	DIS	APP	REV	APP	G	D		
Rehnquist, J.													
Powell, J.													
Blackmun, J.													
Marshall, J.													
White, J.													
Stewart, J.													
Brennan, J.													
Douglas, J.													
Burger, Ch. J.													

*Grant 477 & Deny 5542*  
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*Held both*  
*Held both*  
*Grant 5542 & Deny 477*  
*Grant 477 & Deny 5542*



fill

MEMORANDUM

TO: Mr. Justice Powell

FROM: Jack Owens

DATE: March 25, 1974

No. 73-477 Gerstein v. Pugh

(Caution! Jury Speech follows.)

?  
Most states utilize grand juries or, if proceeding by information rather than indictment, require a hearing before a neutral magistrate shortly after arrest. The federal government normally proceeds by indictment and grants a preliminary hearing soon after arrest. Thus, most jurisdictions generally insure that someone other than law enforcement officials makes an early determination of whether it is likely that a criminal suspect or arrestee has committed a crime. Florida and a few other states, however, have placed a lower premium on protecting liberty and, more than likely, have hindered their own interests in reducing jail and police costs by allowing law enforcement personnel to put people in jail on the basis of their own ex parte decision to prosecute and to leave those people there for as much as a month before they get a hearing.

Technically speaking, the most relevant (old) constitutional precedents allow this. The grand jury requirement



of the Fifth Amendment has not been incorporated against the states, and states are permitted to proceed by information rather than indictment. But it is no great leap for me from cases like Morrissey v. Brewer and <sup>Gagnon</sup>~~Goguan~~ v. Scarpelli (hearing rights of those whose parole/probation is revoked) to this case. I think due process notions\* could easily evolve to require speedy preliminary hearings for anyone arrested on the basis of an information rather than as a result of grand jury action. In fact, I'm amazed that all states don't do this voluntarily. Holding in jail people against whom there is no real case is a waste of everyone's resources, especially the state's.

Of course it is true that many arrestees have access to bail. It is equally true that the detainees will ultimately get the most comprehensive hearing there is -- trial. But the bail thing doesn't persuade me. If anything, it suggests a form of economic discrimination. And although trials are held fairly speedily in Florida, I still can't buy holding a guy in jail for 30 days on no one's say but the prosecutor. Such a system simply should not exist in a free country. And it is very simple to fix, to everyone's benefit. It seems particularly odd to have all the hoopla about right to a hearing over whether X defaulted on the monthly payments for

\* I think the due process clause should be relied on rather than the Fourth Amendment, although both have been advanced in this case.



3.  
a TV set and yet countenance the criminal law system Florida as it operated prior to this suit. *Hard to resist this point!*

At any rate, this looks to me to be a case for interring old, bad precedents and for making some sensible new law. Florida should be grateful if you do.

There is a serious Younger v. Harris problem here. *yes*  
Technically speaking, the state courts were open to hear this constitutional claim and state prosecutions had obviously begun. But I think that, without too much violence to precedent and without letting too many hobgoblins loose, it is possible to conclude (i) that state criminal trial courts were not an adequate forum, since by the time trial arrived the damage would have been done; and (ii) the relief sought was not the enjoining of a state prosecution.

Flex your muscles a bit. Affirm this one.

JBO







Class action  
suit in DC  
under 1983

Under ~~the~~ law a person <sup>or to probable cause for arrest</sup> charged & arrested on an information by State atty was not entitled to a preliminary hearing pending ~~and~~ arraignment. CA5 held this law invalid under 4<sup>th</sup> & 14<sup>th</sup> amend.

I'm strongly inclined to agree with CA5, altho our old cases seem to point other way.

As to Younger issue, a criminal prosecution had commenced in state court. But no injunction was requested - only a declaratory judg. Also, probably no relief was actually available in state ct. (See CA5's disposition of this issue).

Also a "mootness" issue.

### Mellon (as to State atty)

Relies on cases holding no hearing is necessary prior to arrest under an information: Hurtado, Lem Woon & Deampos. [But CA5 distinguished on ground that here the hearing sought is after the arrest]

In most cases in Fla., arrest is made by police w/o warrant (crime committed in presence, exigent circumstances, etc) & hereafter the state's atty issues an information.

Grand jury <sup>requested</sup> ~~used~~ in Fla. only on capital offenses - but in fact many other cases are presented to G/J.



Mellon (cont)

On ~~the~~ information, the state's atty does have sworn testimony - but it is not always recorded. Under Fla. S/Ct new rule, ~~the~~ state atty must be satisfied ~~the~~ there is ev. of guilt beyond reasonable doubt - not just probable cause.

A is brought before a magistrate within 24 hrs after arrest & is advised of his rights - but there is no determination then of probable cause of arrest.

Marky (Ant AG of Fla)

Argues there is a rational basis to classify capital crimes (life penalty) separate from other crimes. The ~~extra~~ <sup>indictment</sup> additional step of a G/J. is required in capital case. This justifies the difference in time bet. capital & other offenses.

Concedes that ~~old~~ old system was invalid. But now have to test case by New Rule.

(Paller became impatient with Marky's argument as to all sort of other remedies in Fla. Paller said role issue is the validity of locking up an arrestee for 10/15 ~~days~~ w/o a prelim. hearing to determine probable cause for her arrest]



## Rogow (for Riker)

moot?

There is a class action - but ~~the~~ orig. IT ~~was~~ convicted & is now in jail. There is ~~there~~ any member of class now in position to complain.

Marshall & Stewart raised Q of mootness.

Rogow argues this case is capable of repetition w/o op. for review.

~~Information process~~

Rogow concedes that there is "probable cause" for arrest - whether made by officer on scene of crime or pursuant to an information issued by state's atty on basis of testimony of a police officer. Rogow, responding to my Q, conceded there is still probable cause even in second type of case where there is no authorization by a neutral & detached officer.

I don't understand this?

Check this.

I'm confused.

[Stewart notes that in Fed system, if arrest is made <sup>by warrant</sup> on prob. cause there is no right to prelim. hearing for 10 days. Stewart says if ~~that~~. Rogow is right as to Fla where there is valid arrest, then Fed rules also are invalid]



## Rogow (cont.)

There may be <sup>a valid</sup> custodial arrest on probable cause w/o a prior hearing, but then there must be a hearing to "test" the existence of prob. cause. This is an adversary hearing - confrontation, counsel, etc. He argues the hearing must be within 24 hrs.

(Would not extend this to a D indicted by a G/J)

If a D is convicted w/o having had an adversary hearing, the conviction cannot be set aside on this ground. E



The Chief Justice Passed

Serious Q of mootness - Rules have been changed & none of "class" remain.

On merits, an information taken place of G.F. Under Fed Rules (5) there is no prelim. hearing ~~under~~ on misdemeanors.

D.C. wrote a set of Cr. Rules for state of Fla. (I agree this is not function of a Fed Ct)

C/J says record should then would increase prelim. hearing by 30/35,000 per year - but this is probably high

Douglas, J. Affirm

Coolidge v. N.H. is relevant.

But disapproves of Fed Ct. setting on "drophog committee" for state cts.

The class described is still extant.

Brennan, J. Affirm

~~But~~ Bee says the Fed Ct did not originate Rules - defendant Purdy was ordered to propose Rules & D.C. simply modified them. This is O.K.

No Younger issue here. Nor is case moot.

Agree with Douglas that Coolidge is relevant.

Tuttle decided this case correctly.

Not moot because their problem exists now. Their Burney & O'Shea not controlling.

Stewart, J. Affirm

Not moot - bona fide case of "existing review"

As to Preiser issue, there is no prayer for release for custody. Hence Preiser not applicable & 1983 is appropriate.

As to merits, this is ~~not~~ extremely difficult case. There are many cases dealing with seizure of things (property) but very few cases dealing with seizure of persons - just a void in this area.

Fed Rule 5 (in effect since 1939) is at issue here.

In Coolidge, we held as to a "thing" that there must be finding of P/C by impartial officer. But for life of this Republic, people have been arrested & held w/o ~~any~~ such finding. We have just assumed w/o a decision by this Ct., that persons could be locked up & held for trial w/o any hearing on P/C.

Potter cites Brandenburg in Albrecht v. U.S., 273 U.S. 1, & relies on all property cases (Burton, Sundbach)

10 States have "Information" procedure

Potter assumes a valid arrest

Should provide for prompt hearing - which could be same as Fed Rules on a felony

A grand jury in different - Court, provide



If a magistrate has determined probably cause, then no need for prelim. hearing. But if there is no provision under rules for a determination of P/C by a neutral magistrate then there must be a prelim. hearing.

If the magistrate has information before him about

Byron agrees in principle that no man should be compelled to stay in jail w/o a det. of P/C ~~by~~ by neutral mag. - but there can be ex parte. There need not be an adversary hearing.

~~Byron~~ - ~~an~~ affidavits or sworn testimony is sufficient.\*

Byron disagrees with Paller's reading of Fed. Rules.

We are not talking about persons on bail. (I'm not sure I agree with this)

One wants, Tuttle ~~is~~ right - except Fed. it has no burden to present specific rules.

Blackmun, J. Agree

Case not moot - nor is Pryor applicable.

Agrees with Byron.

Powell, J. Agree

There is a due process issue. I agree generally ~~with~~ with Byron - as I understand his position. Altho Paller may not really differ from Byron. [I'm not entirely sure].

There must be a det. of probably cause by neutral magistrate where there has only been an information, but I question the requirement ~~for~~ of an adversary hearing.

[If I write I should learn more about Fed. criminal procedure.]

See 18 USC 3060(a)

(Paller said to me - not to entire group - that counsel ~~to~~ would not necessarily be required. He ~~do~~ with respect to information what is now done in other ~~type~~ methods of initiating criminal cases)

\* Paller said he doesn't insist on an adversary hearing - but ~~we~~ we don't necessarily reach that in this case.

Rehnquist, J. Agree

Agrees with Byron.



MEMORANDUM

TO:

DATE: September 13, 1974

FROM: Lewis F. Powell, Jr.

No. 73-477 Gerstein v. Pugh

The above case was argued here on March 25, 1974, and at our Conference on March 29 the Court voted at least 8 to 1 to affirm CA5. But as the discussion at Conference evolved, we began to have second thoughts - especially as to the impact of our decision on federal practice and the federal rules based on early decision of the Court. Accordingly, we finally decided to carry this case over to the present term to enable the Solicitor General to file a brief (and possibly to argue orally). Apparently, an invitation also was extended to the attorneys general of the various states to file briefs amici.

The Question

At the time this case (and companion cases) were before CA5, all criminal cases in Florida, apart from capital cases, apparently could be commenced by "an information filed by the prosecuting attorney under oath". Apparently most criminal actions were commenced upon an information sworn to by the state attorney, either before or after arrest; the accused person would then be held in jail (if unable or unwilling to post bail) without a hearing of any kind until arraignment. CA5 noted that this incarceration may last as long as 30 days. CA5 held that



the federal Constitution (4th and 14th Amendments) required as a minimum a preliminary hearing before a judicial officer promptly following such an arrest.

The case is confused (at least according to my present recollection) as a result of the fact that Florida procedure (in Dade County, which was the county involved) was significantly changed in accordance with an order of the federal District Court. Moreover, the individuals who instituted this action, as a class suit, have long since been convicted on misdemeanor charges, served their sentences and are out of jail. Thus, there is a lingering question of mootness.

But we set the case for reargument on the constitutional issue, passing the mootness point on the theory (at least tentatively) that the issue will reoccur and otherwise would evade review.

#### General Comments

The briefs in hand, as of this date, are those filed at the last Term, together with perhaps 8 or 9 briefs amicus filed by attorneys general of a number of states. The Solicitor General's brief (which I am particularly anxious to see) is not in hand.

The original briefs - both on behalf of petitioner and respondents - meander all over the subject, and are not really helpful. I have examined several of the briefs amicus, and at least have been impressed by the fact that if we adhere to



decision last March to affirm CA5, we will effect a major change in what has been perceived as settled constitutional law. See, e.g., amicus briefs filed on behalf of Massachusetts and California.

Although I have not studied the Federal Rules carefully and have never had any experience with federal criminal procedure, it does appear that the Federal Rules allow the initiation of misdemeanor and petty criminal cases by the filing of sworn informations by U.S. attorneys, and that defendants in such cases are not entitled to any preliminary hearing prior to arraignment. The theory is that the sworn affidavit of the U.S. attorney establishes adequate probable cause.

I invite your attention to Jack Owens' brief memo to me of March 25, (which he entitles a "jury speech") which is certainly persuasive.

My present disposition remains, as it was last March, to conclude that due process requires an early hearing before a neutral magistrate promptly following arrest. But I do not think such a hearing should be elevated to the status of a "mini-trial". That is, it should not be adversary in nature, counsel should not be required, nor should there be a right to confront witnesses. I would think, for purposes merely of establishing probable cause for arrest, a neutral magistrate need only be convinced by appropriate affidavits or testimony of law enforcement officers that probable cause in fact existed.

All of these are troublesome issues, and I would welcome your thoughtful consideration and advice - especially after the SG's brief has been received.

L.F.P., Jr.



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L.F.P., Jr.



BOBTAIL MEMORANDUM

TO: Mr. Justice Powell

FROM: Joel Klein

DATE: October 18, 1974

No. 73-477, Gerstein v. Pugh

This case was here last year and you have your own notes and memoranda as well as Jack Owens memorandum. Before I discuss several jurisdictional problems - none of which do I believe necessarily bars review - let me address the issue on the merits.

1. Frankly, I think some confusion arose last time around because the Court was somewhat unclear as to what was at stake. The Fifth Circuit, and the district court, held that a "preliminary hearing" before a neutral magistrate is required before someone is detained pre-trial. The simple use of the words "preliminary hearing", however, was bound to confuse the issue. A preliminary hearing, as the term is now used, encompasses much that is irrelevant to this case. Usually, if such a hearing is given at all, it is given to all defendants, not only to those who are confined pre-trial. Moreover, although one purpose of a preliminary hearing is to determine probable cause, they also serve other purposes, such as being a vehicle for discovery. And the



rationale upon which a probable cause hearing rests is that someone should not be required to face trial unless there is probable cause to believe that he has committed an offense.

The instant case raises an issue that is somewhat different from the broader issues inherent in the use of a probable cause hearing. Respondents here argue that pre-trial incarceration, in and of itself, is a substantial deprivation of liberty, and therefore due process requires a hearing to establish probable cause to confine. In effect, I think the gravamen of respondent's contention is that bail determinations are insufficient because, even before bail is considered, a magistrate should decide that there is probable cause. Thus, I would suggest that the issue in this case is what does due process require before someone may be required to post bail or, if unable, to remain confined pending trial.\*

9mm

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\* My view of the issue is buttressed by the problem of relief. Assuming a hearing is given to those who are detained pre-trial, and assuming further that probable cause is not shown, what relief would then be appropriate? At a usual "preliminary hearing," as they are now known, a defendant, be he incarcerated or not, is discharged. He can, of course, subsequently be reindicted, but a failure to show probable cause leads to a dismissal. In our case, however, if what is being tested is probable cause to confine pre-trial, then, if the court finds no probable cause, presumably the defendant should be released pre-trial. The charges against him, however, should not be dismissed.



Traditionally, of course, either an indictment or information is sufficient to bring someone to trial. And if the person is likely to flee and cannot meet bail, he is incarcerated pending trial. The decisions below would add an additional requirement of an adversary hearing with counsel and witnesses before someone who has been proceeded against by information can be held pre-trial. The first question then, must be why should someone who is indicted by a grand jury not get a preliminary hearing. After all, those indicted by a grand jury do not get an adversary hearing with the attendant opportunity of viewing the state's evidence. Second, the decisions below limit relief to those confined pre-trial. That group, however, is hardly a fixed group. Presumably if a hearing must be held, it should be held rather promptly. Thus defendants who must meet a bail requirement can delay payment, get the benefits of a preliminary hearing, then meet bail and be released. In short, by spending a day or so in jail the defendant could secure a preliminary hearing. \*

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\* As a practical matter, many defendants require several days before they can raise bail.



In view of these considerations, I think you could reject the adversary hearing requirement imposed below. If for no other reason than strong historical tradition, our system allows pre-trial incarceration on the basis of an ex parte hearing, typically before a grand jury.

yes Thus, I see no reason for not limiting the decision below to an ex parte hearing before a neutral magistrate when the state proceeds by information. While this may seem to be nothing but rubber-stamp, we shouldn't kid ourselves about the role played by grand juries either. I also think that this kind of ex parte hearing should be required for all defendants, irrespective of whether they can post bond. It seems to me that if the state has not convinced a neutral magistrate of probable cause, the state should not be permitted to require bail or even to keep a person answerable for an offense.

I realize that, in effect, I have suggested no special due process for those confined pre-trial. But I see no way of speaking eloquently of liberty and then noting that pre-trial incarceration is a far greater intrusion than the ones involved in Mitchell v. Grant, et al., without concluding that a full preliminary hearing or mini-trial is required. It is extremely hard to make the full due process argument and then say that an ex parte hearing is sufficient. Thus, I would avoid the general due process line of cases, and speak instead in terms of the history of our criminal



procedures and some of this Court's early cases. I would conclude that rudimentary fairness requires that, after arrest, <sup>\*</sup> the prosecutor <sup>must</sup> convince a neutral magistrate that there is probable cause to proceed with the prosecution which includes the possibility that a defendant may be confined pre-trial.

Acceptance of this approach would not have a significant impact on the Federal Rules. Presently, whenever there is an arrest without a warrant, the government must get a complaint under Rule 4(a) which requires that the government establish probable cause. Thus, it would appear that only in cases where an arrest warrant was issued would there be need to expand the rules to require a post-arrest ex parte showing of probable cause. This would be so only if a post

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\* I note that when an arrest warrant is secured, the police must establish probable cause before a magistrate. One might argue, therefore, that the prosecutor need not make such a showing after arrest. I think that the argument is unpersuasive because in determining probable cause for an arrest the magistrate might well consider different factors from those he would consider after arrest. Since the ex parte procedure is not very cumbersome, the government can hardly complain if it is required to make a post-arrest showing. Nevertheless, since the issue is not critical you could say that a determination of probable cause is only required at some time - either before or after arrest.



arrest hearing is required. See preceding note.

If, on the other hand, a preliminary hearing, adversary in form, is required, the federal rules will have to be changed for misdemeanor cases since frequently the government proceeds by information, and therefore the rules do not require a preliminary hearing. The SG claims that requiring a preliminary hearing in federal cases when the government proceeds without an indictment would have no practical consequences. In the District of Columbia, however, there are approximately 1,000 misdemeants each year who are incarcerated pre-trial, sometimes for so long as 90 days or more. These people do not now, under the local equivalent of the federal rules, get a preliminary hearing.\*

I agree with Jack Owens that it is anomalous, to say the least, to require hearings in all of the cases in which this Court has required them, and still permit pre-trial confinement without an adversary hearing. Indeed,

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\* Any holding of this Court requiring an adversary hearing could not reasonably be limited to felons since the purpose of the hearing relates to pre-trial detention, which is functionally the same for felons and misdemeants.



after Morrissey and Gagnon, it is hard to argue that an adversary hearing, perhaps without counsel, is not compelled. Nevertheless, the costs and difficulties of imposing such a constitutional requirement may well outweigh the anticipated benefits.

2. There are also three jurisdictional questions presented in this case.

First is the question of mootness. These respondents have been convicted and thus are not longer in need of a preliminary hearing. Nevertheless, it would seem that this is a classic case for application of the "capable of repetition yet avoiding review" doctrine. Pre-trial detention will almost invariably be too short to allow an appeal, and therefore I would think the abortion cases should be controlling. Last year's O'Shea case does not undercut this conclusion since in that case there was no clear likelihood of repetition nor was it apparent that review would be evaded. Moreover, in O'Shea the Court refused to assume that petitioners would commit a subsequent crime. Here, like in Spomer, the companion case to O'Shea, respondents need not assert that they will commit subsequent crimes, but only that they <sup>may</sup> ~~will~~ be arrested and not given a hearing.



Second, this case raises a question under Preiser v. Rodriguez, which held that habeas corpus is the only way to challenge the fact or duration of state confinement. The only relief sought by respondents, however, was a hearing, and not release. Likewise, the federal courts ordered only a hearing. Thus, a technical application of Preiser would appear to allow this as a § 1983 suit.

Having said this, though, I am by no means sure that Preiser should not be stretched to reach this situation. It seems to me that federal courts should not, by mandatory injunction, require states to give hearings. All that a federal court can do is to order that, unless a hearing is given, the prisoner will be released.\* This should have been the relief sought in this case. If it had been, the relief would have been a classic form of habeas, requiring exhaustion of state remedies. Thus, you might want to consider applying Preiser to bar jurisdiction.

The final issue is a Younger question. In this case, there was a state prosecution and respondents did seek injunctive relief. As I read the Younger cases, however, I think they would not apply here because respondent's injunction was not directed at the criminal proceeding "as such" but rather at the state's right to detain pre-trial. That matter is wholly unrelated to guilt or innocence and thus

*\* DC did so order, but this was vacated by CA5*



would not even fall within Perez v. Ledesman, which dealt with suppression of federal court evidence. I would think that a sensible line for Younger would be whether the federal interference goes to the issue of guilt.

In any event, even if Younger is applicable, I think the harm to respondents is such that the narrow band of exceptions to Younger should govern. If an incarcerated prisoner cannot get his case considered by a federal court before trial, he probably loses all chance for meaningful relief. After trial there is no appropriate remedy for someone who claims to have been illegally confined pre-trial. If this case had been a habeas case, with exhaustion of state remedies pre-trial, I think federal review clearly would be permissible. Hence, if there is any bar to federal jurisdiction in this case, it is based on the Preiser problem, and not the Younger problem.



Keep  
see

73-477 (Hollow)  
(Very rough notes on talk with JH)

Warrantless ~~arrest~~ arrest.

Rule 4a Probable Cause ex parte hearing before  
magistrate..

Then - Wallopy hearing - told of rights,  
counsel.

Arraignment - ~~is~~ plead

Usually a ~~bad~~ bail hearing  
(No ev. except as to bail)

Information is used in Fed system only  
for misdemeanors. Indictment is necessary  
for felonies.

Indictment (only way in Fed System)  
Grand jury - ex parte

x x y

See Kammar's Book



## Preliminary Hearings in Fed System

Never an matter of right.

Example: If one is arrested & lock-up & is not indicted by G/J within 10 days, he is entitled to Preliminary Hearing - which is adversary. This is usually before a D Judge. Gov't must show probable cause.

If arrested & is allowed out on bail, then must be indicted by G/J within 20 days. Otherwise, entitled to P/Hearing.

If indicted by G/J within these periods, or pre-arrest, then not entitled to Preliminary Hearing.

Since a G/J indictment for felonies is always necessary in Fed system, the U.S. Atty has strong incentive to get G/J. indictment promptly.



## As to Misdemeanors in Fed System

(as to Mower)

All of above applies, except U.S. may proceed by Information as to misdemeanors ("knowledge & belief of U.S. Atty")

### Rule 5(c)

Usually one is arrested <sup>on scene</sup> & brought in w/o an Information. A magistrate must issue a post-arrest warrant (or prob. cause showing). Then, U.S. Atty issues a post arrest Information. Unless this Inf. is issued within 10 or 20 days (or case may be) there must be a Prelim Hearing.

If Inf. is issued within prescribed time, D is not entitled to a Prelim. Hearing

(There are very few Fed. misdemeanors - & most Ds get out on bail. Thus, Gonzalez - would have little effect)

(But in local DC Cts - impact would be significant - See SG's brief. Trials usually deferred 60/90 days - & 1000 or more often in jail (no bail))



In State Cts, indictments are  
not required by Const.

(including Fla)  
Only 9 states allow Informations  
in felony cases w/o providing a  
Prelim. Hearing. If they proceed  
by Indictment no hearing.



## Prisoner issue

IMP



(see  
Buckley)

in Fed Ct  
Rehn sought a wandering  
imp. to provide a hearing.

But should a Fed Ct ever  
compel a hearing by injunction.

Rather, most that Fed Ct  
should do is say ~~only that~~ that  
failure to provide hearing invalidates  
~~conviction~~ conviction. This should  
occur in H/C - not 1983 (Prisoner)



GERSTEIN v. PUGH  
GERSTEIN v. PUGH et al.

Certiorari to the United States Court of Appeals for  
the Fifth Circuit

No. 73-477. Argued March 25, 1974 -- Reargued October 21, 1974--  
Decided 1975

1. The Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint on liberty following arrest. Accordingly, the Florida procedures challenged here whereby a person arrested without a warrant and charged by information may be jailed or subjected to other restraints pending trial without any opportunity for a probable cause determination are unconstitutional. Pp. 7-15.

(a) The prosecutor's assessment of probable cause, standing alone, does not meet the requirements of the Fourth Amendment and is insufficient to justify restraint of liberty pending trial. Pp. 13-15.

(b) However, the Constitution does not require judicial oversight of the decision to prosecute by information, and a conviction will not be vacated on the ground that the defendant was detained pending trial without a probable cause determination. P. 15.

2. The probable cause determination, as an



initial step in the criminal justice process, may be made by a judicial officer without an adversary hearing. Pp. 15-21.

(a) The sole issue is whether there is probable cause for detaining the arrested person pending further proceedings, and this issue can be determined reliably by the use of informal procedures. Pp. 16-18.

(b) Because of its limited function and its non-adversary character, the probable cause determination is not a "critical stage" in the prosecution that would require appointed counsel. Pp. 18-19.

483 F. 2d 778, affirmed in part, reversed in part, and remanded.



See Note  
834 pl. 19.771  
See Modern Criminal  
Procedure (Kominar) - p 968 et seq.

Friedman (for SG)

The Fed Ruler would be unconst. if this case is affirmed. Impact would be especially severe in D of C - where there are thousands of misdemeanor cases.

Lower CTs did not understand differences bet. the various steps.

(Our opinions in McHale were wrong as to <sup>whether</sup> probable cause is determined)

The Fed Ruler comply with the Court. The issue is whether an early opportunity is afforded to be released on bail.



## Friedman (cont. 56)

Three "institutions" have responsibility for det. prob. cause for detention:

Prosecutor  
Magistrate  
Grand Jury

Gov't views this as a D/P - not an E/P - case.

Whether a D is detained is determined not by prosecutor ~~of~~ but by a magistrate.

Information is different from the mere det. of prob. cause

7. So long as there is a prompt ~~hearing~~ appearance before magistrate or judge on a bail hearing, there is due process.

Information is valid procedure & has been since Harris

Prosecutor who issues a post arrest information is as detached as a G.J. Prosecutor has resp. for trial. He won't act unless he thinks ev. is sufficient.

The whole system of <sup>use of</sup> Informations & of ~~discretion~~ discretion of prosecutor is at stake in this case.



Friedman (cont)

Prosecutor is better qualified to make preliminary decisions than the probation officer in Memsett

Mellon (for Petr)

In Dade County, Meigsdale sits 4 times daily Mon - Fri, & once on Sat & Fri.

Marky (for AG of Fla)

Case is moot.

Relies on Younger - no case or controversy.

Rogow

Not moot - capable of repetition yet evading review.

→ [The "judicial hearing" demanded by Rogow is an adversary hearing - with counsel, right to call witnesses, confront & cross-examine.]

J Stewart noted there are far more extensive rights than are provided one indicted by G/J.

Determination ex parte of probable cause is not enough.



Rogow (cont)

I am not asking for hearing  
~~prior~~ prior to custody - but  
promptly thereafter (within 96 hrs)  
(4 to 7 days)

Friedman (Reply)

~~OK~~ (Read Transcript for  
two suggestions as to  
what we should clarify  
if we rule vs. Gov't)



10/24/74

## Gerstein v Pugh

Notes summarizing my position for Court Conference on 10/25:

### I Jurisdictional Issues

(a) Moohren - no problem. Classical case of "capable of repetition yet avoiding review."

(b) Younger - not applicable. Resp's injunction was not addressed to the pending state criminal proceedings but at the state's right to ~~detain~~ <sup>detain</sup> pre-trial.

1983  
action

(c) Preiser - Sevier v G. ~~not the~~ In Preiser, we held that H/C ~~to~~ <sup>only</sup> ~~not~~ - not 1983 - is procedure to challenge detention. Here, Resp ~~only~~ demands <sup>only</sup> a hearing - which affords a narrow basis for distinguishing Preiser.

But the only purpose of a hearing is to gain ~~release~~ <sup>freedom</sup>. I do not think 1983 ~~may~~ <sup>may</sup> properly be used to have a Fed. Ct. - by mandatory injunction - order a state court (or a state) to afford a hearing.

Resp's relief should have been by H/C, after he had exhausted state remedies.



The Chief Justice Affirm

Chief passed  
on first go-around.  
x x x

After long discussion,  
Chief says he will  
go with White, etc

Douglas, J. Affirm

Agree with C.A. 5.

(After Potter's statement  
Douglas said he would  
go along)

Brennan, J. Affirm

Fla. has adopted new Rules  
but the issue in this case  
survives the new Rules.

\*There must be a hearing  
to determine whether prosecutor  
"has a strong enough case to  
go to jury".

(Responding to my Qs,  
Bren said ~~accused~~ would  
be entitled to counsel, to  
X-exam, etc - a full mini  
trial. Bren recognizes this  
~~is~~ goes well beyond  
rights of one indicted by G.J.  
- he thinks G.J. procedure  
may be uncourtly!)

Two states - Mich & Okla  
provide for this.

Stewart, J. Affirm (But on narrow basis)

Then Court was wrong in  
McKabb & related cases.

There is not a case to try  
to establish guide lines. We  
should limit our decision  
to deciding whether Fla system  
is valid.

Potter ~~states~~ Fla system  
is not valid. He addresses  
only narrow facts: a  
person based only on an  
information. Trial hearing  
is not enough. There must  
be something more than  
prosecutor's judgment. At  
least, there must be a  
finding ~~only~~ a neutral

magistrate of probable cause.  
4th Amend cases require this.  
We need not reach D/Person.  
Not need op. consider position of  
Douglas & Brennan.



Only a probable cause hearing is required.

We can't affirm judgment of CA 5 ~~in its full sweep~~ in its full sweep.

Byron sees no middle ground between a "probable cause" ~~ex parte~~ hearing + the full mini-trial advocated by Brennan.

(Potter is not far from Byron, but Potter does not want to approve any procedure in this case. He would merely hold that's system is flawed.)

Potter makes order

Powell, J. affirms

~~See~~ my yellow page notes.

On merits, I'm with Byron

Can go along with Potter if hearing is not ex parte.

(Since Potter ~~thinks~~ thinks ex parte is OK,

~~Thurgood~~ Thurgood ended up with Brennan - I think)

Blackmun, J. affirms

Agrees with Byron

Rehnquist, J. ~~Rehnquist~~ affirms

Would prefer to Reverse, but will join 4 Justices who agree with Byron, Blackmun + Powell.



10/31/74

Preiser probably not applicable:

Complaint did not challenge validity (or duration) of ~~an~~ confinement.

No relief was requested which would directly result in liberty. (No automatic ~~that~~ release from confinement would result from a hearing. Appellee would continue to be confined if probable cause ~~was~~ was found). See Complaint, A 1, 11, 12

Resps.  
~~Appellee~~ contends that even if Preiser is applicable, compelling exhaustion of state remedies ~~would~~ <sup>would</sup> be futile because of Fla law. (See Resps' Supplemental Brief p 15)

CA 5 - w/o elaboration said that Resps' rights "cannot be vindicated in the state court trial". (Ret for Cert. A 7)  
CA 5 also noted that since Resps' "pre trial ~~detention~~ incarceration would have ended as of the time of trial, no remedy would exist." The issue would have been mooted. (A 8)

But Resps might have gone to a state court - rather than Fed Ct - & sought vindication (A 8)

Talked to Potter - He thinks Preiser does not apply,



Justice Powell-

93-477

RE CHAMBERS  
DRAFT, 12-4-74

Here's a draft of a proposed memorandum on the one case that was held for Gerstein. The Gerstein issue is easy, since we addressed it explicitly in the opinion, but I wasn't sure ~~was~~ how much we should say about the other issues in the case. If you think it unnecessary to say anything about them, the memorandum could stop at the end of the first paragraph, adding, "I therefore will vote to deny the petition." I did not attempt to go into the other issues in any detail, but thought just to alert the other Justices to them, in case they wish to grant on something other than the Gerstein question.

penny

*This is on Friday's conference list.*



## RECENT DEVELOPMENTS

### PUGH v. RAINWATER: SPOTLIGHT ON THE PRELIMINARY HEARING

The preliminary hearing<sup>1</sup> provides a forum for determining whether there is probable cause to believe that an accused committed the crime for which he was arrested.<sup>2</sup> The hearing is adversarial in nature, and the constitutional rights of the accused to assistance of counsel<sup>3</sup> and cross-examination of witnesses<sup>4</sup> are recognized. Despite the assortment of due process guarantees available to the accused if the preliminary hearing is held, however, courts have consistently ruled that there is no right to the hearing itself.<sup>5</sup> Moreover, it is widely acknowledged that a prior grand jury indictment or the filing of an information<sup>6</sup> by a prosecutor precludes a preliminary hearing.<sup>7</sup> When an arrestee is detained solely on the basis of an information, the prosecutor alone has determined the critical issue of probable cause for arrest and detention.

<sup>1</sup> For brief historical accounts of the birth and evolution of the preliminary hearing, see Anderson, *The Preliminary Hearing—Better Alternatives or More of the Same?*, 35 Mo. L. Rev. 281, 284-85 (1970); Weinberg & Weinberg, *The Congressional Invitation to Avoid the Preliminary Hearing: An Analysis of Section 303 of the Magistrates Act of 1968*, 67 Mich. L. Rev. 1361, 1365-78 (1969); Note, *The Preliminary Hearing—An Interest Analysis*, 51 Iowa L. Rev. 164, 165-67 (1965); Comment, *The Preliminary Examination in the Federal System: A Proposal for a Rule Change*, 116 U. Pa. L. Rev. 1416, 1416-17 (1968).

<sup>2</sup> Fed. R. Crim. P. 5, Advisory Committee Notes, reprinted in 18 U.S.C.A. (Supp. 1973); 8 J. Moore, *FEDERAL PRACTICE* ¶ 5.1.02[1] (2d ed. 1973).

<sup>3</sup> *Coleman v. Alabama*, 399 U.S. 1 (1969).

<sup>4</sup> *Pointer v. Texas*, 380 U.S. 400, 403 (1965).

<sup>5</sup> E.g., *United States ex rel. Hughes v. Gault*, 271 U.S. 142, 149 (1926); see Goldsby v. United States, 160 U.S. 70, 73 (1895).

<sup>6</sup> An information is a formal accusation drawn by the prosecutor and filed with the court after he has determined the existence of probable cause.

<sup>7</sup> Cases holding that an indictment precludes a preliminary hearing include *Costello v. United States*, 350 U.S. 359, 363 (1956); *Ex parte United States*, 287 U.S. 241, 250 (1932); *Robbins v. United States*, 476 F.2d 26, 32 (10th Cir. 1973); *United States v. Mackey*, 474 F.2d 55, 56-57 (4th Cir.), cert. denied, 412 U.S. 941 (1973); *United States v. Dorsey*, 462 F.2d 361, 363 (3rd Cir.), cert. denied, 409 U.S. 870 (1972); *United States v. Harris*, 458 F.2d 670, 677-78 (5th Cir.), cert. denied, 409 U.S. 888 (1972). See *Jaben v. United States*, 381 U.S. 214, 220 (1965). The Federal Rules of Criminal Procedure adopt this proposition. Fed. R. Crim. P. 5(c).

Cases holding or suggesting that the filing of an information precludes a preliminary hearing include *Barber v. Arkansas*, 429 F.2d 20, 22 (8th Cir. 1970); *Virgin Islands v. Bolones*, 427 F.2d 1135, 1136 (3rd Cir. 1970); *United States v. Funk*, 412 F.2d 452, 453 (8th Cir. 1969); *Crump v. Anderson*, 352 F.2d 649, 656 (D.C. Cir. 1965); *Stephens v. United States*, 341 F.2d 100, 101 (10th Cir. 1965); *Roddy v. United States*, 296 F.2d 9, 10 (10th Cir. 1961); *United States v. Pickard*, 207 F.2d 472, 474 (9th Cir. 1953); The Federal Rules of Criminal Procedure adopt this view. Fed. R. Crim. P. 5(c).

In *Pugh v. Rainwater*<sup>8</sup> the United States Court of Appeals for the Fifth Circuit recently declared that holding an arrestee solely on the basis of a prosecutor's information is unconstitutional because it denies the accused his right to a determination of probable cause by a neutral and detached arbiter, thereby violating the fourth and fourteenth amendments.<sup>9</sup> While the case's immediate impact is limited to proceedings in which an individual is detained solely on the basis of an information, the Fifth Circuit may intend it to be a step towards recognition of the preliminary hearing as a constitutional right.

When the case was first filed in federal district court,<sup>10</sup> law enforcement officials in Dade County, Florida, used several different methods to charge an individual with the commission of a crime. Three of these procedures based the charge on an information.<sup>11</sup> Because the Florida state courts had repeatedly regarded a prosecutor's information as conclusive on the existence of probable cause, the filing of an information routinely precluded a preliminary hearing.<sup>12</sup> Under this system, the prosecutor was often the sole governmental official to determine the existence of probable cause until arraignment or perhaps even trial.<sup>13</sup>

The plaintiffs in *Rainwater* had been arrested and imprisoned solely upon the authority of a prosecutor's information and had not been afforded a preliminary hearing after their arrest. Claiming a constitutional right to a preliminary hearing before a judicial officer,<sup>14</sup> they brought a class action on behalf of themselves and others incarcerated in Dade County on the basis of informations. They sought declaratory relief and an injunction compelling various county officials<sup>15</sup> to grant them preliminary hearings. The

<sup>8</sup> 483 F.2d 778 (5th Cir.), cert. granted sub nom., *Gerstein v. Pugh*, 94 S. Ct. 567 (1973) (No. 73-477).

<sup>9</sup> 483 F.2d at 784-88.

<sup>10</sup> *Pugh v. Rainwater*, 332 F. Supp. 1107 (S.D. Fla. 1971), noted in 25 VAND. L. REV. 434 (1972). Later orders of the district court appear at 336 F. Supp. 490 and 355 F. Supp. 1286. See note 19 infra.

<sup>11</sup> 332 F. Supp. at 1109-10. The remaining two procedures involved either a grand jury or a preliminary hearing and were not under attack. The three information procedures were: (1) the filing of an information based on the affidavit of an officer who witnessed the crime and made a warrantless arrest; (2) the filing of an information on the basis of an affidavit of an officer who had not witnessed the crime but had made an investigation; (3) the filing of an information after an officer's investigation but before the arrest of the suspect. *Id.*

<sup>12</sup> E.g., *State ex rel. Hardy v. Blount*, 261 So. 2d 172, 174 (Fla. 1972).

<sup>13</sup> 483 F.2d at 780, 781 & n.8. If an arrestee was unable or unwilling to furnish bail, he could be imprisoned for as long as thirty days before a judicial officer had any contact with his case. *Id.*

<sup>14</sup> The plaintiffs alleged violations of 42 U.S.C. § 1983 (1970), and federal jurisdiction was grounded in 28 U.S.C. § 1343(3) (1970).

<sup>15</sup> The defendants included the sheriff, police chiefs, the state's attorney, justices of the peace, and judges of the small claims courts. 332 F. Supp. at 1109.



district court, after deciding that a neutral and detached arbiter must promptly determine the existence of probable cause and that the prosecuting attorney was not neutral and detached, held that in information cases, the fourth and fourteenth amendments require a preliminary hearing.<sup>16</sup> The court ordered the appropriate Dade County officials to give the plaintiffs preliminary hearings.<sup>17</sup>

On appeal, the Fifth Circuit affirmed.<sup>18</sup> Although Supreme Court cases had conclusively established that a preliminary hearing is not required prior to an arrest<sup>19</sup> or the filing of an information,<sup>20</sup> the court of appeals regarded the question of whether the Constitution requires a subsequent judicial finding of probable cause as unsettled.<sup>21</sup> Moreover, the court distinguished conditions existing before and after an arrest. Before arrest a probable cause hearing would place a heavy burden on the state, since delay might give the accused an opportunity to escape apprehension altogether. After an arrest, however, when the accused is in custody, the court saw no danger

<sup>16</sup> *Id.* at 1113-14.

<sup>17</sup> *Id.* at 1115. The district court also ordered the officials to submit a plan for providing a preliminary hearing in all cases prosecuted by information. *Id.* at 1116. The plan, called the Purdy Plan, submitted by Sheriff Purdy of Dade County, was accepted by the court. *Pugh v. Rainwater*, 336 F. Supp. 490 (S.D. Fla. 1972). The Fifth Circuit stayed the plan's implementation to allow Dade County's judiciary to establish a plan, but not authorized implementation of the Purdy Plan. 483 F.2d at 779. After the Florida Supreme Court issued amended rules of criminal procedure, the district court found main aspects of the new rules invalid. *Pugh v. Rainwater*, 355 F. Supp. 1286 (S.D. Fla. 1972).

<sup>18</sup> The circuit court refused to hold that the district court should have abstained on the basis of *Younger v. Harris*, 401 U.S. 37 (1971). Stating that *Younger* applies only when the plaintiffs seek to enjoin a state proceeding "as such," the court noted that the *Rainwater* plaintiffs were seeking relief not against the prosecution itself, but against the practice of permitting the prosecutor to be the sole judge of probable cause. 483 F.2d at 781-82. The court noted that if the plaintiffs were barred from seeking relief, no remedy would exist. Pretrial incarceration would end at the time of trial, and their claim to a preliminary hearing would be mooted by either conviction or acquittal. *Id.* at 782.

<sup>19</sup> *Ocampo v. United States*, 234 U.S. 91 (1914).

<sup>20</sup> *Lem Woon v. Oregon*, 229 U.S. 586 (1913).

<sup>21</sup> 483 F.2d at 784. While the Supreme Court has never held that a preliminary hearing is not required after the filing of an information, in *Costello v. United States*, 389 U.S. 359 (1968), Justice Black stated that such is the case:

An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more.

(emphasis added). Many states require that the preliminary hearing be held prior to the filing of an information. See Note, *Initiation of Prosecution By Information—Leave of Court or Preliminary Examination*, 25 MONT. L. REV. 135, 136-37 & n.3 (1973).

of losing him before a probable cause hearing could be held<sup>22</sup> and found that no strong interest of the state justified denial of a preliminary hearing.

In ruling that Florida prosecutors were not sufficiently detached to decide when probable cause exists, the court relied on several Supreme Court cases stressing the importance of not entangling prosecutorial and judicial functions.<sup>23</sup> In *Coolidge v. New Hampshire*<sup>24</sup> the Supreme Court invalidated a search warrant issued by the state's Attorney General, who was also the chief investigator and prosecutor in the case. The Court held, in *Morrissey v. Brewer*,<sup>25</sup> that someone not directly involved in the case must determine whether there is probable cause to believe that an individual has violated the conditions of his parole before the parole can be revoked. The circuit court also cited *Shadwick v. Tampa*,<sup>26</sup> in which the Supreme Court reaffirmed its adherence to the principle that arrest warrants must be based on inferences of probable cause drawn by a neutral and detached magistrate rather than by an officer engaged in the competitive enterprise of ferreting out crime.<sup>27</sup>

The court brushed aside prior Fifth Circuit cases<sup>28</sup> holding that there is no constitutional right to a preliminary hearing. These cases were limited by noting that they simply establish that failure to afford a preliminary hearing will not vitiate a conviction.<sup>29</sup> The court emphasized that the plaintiffs were

<sup>22</sup> 483 F.2d at 784.

<sup>23</sup> The court used recent Supreme Court precedent to overcome dictum in *Ocampo v. United States*, 234 U.S. 91 (1914), indicating that the prosecutor is a proper person to determine probable cause:

It is insisted that the finding of probable cause is a judicial act, and cannot properly be delegated to the prosecuting attorney. We think, however, that it is erroneous to regard this function . . . as being judicial in the proper sense. There is no definite adjudication. A finding that there is no probable cause is not equivalent to an acquittal, but only entitles the accused to his liberty for the present, leaving him subject to rearrest. . . . [S]ince . . . the same act . . . does not prescribe how "probable cause" shall be determined, it is, in our opinion, as permissible for the local legislature to confide this duty to a prosecuting officer as to entrust it to a justice of the peace.

*Id.* at 100-01.

<sup>24</sup> 403 U.S. 443 (1971).

<sup>25</sup> 408 U.S. 471 (1972).

<sup>26</sup> 407 U.S. 345 (1972).

<sup>27</sup> *Id.* at 350.

<sup>28</sup> E.g., *Buchannon v. Wainwright*, 474 F.2d 1006 (5th Cir. 1973); *Jackson v. Smith*, 435 F.2d 1284 (5th Cir. 1970), cert. denied, 402 U.S. 947 (1971); *Scarborough v. Dutton*, 393 F.2d 6 (5th Cir. 1968).

<sup>29</sup> 483 F.2d at 786-87. While the court's distinction of its prior cases is for the most part valid, in *Kerr v. Dutton*, 393 F.2d 79 (5th Cir. 1968), the Fifth Circuit wrote in a footnote: "As a general rule there is no constitutional right to a preliminary hearing prior to indictment or trial." *Id.* at 80 n.2 (emphasis added). This statement seems broad enough to include situations where pretrial confinement is ongoing. See also *United States v. Harris*, 458 F.2d 670, 677-78 (5th Cir.), cert. denied, 409 U.S. 888 (1972).



ing only the validity of their present confinement, an issue on which was no controlling precedent.

*Rainwater's* holding that probable cause must be determined by a neutral detached arbiter, and that the prosecutor does not qualify as such, rests on ground. In *Shadwick*, for example, an arrest warrant issued by a clerk was challenged because it was not issued by a judicial officer. The Supreme Court rejected this attack, stating that the only requirements for a judicial officer who issues a warrant must meet are neutrality and the capacity to determine whether probable cause exists. In the course of concluding that the clerk passed these tests, Justice Powell cited "the now accepted principle that someone independent of the police and prosecution must determine probable cause."<sup>80</sup>

If the prosecuting attorney cannot constitutionally determine probable cause for an arrest or search warrant, he should not be constitutionally precluded from precluding a preliminary hearing, particularly when an individual is arrested and detained without a warrant. If filing an information precludes a preliminary hearing, the prosecutor can single-handedly subject the arrestee to pretrial incarceration and the embarrassment and expense of trial. The decision to restrict an individual's freedom so significantly should not be made exclusively by the prosecutor.

At best, *Rainwater* does not squarely create a due process right to a preliminary hearing. Rather, the court applied a principle long recognized in the issuance of warrants: to be an effective safeguard, probable cause must be determined by an individual not involved in law enforcement. In the cases the court cited establish that probable cause must be determined by a neutral and detached arbiter, they do not compel the conclusion that the determination of probable cause must be made in a preliminary hearing. For example, if a grand jury returns an indictment before or after a neutral and detached officer issues an arrest warrant before or after arrest and prior to the filing of an information, it would seem that the arrestee has had a determination of probable cause by a neutral and detached arbiter, despite the ex parte nature of the proceeding. In short, the court stated that probable cause must be determined by a neutral and detached arbiter, why must the determination be made in a preliminary hearing? The fourth amendment dictates that probable cause must be determined in an adversarial proceeding.<sup>81</sup> Because the fourth amendment's requirement of neutral and detached determination of probable cause is

<sup>80</sup> 407 U.S. at 348.

The issuance of search or arrest warrants is almost necessarily an ex parte proceeding. Requiring adversary hearings on the issuance of a warrant would cause the harm that requiring a warrant seeks to prevent: unjustified interference with citizens' lives. Also, adversary hearings could make the warrant useless if obtained, for the purpose of destruction of incriminating evidence.

satisfied by ex parte proceedings, that amendment is not a useful tool for fashioning a constitutional right to a preliminary hearing.

The proper implement for fashioning a right to a preliminary hearing on the state level is the due process clause of the fourteenth amendment. Close analysis of *Rainwater* reveals that the court may have been laying the foundation for future recognition of such a right. Analogizing to civil cases requiring a hearing before persons can be deprived of property, the court stated:

Incarceration of an untied defendant for up to a month without any scrutiny by a judicial officer of the basis for this incarceration is far more odious to a sense of justice than the temporary deprivation of property without a hearing. Yet the Supreme Court has repeatedly held that such deprivations of property are impermissible.<sup>82</sup>

The court's reference to Supreme Court cases which require adversary hearings prior to deprivation of property highlights a constitutional anomaly. An individual's property may not be taken from him without a hearing, yet his personal freedom may. The Fifth Circuit's statement that an individual should not be incarcerated without an opportunity to be heard<sup>83</sup> rejects this anomaly and goes beyond holding that an arrestee facing pretrial incarceration has a right to a determination of probable cause by a neutral and detached arbiter.

Although there appears to be no federal case which holds that, as a matter of due process, an accused is entitled to an adversarial hearing prior to incarceration for any significant length of time, prior cases indicate that such a right ought to exist. In *Goldberg v. Kelly*<sup>84</sup> the Supreme Court stated:

The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be "condemned to suffer grievous loss" . . . and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication.<sup>85</sup>

Further, the Court stated that the opportunity to be heard<sup>86</sup> and the right

<sup>82</sup> 483 F.2d at 787. The Supreme Court cases cited by the court were *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Bell v. Burson*, 402 U.S. 535 (1971); *Wisconsin v. Constantineau*, 400 U.S. 433 (1971); *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Saladach v. Family Finance Corp.*, 395 U.S. 337 (1969).

<sup>83</sup> "We believe the right to a preliminary probable cause hearing before a defendant is subjected to pretrial incarceration is . . . essential to due process. . . ." 483 F.2d at 789.

<sup>84</sup> 397 U.S. 254 (1970).

<sup>85</sup> *Id.* at 262-63.

<sup>86</sup> *Id.* at 267.



to confront and cross-examine adverse witnesses are fundamental to the concept of due process.<sup>37</sup>

A case cited by the Fifth Circuit supports the proposition that due process requires an adversarial preliminary hearing. In *Morrissey v. Brewer*<sup>38</sup> the plaintiff had been accused of violating parole rules and had been returned to prison without a hearing. The Supreme Court held that because reincarceration constituted a grievous loss, the parolee was entitled to a hearing before someone not directly involved in the case to determine whether there was probable cause to believe that the parolee had violated the conditions of his release.<sup>39</sup> Although arrest and search warrant procedures are ex parte in nature, the Court in *Morrissey* required an adversary hearing. The reasoning that incarceration is a grievous loss and that due process requires a hearing before a neutral arbiter seems equally applicable to the situation involved in *Rainwater*.

The preliminary hearing may provide the accused significantly more protection than other methods of determining probable cause. The Fifth Circuit's opinion in *Rainwater* cited statistical data indicating that replacing the information system in Dade County with hearings before a magistrate had significantly reduced felony caseloads.<sup>40</sup> The advantage that the preliminary hearing enjoys over an information, replacing a perhaps overzealous prosecutor with a presumptively neutral magistrate, is absent if the hearing is compared to a grand jury proceeding. The grand jury is presumed to be impartial; although it has been labelled a mere rubberstamp for the prosecutor,<sup>41</sup> the same criticism is made of magistrates.<sup>42</sup> The chief advantage of the preliminary hearing over a grand jury proceeding is that the hearing is adversarial, while the accused has no right to appear before the grand jury. Additionally, in a preliminary hearing the accused has the benefit of counsel, the right to cross-examine adverse witnesses, and the opportunity to present his own case. In this country at least, this procedure is

<sup>37</sup> *Id.* at 269.

<sup>38</sup> 408 U.S. 471 (1972).

<sup>39</sup> *Id.* at 485.

<sup>40</sup> 483 F.2d at 787.

<sup>41</sup> See Ploscowe & Spiero, *The Prosecuting Attorney's Office and the Control of Organized Crime*, in 2 *MANUAL FOR PROSECUTING ATTORNEYS* 318 (M. Ploscowe ed. 1956).

<sup>42</sup> In L. ORFIELD, *CRIMINAL PROCEDURE FROM ARREST TO APPEAL* (1947), the author states:

Magistrates and justices of the peace are . . . ignorant of the law as compared with the prosecutor. Hence they are more likely to be dominated and overridden by the prosecutor than they are to exercise an effective checking influence. A better check than a weak preliminary examination is the grand jury.

*Id.* at 75. See generally W. LAFAYE, *ARREST—THE DECISION TO TAKE A SUSPECT INTO CUSTODY* 35-36 (1965); *THE CHALLENGE OF CRIME IN A FREE SOCIETY, A REPORT BY THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE* 130 (1967); Weinberg & Weinberg, *supra* note 1, at 1371-72 & nn.48-50.

presumptively the most effective method of determining truth.<sup>43</sup>

There are additional benefits derived from the use of the preliminary hearing. The prosecutor can use it to test the substance of a case before expending additional time and effort or to preserve the testimony of potential witnesses prior to trial.<sup>44</sup> The accused gains an opportunity to avoid a potentially unnecessary trial and a chance to discover elements of the prosecution's case. Because opportunities for discovery in criminal cases are ordinarily very limited,<sup>45</sup> both courts<sup>46</sup> and commentators<sup>47</sup> have suggested further utilization and expansion of the preliminary hearing. Although the preliminary hearing is a poor vehicle for discovery,<sup>48</sup> unless the criminal discovery rules of a jurisdiction have been liberalized<sup>49</sup> any procedure which reduces opportunities for unfair surprise at trial seems desirable.

While the Fifth Circuit may be moving towards a declaration that there is a constitutional right to a preliminary hearing before imprisonment, progress is likely to be slow because of strong contrary authority. There is Supreme Court language indicating that there is no constitutional right to a preliminary hearing at any time.<sup>50</sup> Many circuit courts have also stated that there is no due process right to a preliminary hearing regardless of when it is requested.<sup>51</sup> Other cases impliedly state the identical proposition by holding that a grand jury indictment or an information preclude a preliminary

<sup>43</sup> For a strong argument that the preliminary hearing is a more effective screening device than grand jury proceedings, see Weinberg & Weinberg, *supra* note 1, at 1379-84.

<sup>44</sup> See Note, *The Preliminary Hearing—An Interest Analysis*, *supra* note 1, at 173-74. For a discussion of the effectiveness of the preliminary hearing in serving these interests, see Note, *Constitutional Right to Counsel at the Preliminary Hearing*, 75 *DICK. L. REV.* 143, 156-65 (1970).

<sup>45</sup> See, e.g., *FED. R. CRIM. P.* 16.

<sup>46</sup> See *Coleman v. Alabama*, 399 U.S. 1 (1970); *Blue v. United States*, 342 F.2d 894, 901 (D.C. Cir. 1964), *cert. denied*, 380 U.S. 944 (1965); *United States ex rel. Wheeler v. Flood*, 269 F. Supp. 194, 198 (E.D.N.Y. 1967). *But see* *United States v. Conway*, 415 F.2d 158, 161 (3rd Cir. 1969); *Sciortino v. Zampano*, 385 F.2d 132, 134 (2d Cir. 1967), *cert. denied*, 390 U.S. 906 (1968); *Crump v. Anderson*, 352 F.2d 649, 656 (D.C. Cir. 1965). For a general discussion of judicial decisions considering the functions of the preliminary hearing, see Weinberg & Weinberg, *supra* note 1, at 1374-78.

<sup>47</sup> E.g., THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 143 (1967); Anderson, *supra* note 1, at 288; Note, *Preliminary Hearing in the District of Columbia—An Emerging Discovery Device*, 56 *Geo. L. J.* 191 (1967); Note, *The Preliminary Hearing—An Interest Analysis*, *supra* note 1, at 176-80.

<sup>48</sup> See sources cited note 44 *supra*.

<sup>49</sup> Chief Justice Burger has expressed a preference for this course. See *Coleman v. Alabama*, 399 U.S. 1, 25 (1970) (Burger, C.J., dissenting).

<sup>50</sup> *United States ex rel. Hughes v. Gault*, 271 U.S. 142, 149 (1926).

<sup>51</sup> E.g., *Robbins v. United States*, 476 F.2d 26, 32 (10th Cir. 1973); *Barber v. Arkansas*, 429 F.2d 20, 22 (8th Cir. 1970); *Walker v. Rodgers*, 389 F.2d 961 (D.C. Cir. 1968); *Sciortino v. Zampano*, 385 F.2d 132, 134 (2d Cir. 1967), *cert. denied*, 390 U.S. 906 (1968); *Dillard v. Bomar*, 342 F.2d 789, 790 (6th Cir.), *cert. denied*, 382 U.S. 883 (1965); *Odell*



hearing.<sup>62</sup> The Federal Rules of Criminal Procedure provide for a preliminary hearing only if it precedes the issuance of an indictment or the filing of an information.<sup>63</sup>

A primary obstacle to establishing a constitutional right to a preliminary hearing is the fifth amendment, which explicitly requires indictment or presentment by a grand jury in cases involving capital or otherwise infamous crimes.<sup>64</sup> Although the grand jury has been severely criticized because its characteristic secrecy and the ex parte nature of its proceedings provide little procedural protection for the accused,<sup>65</sup> the fifth amendment makes it anomalous to hold that an adversarial preliminary hearing is always required to satisfy due process.<sup>66</sup> A constitutional right to a preliminary hearing would protect an accused by serving as a check on grand jury findings, but this sort of quasi-appellate review would result in a wasteful duplication of effort. Moreover, it is by no means clear that a magistrate would have the power to undermine the grand jury's constitutional role by negating its finding of probable cause.<sup>67</sup>

*v. Burke*, 281 F.2d 782, 786 (7th Cir. 1960), *cert. denied*, 364 U.S. 875 (1960), 371 U.S. 963 (1963).

<sup>62</sup> See cases cited note 7 *supra*.

<sup>63</sup> Fed. R. Crim. P. 5(c).

<sup>64</sup> U.S. CONST. amend. V provides in part:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury. . . .

Any offense punishable by imprisonment for a term of greater than one year is an infamous crime within the meaning of the fifth amendment. See Fed. R. Crim. P. 7(a), Advisory Committee Notes, reprinted in 18 U.S.C.A. (1969).

<sup>65</sup> In Note, *An Examination of the Grand Jury in New York*, 2 COLUM. J.L. & Soc. PROS. 88 (1966), Dean Paulsen is quoted as saying:

[The] [grand jury is a poor construct for protection of the accused and there is little difference between its operation and a McCarthy investigation.

*Id.* at 90 n.20. See also Antell, *The Modern Grand Jury: Benighted Supergovernment*, 51 A.B.A.J. 153 (1965). For commentary expressing a contrary view see Dession, *From Indictment to Information—Implications of the Shift*, 42 YALE L.J. 163 (1932); Hall, *Analysis of Criticism of the Grand Jury*, 22 J. CRIM. L.C. & P.S. 692 (1931).

<sup>66</sup> In two cases, both juvenile court proceedings, the United States Court of Appeals for the District of Columbia has held that the Constitution requires a preliminary hearing. *Brown v. Faunteroy*, 442 F.2d 838 (D.C. Cir. 1971); *Cooley v. Stone*, 414 F.2d 1213 (D.C. Cir. 1969). In neither case was the issue of whether an indictment obviates the need for a preliminary hearing before the court. Rather, the cases considered the need for a judicial determination of probable cause without the necessity of deciding whether a grand jury proceeding would eliminate this requirement. In *Blue v. United States*, 342 F.2d 894 (D.C. Cir. 1964), *cert. denied*, 380 U.S. 944 (1965), the District of Columbia Circuit held that an intervening indictment did not necessarily preclude a preliminary hearing. However, the decision was grounded in what the court perceived to be congressional policy as expressed in a statute applicable only to the District.

<sup>67</sup> *Sciortino v. Zampano*, 385 F.2d 132 (2d Cir. 1967), *cert. denied*, 390 U.S. 906 (1968):

*Rainwater* did not constitutionalize the adversarial preliminary hearing but, if affirmed by the Supreme Court, will require abolition of information systems in which the prosecutor alone certifies the existence of probable cause. This would undoubtedly cause wider utilization of the preliminary hearing, particularly in those jurisdictions which do not employ grand juries.

Although the *Rainwater* court did not advert to the Federal Rules of Criminal Procedure, the case impliedly renders portions of them constitutionally suspect, since in certain circumstances the Rules allow an individual to be proceeded against by information alone. Under Rule 5(a) an officer making an arrest with or without a warrant is required to bring the arrestee before a federal magistrate without unreasonable delay.<sup>68</sup> This first proceeding is called the initial appearance and must be distinguished from the preliminary examination,<sup>69</sup> which is the subject of Rule 5.1. Normally no determination of probable cause is made at the initial appearance,<sup>70</sup> but the accused is informed of his right to a preliminary examination.<sup>71</sup> If the preliminary examination is not waived by the arrestee, the magistrate must schedule a hearing.<sup>72</sup> Rule 5(c) provides, however, that if an information is filed or the defendant is indicted before the date of the hearing, the preliminary examination will not be held.<sup>73</sup> Since Rule 7(a)<sup>74</sup> authorizes

A post-indictment preliminary examination would be an empty ritual, as the government's burden of showing probable cause would be met merely by offering the indictment. Even if the commissioner disagreed with the grand jury, he could not undermine the authority of its finding.

385 F.2d at 133. *Accord*, *United States v. Hinkle*, 307 F. Supp. 117, 120 (D.D.C. 1969).

<sup>68</sup> Fed. R. Crim. P. 5(a).

<sup>69</sup> The Federal Rules use the term "preliminary examination" instead of "preliminary hearing." There is no difference in meaning.

<sup>70</sup> Although it is possible to hold a preliminary examination at the time of the initial appearance, ordinarily counsel need time to prepare for the preliminary examination, and a separate date is set. Fed. R. Crim. P. 5, Advisory Committee Notes to 1972 Amendments, reprinted in 18 U.S.C.A. (Supp. 1973). For an argument that the preliminary examination should be held at the time of the initial appearance see Note, *Probable Cause at the Initial Appearance in Warrantless Arrests*, 45 S. CAL. L. REV. 1128 (1972).

<sup>71</sup> Fed. R. Crim. P. 5(c).

<sup>72</sup> *Id.*

<sup>73</sup> Fed. R. Crim. P. 5(c) provides in pertinent part:

A defendant is entitled to a preliminary examination, unless waived, when charged with an offense, other than a petty offense, which is to be tried by a judge of the district court. . . . If the defendant does not waive the preliminary examination, the magistrate shall schedule a preliminary examination. . . . [P]rovided, however, that the preliminary examination shall not be held if the defendant is indicted or if an information against the defendant is filed in district court before the date set for the preliminary examination.

<sup>74</sup> Fed. R. Crim. P. 7(a) states:

An offense which may be punished by death shall be prosecuted by indictment. An offense which may be punished by imprisonment for a term exceeding one year or at hard labor shall be prosecuted by indictment or, if indictment is



prosecution by information when an accused faces slight penalties or when indictment by grand jury is waived, some individuals may never have probable cause determined by a neutral party despite their having requested a preliminary examination.<sup>65</sup> Assuming that these persons have been unable to secure release by meeting the requirements of the federal bail provisions,<sup>66</sup> this system seems distinguishable from the Florida system struck down in *Rainwater* only because, absent waiver of indictment by an arrestee, it may be used to prosecute only minor offenders. Since a primary evil caused by lack of a neutral determination of probable cause is pretrial incarceration,<sup>67</sup> there seems to be no basis for affording less procedural protection for those accused of less serious offenses.<sup>68</sup>

The *Rainwater* decision highlights the inconsistency arising from constitutional protection of the right to a hearing before deprivation of property and the simultaneous failure to guarantee such a hearing to one accused of crime. The fact that the Federal Rules of Criminal Procedure result in unscrutinized incarceration in certain cases points out the need for a reexamination of pre-trial procedures. The *Rainwater* court's emphasis of the preliminary hearing's role is a significant step in the direction of fairer treatment for those accused of crime.

waived, it may be prosecuted by information. Any other offense may be prosecuted by indictment or by information. An information may be filed without leave of court.

<sup>65</sup> With respect to the person who waives his right to an indictment by a grand jury, this result does not seem unreasonable, since he has once rejected an opportunity to have probable cause determined by a neutral party.

<sup>66</sup> 18 U.S.C. §§ 3146, 3148-49 (1970).

<sup>67</sup> The decision in *Rainwater* and the order to grant preliminary hearings applied only to individuals actually incarcerated on the basis of informations. 483 F.2d at 789. However, persons freed upon posting a bond should also be afforded a hearing before a neutral arbiter, since they must undergo the expense and inconvenience of preparing to defend against a criminal charge. Cf. *Hensley v. Municipal Court*, 411 U.S. 345 (1973) (restraints on an individual who was released on his own recognizance pending appeal of a misdemeanor conviction constituted custody for the purposes of federal habeas corpus).

<sup>68</sup> In considering the amended Florida Rules of Criminal Procedure, see note 19 *supra*, and testing them against its holding, the *Rainwater* court determined that Florida's attempt to deny a preliminary hearing to misdemeanants was impermissible. Relying in part on *Argersinger v. Hamlin*, 407 U.S. 25 (1972), which extended the right to court-appointed counsel to all individuals charged with an offense punishable by imprisonment, the court stated: "In short, the offense charged is irrelevant to the man incarcerated prior to trial. . . ." 483 F.2d at 789.

Further dealing with Florida's amended rules, the court did not find it necessary to decide whether the lapse of as long as six days between arrest and preliminary hearing permitted by the Florida Rules violated due process. *Id.* at 788. The court did, however, strike down as violative of the equal protection clause, a provision which would have allowed the preliminary hearing to be delayed several days in cases involving offenses punishable by death or life imprisonment. *Id.* at 789-90.

## BOOKS RECEIVED

**JUST ABOUT EVERYBODY vs. HOWARD HUGHES.** By David B. Tinnin. Garden City: Doubleday & Company, Inc., 1973. Pp. xi, 462. \$10.00. *Just About Everybody vs. Howard Hughes* has much of the same appeal that characterizes Joseph Golden's *The Superlawyers*: a chance for mere mortals to obtain a glimpse of the gods. In this case, however, the gods are not the denizens of Farragut Square, but rather Howard Hughes, the management of Trans World Airlines, a large part of the Wall Street financial community, and, of course, some very skillful lawyers. Although on one level the book is an inside view of the fight for control of TWA, its major interest lies in Mr. Tinnin's grasp of the nature of a corporate power struggle and the strategies it engenders. Every stage of the litigation is interwoven with external facts and the objectives of the protagonists to produce an intriguing picture of the function of the legal process in resolving private disputes and the way in which private parties manipulate the machinery of that process to achieve their goals. The reader's interest in the merits of the actual case is quickly subsumed by his interest in the way one litigates such a suit. In this regard it is important to note that the primary emphasis is on strategy as such, rather than the substantive law of antitrust litigation. While a familiarity with the law lends a deeper appreciation of the book, it is written in such a way that the layman can appreciate the author's achievement.

**PUBLIC INTEREST ADVOCACY: MATERIALS FOR CLINICAL LEGAL EDUCATION.** By Michael Meltsner and Philip G. Schrag. Boston: Little, Brown and Company, 1974. Pp. xii, 418. Responding to legal education's increased emphasis on clinical law programs and courses dealing with the development of advocacy skills, the authors have compiled an impressive set of materials for the use of law professors and students involved in these areas. Since the focus of the volume is on public interest law, the book not only is highly readable but also provides insights and guidance into the peculiar problems of this sort of practice. The authors have divided the materials into three major parts. The first, entitled "The Practice of Public Interest Law," primarily contains excerpts from articles concerned with such problems as caseload and political constraints on public interest practice, the extent of the lawyer's effectiveness, and types of institutional organization appropriate for public interest advocacy. Part II deals with public interest advocacy techniques and includes chapters on planning a test case (focusing on *Fuentes v. Shevin*), interviewing clients, drafting, counseling, negotiation, and examination of witnesses. The book closes with two case studies which dramatize the challenges encountered throughout the various stages of litigation. The authors also pose a myriad of provocative questions about the attorneys' tactics and strategy.



*Petter will  
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until he  
he hears  
further  
from  
me.*

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-477

Richard E. Gerstein, State At-  
torney for Eleventh Judicial  
Circuit of Florida,  
Petitioner,  
v.  
Robert Pugh et al.

On Writ of Certiorari  
to the United States  
Court of Appeals for  
the Fifth Circuit.

[January —, 1975]

MR. JUSTICE STEWART, concurring.

I concur in Parts I and II of the Court's opinion, since the Constitution clearly requires at least a timely judicial determination of probable cause as a prerequisite to pretrial detention. Because Florida does not provide all defendants in custody pending trial with a fair and reliable determination of probable cause for their detention, the respondents and the members of the class they represent are entitled to declaratory and injunctive relief.

Having determined that Florida's current pretrial detention procedures are constitutionally inadequate, I think it is unnecessary to go further. I would not, therefore, in the abstract, either attempt to define the minimal procedural safeguards that must be accorded to incarcerated suspects awaiting trial or to specify those procedural protections that are not constitutionally necessary.

It is the prerogative of each State in the first instance to develop pretrial procedures that provide defendants in pretrial custody with the fair and reliable determination of probable cause for detention required by the Constitution. Cf. *Morrissey v. Brewer*, 408 U. S. 471, 488. The constitutionality of any particular method for determining probable cause can be properly decided only by evaluating a State's pretrial procedures as a whole, not by



isolating a particular part of its total system. As the Court recognizes, great diversity exists among the procedures employed by the States in this aspect of their criminal justice systems. *Ante*, at slip op. 22.

There will be adequate opportunity to evaluate in an appropriate future case the constitutionality of any new procedures that may be adopted by Florida in response to the Court's judgment today holding that Florida's present procedures are constitutionally inadequate.



Pp 1-2  
En. omitted

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

From: Stewart, J.

Circulated: \_\_\_\_\_

Recirculated: FEB 11 1975

4th DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 73-477

Richard E. Gerstein, State Attorney for Eleventh Judicial Circuit of Florida,  
Petitioner,  
v.  
Robert Pugh et al.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[January —, 1975]

MR. JUSTICE STEWART, with whom MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE MARSHALL join, concurring.

I concur in Parts I and II of the Court's opinion, since the Constitution clearly requires at least a timely judicial determination of probable cause as a prerequisite to pretrial detention. Because Florida does not provide all defendants in custody pending trial with a fair and reliable determination of probable cause for their detention, the respondents and the members of the class they represent are entitled to declaratory and injunctive relief.

Having determined that Florida's current pretrial detention procedures are constitutionally inadequate, I think it is unnecessary to go further by way of dicta. In particular, I would not, in the abstract, attempt to specify those procedural protections that constitutionally need not be accorded incarcerated suspects awaiting trial.

Specifically, I see no need in this case for the Court to say that the Constitution extends less procedural protection to an imprisoned human being than is required to test the propriety of garnisheeing a commercial bank account, *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, — U. S. —; the custody of a refrigerator, *Mitchell v.*

We do not extend less in these cases

no prior hearing at all

subvise  
Apart from the concurring of  
suggesting that a determination  
of probable cause by a judge appears



*W. T. Grant Co.*, 416 U. S. 600; the temporary suspension of a public school student, *Gross v. Lopez*, — U. S. —; or the suspension of a driver's license, *Bell v. Burson*, 402 U. S. 535. Although it may be true that the Fourth Amendment's "balance between individual and public interests always has been thought to define the 'process that is due' for seizures of person or property in criminal cases," *ante*, pp. 21-22, n. 7, this case does not involve an initial arrest, but rather the continuing incarceration of a presumptively innocent person. Accordingly, I cannot join the Court's effort to foreclose any claim that the traditional requirements of constitutional due process are applicable in the context of pretrial detention.

It is the prerogative of each State in the first instance to develop pretrial procedures that provide defendants in pretrial custody with the fair and reliable determination of probable cause for detention required by the Constitution. Cf. *Morrissey v. Brewer*, 408 U. S. 471, 488. The constitutionality of any particular method for determining probable cause can be properly decided only by evaluating a State's pretrial procedures as a whole, not by isolating a particular part of its total system. As the Court recognizes, great diversity exists among the procedures employed by the States in this aspect of their criminal justice systems. *Ante*, at slip op. 20.

There will be adequate opportunity to evaluate in an appropriate future case the constitutionality of any new procedures that may be adopted by Florida in response to the Court's judgment today holding that Florida's present procedures are constitutionally inadequate.

Suggestion  
of  
motion



file

This case involves the Florida procedure/where an arrest is made without a warrant, ~~as is usually the case.~~ ~~In Florida,~~ The suspect may then be charged/ upon information by the prosecuting attorney, and held in jail/pending the other steps in the criminal process, e.g., a bail hearing, arraignment and trial. <sup>well.</sup>

These usually include

We hold <sup>today</sup> that the <sup>information filed by the</sup> ~~prosecutor's assessment of~~ ~~probable cause,~~ standing alone, <sup>is</sup> not sufficient to justify detention pending trial. Rather, the Fourth Amendment requires/a fair and reliable determination of probable cause/as a condition to any significant pretrial restraint on liberty. Moreover, this determination must be made by a judicial officer promptly after arrest.

But we do not <sup>however,</sup> accept respondent's argument/that a full adversary hearing - with counsel, confrontation and cross examination of witnesses - is required by the Constitution. The determination of probable cause for detention/is merely the first stage in the elaborate

criminal justice  
systems



criminal justice system/ designed to safeguard the rights of those accused of criminal conduct. At this initial stage, we think a mini-trial is not required, <sup>by the Court</sup> and <sup>indeed</sup> is not necessarily in the interest/ of either the suspect or society.

Accordingly, and for the reasons more fully set forth in our opinion, we affirm in part and reverse in part/ the decision in this case by the Court of Appeals for the Fifth Circuit.

Mr. Justice Stewart has filed a concurring opinion, <sup>in I & II</sup> in which Justices Douglas, Brennan and Marshall have joined.



Supreme Court of the United States  
Washington, D. C. 20543

✓

CHAMBERS OF  
JUSTICE BYRON R. WHITE

January 10, 1975

Re: No. 73-477 - Gerstein v. Pugh

Dear Lewis:

Please join me in your circulation of  
today.

Sincerely,



Mr. Justice Powell

Copies to Conference



Supreme Court of the United States  
Washington, D. C. 20543

✓

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

January 14, 1975

Re: No. 73-477 - Gerstein v. Pugh

Dear Lewis:

Please join me.

Sincerely,

WHR

Mr. Justice Powell

Copies to the Conference



*Penny - Any reason not to do this?*

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

January 15, 1975

*Done*

Re: No. 73-477 - Gerstein v. Pugh

Dear Lewis:

Would there be any point in adding, at the end of footnote 2 on page 2, a phrase such as "See note 20, post, \_\_\_\_\_"? When I first read footnote 2, I wondered whether there was an inference that if the described procedure had been challenged, there might be a chance of success. Footnote 20 provides an answer to this and prompts me to suggest the addition to footnote 2.

Sincerely,

*Larry*

Mr. Justice Powell



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

January 15, 1975

Re: No. 74-477 - Gerstein v. Pugh

Dear Lewis:

Please join me.

Sincerely,

A handwritten signature in blue ink, appearing to read "Harry", with a horizontal line underneath.

Mr. Justice Powell

cc: The Conference



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

January 16, 1975

RE: No. 73-477 Gerstein v. Pugh

Dear Potter:

Please join me in your concurring opinion  
in the above.

Sincerely,

*Bill*

Mr. Justice Stewart

cc: The Conference



Supreme Court of the United States  
Washington, D. C. 20543



CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

January 16, 1975

Re: No. 73-477 -- Richard E. Gerstein v. Robert Pugh

Dear Potter:

Please join me in your concurring opinion.

Sincerely,

*J.M.*  
T. M.

Mr. Justice Stewart

cc: The Conference



Supreme Court of the United States  
Washington, D. C. 20543

✓

CHAMBERS OF  
THE CHIEF JUSTICE

January 24, 1975

Re: No. 73-477 - Gerstein v. Pugh

Dear Lewis:

I join in your opinion circulated January 10.

Regards,

WJB

Mr. Justice Powell

Copies to the Conference



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM O. DOUGLAS

February 5, 1975

Dear Potter:

Please join me in your  
concurring opinion in 73-477,  
GERSTEIN v. PUGH.

WILLIAM O. DOUGLAS

Mr. Justice Stewart

cc: The Conference



February 5, 1975

No. 73-477 Gerstein v. Pugh

Dear Mr. Putzel:

The line up in this case is as follows:

Our opinion for the Court - joined by CJ,  
BRW, HAB and WHR.

Justice Stewart's concurring opinion -  
joined by WOD, WJB and TM.

Sincerely,

Mr. Henry Putzel, jr.



Supreme Court of the United States

Washington, D. C. 20543

February 26, 1975

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

FILE COPY

PLEASE RETURN  
TO FILE

Case held for No. 73-477 Gerstein v. Pugh

MEMORANDUM TO THE CONFERENCE:

No. 73-6950 Mega v. West Virginia.

In this case we held that a person charged by prosecutor's information was entitled to a judicial determination of probable cause for pretrial detention. Our opinion noted expressly that we had no intention of changing the settled rule that illegal arrest or detention furnish no grounds for vacating a subsequent conviction. Slip op at 15. In Mega, the Petitioner seeks reversal of his conviction for possession of marijuana because he was denied a preliminary hearing after grand jury indictment. The statement in Gerstein thus disposes of his claim, without reference to the fact that Petitioner was held under indictment rather than an information or other form of prosecutor's charge.

There are other, independent issues raised by the Mega petition. Petitioner also raises questions about the State's failure to disclose certain evidence, and its refusal to grant immunity to an informer witness who was present at the time of the alleged drug transaction and who asserted a Fifth Amendment privilege not to testify about the occurrence. Petitioner contends the informer's testimony would have supported his entrapment defense. I do not find this claim worthy of our consideration, and I will vote to deny the petition.

L.F.P.

L.F.P., Jr.







Chambers Draft

Ciaa  
X224No. 73-477 GERSTEIN v. PUGH

MR. JUSTICE POWELL, delivered the opinion of  
the Court. *le*

The issue in this case is whether a person held-  
~~arrested~~  
~~in custody~~ under a prosecutor's information is  
constitutionally entitled to a judicial determination of  
probable cause for ~~detention~~ *pretrial restraint of liberty.*

*I*  
*le*

In March 1971 respondents Pugh and Henderson  
were arrested in Dade County, Florida. Each was charged  
with several offenses under a prosecutor's information. <sup>1</sup>  
Pugh was denied bail because one of the charges against  
him carried a potential life sentence, and Henderson was  
held in custody because he was unable to post a \$4,500  
bond.

In Florida, indictments are required only for  
prosecution of offenses punishable by death. All other  
criminal offenses may be prosecuted by information, and



violations of municipal ordinances may be prosecuted by a simple affidavit or docket entry. Fla. R<sup>ule</sup> Crim. Proc. 3.140 (Supp. 1974). At the time respondents were arrested, Florida's rules of criminal procedure authorized only one method for determining the existence of probable cause to hold a suspect in jail pending trial. Fla. R<sup>ule</sup> Crim. P<sup>roc.</sup> 1.122 (amended 1972). This proceeding, an adversary preliminary hearing, was not available to a suspect who had already been charged by information. <sup>See</sup> Bradley v. State, 265 So. 2d 533 (Fla.) cert. denied, 411 U.S. 916 (1973); State ex rel. Hardy v. Blount, 261 So. 2d 172 (Fla. 1972) <sup>2</sup> ~~State v. Hernandez, 217 So. 2d 109 (Fla. 1968); Sullivan v. State ex rel. McGary, 49 So. 2d 794 (Fla. 1951); Karz v. Overton, 249 So. 2d 763 (Fla. Ct. App. 1971)~~ <sup>In those instances when</sup> ~~If~~ a preliminary hearing was held and the suspect discharged, the prosecutor could reinstate the charge and <sup>return him</sup> ~~hale him~~



<sup>to</sup>  
~~back into~~ custody ~~immediately~~ by filing an information.

See Montgomery v. State, 176 So. 2d 331 (Fla. 1965);

Baugus v. State, 141 So. 2d 264 (Fla. 1962). As a result,

a person charged by information could be detained pending trial solely on the decision of a prosecutor.

Respondents Pugh and Henderson filed a class action against Dade County officials in the federal

district court, <sup>3/</sup> claiming a constitutional right to a judicial hearing on the issue of probable cause <sup>and requesting</sup>

~~They asked for~~ declaratory and injunctive relief. <sup>4/</sup>

Respondents Turner and Faulk, ~~who were also being held in~~ custody under <sup>5/</sup> informations, subsequently intervened.

Petitioner Gerstein, the State Attorney for Dade County, was one of several defendants. <sup>6/</sup>

After an initial delay while the Florida legislature considered a bill that would have <sup>afforded</sup> ~~granted~~ preliminary

hearings to <sup>persons charged by information,</sup> ~~the plaintiff class,~~ the District Court



1107 (S.D. Fla. 1971). *After certifying the case* ~~The court certified the case~~

as a class action under Fed. R. *Rule* Civ. P. 23(b)(2), ~~and~~  
~~the court~~  
 held that the Fourth and Fourteenth Amendments give all  
 arrested persons *charged by information* a right to a judicial hearing on the

question of probable cause. The District Court ordered  
 the Dade County defendants to give the named plaintiffs  
 an immediate preliminary hearing to determine probable  
 cause for further detention. <sup>7</sup> It also ordered them

to submit a plan providing preliminary hearings in all  
 cases instituted by information. <sup>such</sup> Only one ~~plan~~ <sup>plan</sup> ~~authored~~  
~~by Sheriff E. Wilson Purdy~~ was submitted, and the

District Court adopted it with modifications. The final  
 order prescribed a detailed post-arrest procedure, ~~applicable~~  
~~to all arrested persons~~, 336 F. Supp. 490. Upon arrest

the accused would be taken before a magistrate for a  
 "first appearance hearing." The magistrate would explain  
 the charges, advise the accused of his rights, appoint  
 counsel if he was indigent, and proceed with a probable



cause determination unless either the prosecutor or the accused was unprepared. If either asked for more time, the magistrate would set the date for a "preliminary

hearing," to be held no more than four days later if the accused was in custody and no more than ten days later if he had been released pending trial. At the hearing, the accused would be entitled to counsel, and he would be

allowed to confront and cross-examine adverse witnesses, to summon favorable witnesses, and to have a transcript made on request. If the magistrate found no probable cause, the accused would be discharged. He then could not be charged with the same offense by complaint or information, but only by indictment returned within thirty days. The plan also provided sanctions for failure to hold ~~the~~ hearings at the prescribed times.

The Court of Appeals for the Fifth Circuit stayed the District Court's order pending appeal, but while the case was awaiting decision, the Dade County judiciary voluntarily adopted a similar procedure of its own.



Upon learning of this development, the Court of Appeals vacated its stay and remanded the case for specific findings on the constitutionality of the new Dade County system. Then, ~~Before~~ <sup>however,</sup> the District Court issued its findings, the Florida Supreme Court amended the procedural rules governing preliminary hearings, <sup>statewide</sup> and the parties agreed that the District Court should direct its inquiry to the new rules rather than the Dade County procedures.

Under the amended rules every arrested person must be taken before a judicial officer within 24 hours.

Fla. R. <sup>rule</sup> Crim. P. <sup>not</sup> 3.130. ~~At~~ This "first appearance," <sup>is similar to the</sup> ~~at the~~ "first appearance hearing" <sup>ordered by the District</sup> Court, <sup>in all respects but the crucial one:</sup> ~~the magistrate must inform the defendant of the~~ ~~charge, give him a copy of the complaint, advise him of~~ ~~his constitutional rights, and appoint counsel for him if~~ ~~he is indigent. The magistrate then decides whether the~~ ~~accused is entitled to release on bail or other conditions,~~ ~~but the magistrate does~~ ~~not make a determination of probable cause.~~ <sup>Here</sup>



~~xx~~ The rule amendments also changed the procedure for preliminary hearings, restricting them to ~~a~~ felony charges and codifying the rule that no hearings are available to persons charged by information or ~~information~~ indictment.

Rule 3.131; see In re Rule 3.131(b), Florida Rules of Criminal Procedure, 282 So. 2d \_\_\_\_ (Fla. 1972). <sup>8</sup>✓

In a supplemental opinion the District Court held that the amended rules had not <sup>answered</sup> ~~removed~~ the basic constitutional objection, since a defendant charged by information still could be detained pending trial without a judicial determination of probable cause. 355 F. Supp. 1286. Reaffirming the original ruling, ~~xx~~ the District Court declared that the continuation of this practice was unconstitutional. <sup>109</sup>✓ The Court of Appeals



affirmed, 483 F. 2d 778, modifying the District Court's decree in minor particulars and suggesting that the form of preliminary hearing provided by the amended Florida rules would be acceptable, as long as it was provided to all defendants in custody pending trial.

Id., at 788. <sup>10</sup> State Attorney Gerstein petitioned for review, and we granted certiorari because of the importance of the issue. <sup>11</sup> We affirm in part and reverse in part.



## II.

(A) [ As framed by the proceedings below, the issues are whether a person who is arrested and charged with crime is entitled to a judicial determination of probable cause to justify restraint of his liberty pending trial, and if so, *what formalities are required by the* whether only an adversary hearing will serve. ]

*Conclusion*

A.

~~Historically,~~ Both the standards and procedures

for arrest and detention have been derived from the

Fourth Amendment and its common law antecedents. See

*Cupp v. Murphy*, 412 U.S. 291, 294-295 (1973);

*Gierdenello v. United States*, 357 U.S. 480, 485-86 (1958);

*Ex Parte Bollman*, 8 U.S. (4 Cranch) 75 (1807); *Ex Parte*

*Burford*, 7 U.S. (3 Cranch) 447 (1806). 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." *Beck v. Ohio*, 479 U.S. 89, 91

(1964). See also *Henry v. United States*, 361 U.S. 98

(1959); *Brinegar v. United States*, 338 U.S. 160, 175-176



(1949); Johnson v. United States, 333 U.S. 10 (1948).

This standard represents a compromise between the individual's right to liberty and the community's responsibility for controlling crime.

① "These long-prevailing standards seek to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime. They also seek to give fair leeway for enforcing the law in the community's protection. Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability. The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating these often opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice."

② Brinegar v. United States, supra, at 176.

To implement the Fourth Amendment's protection against unfounded invasions of liberty and privacy, the Court has required that the existence of probable cause be decided by a neutral and detached magistrate whenever possible. The classic statement of this principle appears in Johnson v. United States, supra at 13-14:



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

See also Terry v. Ohio, 392 U.S. 1, 20-22 (1968).

Insert  
Rider  
A,  
attached

Requiring that a magistrate review the factual justification for every arrest beforehand would offer maximum protection for individual rights, but it would ~~seriously hamper the~~ *severely handicap* ~~needs of effective~~ law enforcement. To accommodate these opposing interests, the Court has expressed a preference for the use of arrest warrants when possible, Beck v. Ohio, 379 U.S. 89, 96 (1964); Wong Sun v. United States, 371 U.S. 471, 479-482 (1963), but it has never invalidated an arrest supported by probable cause, solely for lack of a warrant.

See Ker v. California, 374 U.S. 23 (1963); Draper v. United States, 358 U.S. 307 (1959); Trupiano v. United States, 334 U.S. 699, 705 (1948).<sup>13</sup> Under this practical *accommodation,* ~~compromise,~~



*Penney - we use "suspect" + "defendant" interchangeably  
What about settling on "suspect" and "arrestee"?*

12.

crime. The policeman's judgment may also <sup>justifies</sup> justify a  
brief period of detention <sup>to take the administrative</sup> ~~in connection with the arrest,~~  
<sup>steps necessary for arrest,</sup>  
but once the suspect is in custody the reasons that  
justify dispensing with the magistrate's neutral  
judgment evaporate. There is no longer any danger that  
the suspect will escape or commit further crimes while the  
police submit their evidence to a magistrate. And, from  
the suspect's point of view, the consequences of prolonged  
detention may be ~~for~~ more serious than the interference  
occasioned by arrest. Lengthy <sup>P</sup>pretrial confinement may  
imperil <sup>the suspect's</sup> ~~the defendant's~~ job, interrupt his source of  
income, and <sup>impose</sup> ~~damage~~ his family relationships. Even  
<sup>pretrial</sup> ~~conditional~~ release <sup>may be</sup> ~~pending trial~~ <sup>accompanied by burdensome conditions</sup> may involve ~~substantial~~  
<sup>that effect a significant</sup> restraints on liberty. When the stakes are this high,  
the detached judgment of a neutral magistrate is  
essential if the Fourth Amendment is to furnish meaningful  
protection from unfounded interference with liberty.  
Accordingly, we hold that the Fourth Amendment requires a

*Penney -  
why omit  
"conditional"  
and "pending trial"?*

*msbm 32-91  
stice Is the  
772).*



As framed by the proceedings below, <sup>this case presents</sup> ~~the issues are~~  
<sup>two issues:</sup>  
 whether a person arrested and held for trial on an  
 information is entitled to a <sup>judicial</sup> ~~determination by a judicial~~  
 officer of probable cause for <sup>detention,</sup> ~~the arrest,~~ and if so,  
 whether the <sup>adversary hearing ordered by the District</sup> ~~what formalities are required in the making of this~~  
 Court and approved by the Court of Appeals <sup>determination?</sup>  
 are required by the Constitution.

Maximum protection of individual rights could be assured  
 by requiring a magistrate's review of the factual justifica-  
 tion prior to any arrest, but such a requirement would  
 severely handicap ~~necessary and~~ legitimate law enforcement.  
 In striking a balance between these opposing interests,  
 the Court has expressed a preference for the use of arrest  
 warrants when possible, Beck v. Ohio, 379 U.S. 89, 96  
 (1964); Wong Sun v. United States, 371 U.S. 471, 479-482  
 (1963), but it has never invalidated an arrest supported  
 by probable cause solely because <sup>the officers had</sup> ~~of the absence of a~~  
<sup>failed to secure a warrant.</sup>  
~~warrant.~~



4 This result has historical support in the common law that has guided interpretation of the Fourth Amendment.

See Carroll v. United States, 267 U.S. 132, 149 (1925).

At common law it was customary, if not obligatory, for an arrested person to be brought before a justice of the peace shortly after arrest. 2 Hale, Pleas of the Crown

77, 81, 95 (1736); 2 Hawkins, Pleas of the Crown 116-17  
 See also Kwitt v. Moffitt, 115 U.S. 478, 498-99 (1885).  
 (4th ed. 1762). The justice of the peace would "examine"

the prisoner and the witnesses to determine whether there was reason to believe the prisoner had committed a crime.

If there was, the suspect would be committed to jail or

bailed pending trial. If not, he would be discharged

from custody. 1 Hale, supra, at 583-585; 2 Hawkins, supra,

at 116-119; 1 J. Stephen, History of the Criminal Law of

England 233 (1883). The initial determination of probable

cause could also be reviewed by higher courts on a writ

of habeas corpus. 2 Hawkins, supra, at 112-115; 1 J. Stephen,

supra, at 243; See Ex Parte Bollman, 8 U.S. (4 Cranch) 75,



criminal procedure in America immediately following the adoption of the Fourth Amendment, See Ex Parte Bollman 8 U.S. (4 Cranch) 75 (1807); <sup>15</sup> Ex Parte Burford, 7 U.S. (3 Cranch) 447 (1806); Ex Parte Hamilton, 3 U.S. (3 Dall.) 17 (1795) <sup>16</sup> In re Bailey, 2 Fed. Cas. 363 (No. 730) (C.C. Kan. 1869) (Miller, Circuit Justice), and <sup>there are</sup> ~~the~~ indications that the framers of the Bill of Rights ~~may have~~ regarded it as a model for a "reasonable" seizure. See ~~generally~~ Draper v. United States, 358 U.S. 307, 317-320 (1959) (Douglas, J., dissenting). <sup>16</sup>

B.e

Under the Florida procedures challenged here, a person arrested without a warrant and charged by information may be jailed or subjected to other restraints pending trial without any opportunity for a probable cause determination. <sup>17</sup> There is no provision for a test of

probable cause at the first appearance before a magistrate

or at the hearing to set bail, Fla. R. <sup>rule</sup> Crim. P. <sup>pro.</sup> 3.130;

see Pugh v. Rainwater, 483 F. 2d 778, 781 n. 8 (5th Cir. 1973), <sup>CAS</sup>



*and*  
The suspect cannot demand a preliminary hearing.

Fla. R. Crim. P. *3.131(a)*. The Florida Supreme

Court has held that habeas corpus cannot be used to test the probable cause for detention under an information.

Sullivan v. State ex rel McCrory, 49 So. 2d 794 (Fla. 1951). ~~(X)~~

The arraignment may be delayed as much as a month, and it is not clear that the issue of probable cause may be raised ~~even~~ then. <sup>18</sup>

Petitioner defends this practice on the ground that the <sup>prosecutor's decision to file an</sup> information (itself <sup>is</sup>) a determination of probable cause and <sup>that</sup> ~~that the prosecutor's judgment is~~ <sup>furnishes</sup> sufficient reason to detain a defendant pending trial. Although a <sup>conscientious</sup> ~~prosecutor's~~ decision that the evidence warrants <sup>affords a measure of</sup> ~~prosecution offers some~~ protection against unfounded detention, we do not think prosecutorial judgment standing alone <sup>meets</sup> ~~merits~~ the requirements of the Fourth Amendment. Indeed, we think the Court's previous



decisions compel disapproval of the Florida procedure.

In Albrecht v. United States, 273 U.S. 1, 5 (1927), the Court held that an arrest warrant issued solely upon a United States Attorney's information was invalid because the accompanying affidavits were defective.

Although the Court's opinion did not explicitly state that the prosecutor's official oath could not furnish probable cause, that conclusion was implicit in the judgment that the arrest was illegal under the Fourth

Amendment.<sup>19</sup> ~~More~~ recently, in Coolidge v. New Hampshire, 403 U.S. 443, 449-53 (1971), the Court held that a

prosecutor's responsibility to law enforcement is inconsistent with the constitutional role of a neutral and detached magistrate. We reaffirmed that principle in

Shadwick v. City of Tampa, 407 U.S. 345 (1972), and

held that probable cause for the issuance of an arrest warrant must be determined by someone independent of police and prosecution.<sup>20</sup> The reason for this

*Coolidge  
purports  
to establish  
a per se  
rule.*

~~at least in certain circumstances~~



① "A democratic society, in which respect for the dignity of all men is central, naturally guards against the misuse of the law enforcement process. Zeal in tracking down crime is not in itself an assurance of soberness of judgment. Disinterestedness in law enforcement does not alone prevent disregard of cherished liberties. Experience has therefore counseled that safeguards must be provided against the dangers of the overzealous as well as the despotic. The awful instruments of the criminal law cannot be entrusted to a single functionary. The complicated process of criminal justice is therefore divided into different parts, responsibility for which is separately vested in the various participants upon whom the criminal law relies for its vindication."

McNabb v. United States, 318 U.S. 332, 343 (1943).

In holding that the prosecutor's assessment of probable cause *is not sufficient alone to* cannot justify restraint on liberty pending

trial, we do not imply that the accused is entitled to *or review a prosecutor's* judicial oversight of the decision to prosecute.

Instead, we adhere to the Court's prior holding that

~~due process does not make~~ *is not* judicial hearings *a* prerequisite

to prosecution by information. Lem Woon v. Oregon, 229 U.S.

586 (1913). <sup>21</sup> *Nor do we retreat* ~~We also intend no departure~~ from

the established rule that illegal arrest or detention



does not void <sup>a subsequent</sup> ~~an otherwise valid~~ conviction. Frisbie v.

Collins, 342 U.S. 519 (1952); Ker v. Illinois, 119 U.S. 436

<sup>Thus,</sup> (1886). ~~This rule,~~ as the Court of Appeals noted below,  
 a suspect who is presently detained may challenge the  
~~distinguishes a challenge to present confinement from an~~  
~~probable cause for that confinement, but a conviction~~  
~~attempt to reverse or vacate a conviction on the ground~~  
 will not be vacated on the ground  
 that the defendant was detained pending trial without

probable cause, ~~determination~~, 483 F. 2d, at 786-87.

Compare Scarborough v. Dutton, 393 F. 2d 6 (5th Cir. 1968),

with Brown v. Fauntleroy, 442 F. 2d 838 (D.C. Cir. 1971),

and Cooley v. Stone, 414 F. 2d 1213 (D.C. Cir. 1969).

### III.

Both the District Court and the Court  
~~The remaining question is whether the adversary~~  
~~of Appeals held that the determination~~  
~~hearing ordered by the District Court and approved by the~~  
~~of probable cause~~  
~~Court of Appeals is mandated by the Constitution. Under~~  
~~the District Court's decree, as modified on appeal, the~~  
~~probable cause determination must be made either at the~~  
~~first appearance or several days later. In either case,~~

it must be accompanied by the full panoply of adversary safe-



and compulsory process for witnesses.

A full preliminary hearing of this sort is modeled after the procedure used in many states to determine whether the evidence justifies going to trial under an information or presenting the case to a grand jury. See

Coleman v. Alabama, 399 U.S. 1 (1970); Y Kamisar, W.

LaFave & J. Israel, Modern Criminal Procedure, 957-967, 996-1000

(4th ed. 1974). The standard of proof required of the

prosecution is usually referred to as "probable cause,"

but it may approach a prima facie case of guilt. A.L.I.

Model Code of Pre-arraignment Procedure, Commentary on

Article 330, at 90-91 (Tent. Draft <sup>No.</sup> 5, 1972). When the

hearing takes this form, adversary procedures are <sup>customarily</sup> ~~almost~~

~~always~~ employed. The importance of the issue to both

the state and the accused justifies the presentation of

witnesses and full exploration of their testimony on

cross-examination. This kind of hearing <sup>also</sup> requires

appointment of counsel for ~~the~~ indigent defendant. Coleman

v. Alabama, 399 U.S. 1 (1970). And, as the ~~issue becomes~~ <sup>outcome of</sup>



The sole issue is whether there is probable cause for <sup>detaining</sup> ~~detention~~ of the party arrested person pending such further proceedings as may be afforded by law.

20.

(encouraging the parties to stage a mini-hearing assumes increased importance) [more difficult and the procedures more complex,]

the less likely it is that <sup>it</sup> ~~the~~ preliminary hearing can be held <sup>promptly</sup> ~~soon~~ after arrest. <sup>See</sup> A.L.I. Model Code of Pre-arraignment Procedure, supra, at 33-34.

These adversary safeguards are not <sup>essential</sup> ~~suitable~~ for the probable cause determination required by the Fourth

Amendment. <sup>First,</sup> Any practice that fosters delay will

thwart the purpose of the probable cause determination, which must be held promptly after arrest if it is to guarantee freedom from unjustified restraints on liberty.

<sup>Second,</sup> the issue of probable cause for detention can

<sup>This issue can</sup> be determined reliably without a full adversary hearing.

The standard is the same as that for arrest. <sup>21A</sup> That

standard -- probable cause to believe the suspect has committed a crime -- has traditionally been decided in nonadversary proceedings on hearsay and written testimony, and the Court has approyed these informal

Penny  
"delay" is  
a point but  
not an imp.  
or difference  
in nature  
of proceedings.  
Suggest you  
put this in  
a note



modes of proof.

Ⓢ "Guilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined to that which long experience in the common-law tradition, to some extent embodied in the Constitution, has crystallized into rules of evidence consistent with that standard. These rules are historically grounded rights of our system, developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property.

. . . . .

Ⓢ "In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved."

Ⓢ Brinegar v. United States, 338 U.S. 160, 174-175 (1949).

Ⓢ cf. McGray v. Illinois, 386 U.S. 300 (1967). Ⓢ The use

of <sup>these</sup> informal procedures is justified not only by the lesser

consequences of a probable cause determination but also by

the nature of the determination itself. The primary

~~function of confrontation and cross-examination is to aid~~

~~in assessing witness credibility and resolving conflicts~~

~~in testimony.~~ Ⓢ

It A determination of probable cause does

not require the fine resolution of conflicting evidence

even a that a reasonable-doubt or preponderance standard demands,



But we find no basis for holding as a matter of constitutional principle that <sup>all</sup> the formalities and safeguards of a trial must be observed in making the Fourth Amendment determination of probable cause. <sup>22</sup> Our system of criminal justice already is criticized, fairly in some respects, for its <sup>obedience</sup> ~~obedience~~ ~~obedience~~ to procedural and ~~evidentiary~~ <sup>evidentiary</sup> formalities which result in delayed justice, often in repetitive trials, and in burdensome expense <sup>for</sup> ~~on~~ <sup>for</sup> both the accused and the state.

Rider A--alternative p. 22 pc

but in most cases their value would be too slight to justify holding, as a matter of constitutional principle, that all the formalities and safeguards of trial must be employed in making the Fourth Amendment determination of probable cause. Our system of criminal justice is already overburdened, and it may be fairly ~~and~~ criticized when overemphasis on procedural and evidentiary formalities



See F. Miller, Charge  
The Decision To  
a Suspect with a Crime  
64-109 (1969).

22.

and credibility determinations are <sup>seldom</sup> ~~less~~ crucial <sup>in</sup> ~~when~~  
<sup>deciding whether the</sup>  
~~the issue is the existence of~~ evidence supporting a  
<sup>reasonable</sup>  
belief in guilt. This is not to say that confrontation  
and cross-examination might not enhance the reliability  
of probable cause determinations in some cases, but the  
delay that might result if live witnesses must be  
produced for every preliminary determination counsels  
against requiring these procedures as a constitutional  
principle. 23

Rider A,  
then  
Rider B

Rider B

On the other hand, allowing the accused to be  
present and participate in the probable cause determination  
<sup>unduly</sup>  
~~would not delay the hearing or burden the state.~~ 23 In  
this respect the post-arrest determination <sup>would</sup> ~~differs~~  
from the procedures <sup>normally followed</sup> ~~used~~ in applying for warrants.  
Warrant applications are ex parte proceedings by necessity,  
<sup>as</sup>  
~~because~~ notifying the suspect <sup>would often frustrate</sup> ~~might jeopardize~~ the purpose



Because of its limited function and  
~~the probable cause determination~~

Partly because of the ~~inexact~~ <sup>its nonadversary character,</sup> diminished role of

~~adversary proceedings,~~ the probable cause determination

is not a "critical stage" in the prosecution that ~~may~~

would require appointed counsel. We have identified

as "critical stages" ~~and~~ those pretrial ~~and~~ procedures

would that/impair ~~having~~ defense on the merits if the accused

is required to proceed without ~~a~~ counsel. Coleman v. Alabama, 399 U.S. 1 (1970);  
United States

v. Wade, 388 U.S. 218, 226 (1967). In Coleman v. Alabama,

where the Court held that a preliminary hearing was a

critical stage of an Alabama prosecution, the majority

and concurring opinions identified two critical factors

that distinguish the Alabama preliminary hearing from

the probable cause determination required by the Fourth

Amendment. First, under Alabama ~~law~~ law the function of

the hearing was to determine whether ~~there was sufficient~~ <sup>the evidence</sup>

~~evidence to justify~~ <sup>justified</sup> charging the suspect with an offense.

A ~~a~~ finding of no probable cause could mean that he would

not be tried at all. (Fourth Amendment)  
The/probable cause determination

is addressed only to pretrial custody. To be sure, pretrial



to confront and cross-examine prosecution witnesses at the preliminary hearing. The Court noted that the suspect's defense on the merits could be compromised if he had no legal assistance for exploring or preserving the witnesses' testimony. This consideration does not apply to the informal, nonadversary procedure required under the Fourth Amendment.

The reasons that make a nonadversary proceeding appropriate, however, do not justify denying the suspect an opportunity to be present and participate in the determination. <sup>24</sup> Our system of justice operates on the premise that the ~~the~~ subject of a judicial proceeding is entitled to participate unless there is good reason to

exclude him. See Rees v. City of Watertown, 86 U.S. (19 Wall.)

The Fourth Amendment is not inconsistent with that concept.  
107, 122-123 (1873). X The procedures normally followed

in applying for ~~warrant~~ <sup>warrants are</sup> ~~warrant~~ ~~arrest warrants~~ ~~may fall~~

~~into the category of proceedings in which necessity~~

~~dictates~~ <sup>by necessity, as</sup> ex parte proceedings. X Notifying the suspect would

often frustrate the purpose



of the warrant. See T. Taylor, Two Studies in Constitutional Interpretation 81-82 (1969). But when the suspect is already in custody, and the only issue is probable cause for detention, he should be allowed to participate in the determination. Allowing him to appear before the magistrate and giving him an opportunity to speak or to submit written evidence for consideration along with the state's presentation could enhance both the reliability and the fairness of the proceeding. The <sup>burden on</sup> ~~inconvenience to~~ the state would be minimal. Virtually all jurisdictions require that arrested persons be presented to a judicial officer within a short time after arrest, <sup>see</sup> A.L.I., Model Code of Pre-arraignment Procedure 230-31 (Tent. Draft No. 1, 1966), <sup>and</sup> ~~Every~~ jurisdiction makes some provision for setting bail or determining other conditions of pretrial release. See <sup>L. Katz, Justice Is the Crime, Appendix B at</sup> ~~Note, Bail: An Ancient Practice Re-examined,~~ 247-365 (1972). ~~70 Yale L.J. 966, 977 (1971),~~ Since the defendant is already in the courtroom, the issue of probable cause may



26  
24.

be decided at that time with little or no inconvenience to the state. In fact, the suspect's first appearance before a magistrate has traditionally been considered the proper time for determining whether there is probable cause for detention. 1 Hale, Pleas of the Crown 589-90 (1736); 2 id., at 77-95; 2 Hawkins, Pleas of the Crown 116-17 (4th ed. 1762); see McNabb v. United States, 318 U.S. 332, Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L. Rev. 349, 342-44 (1943); Although the Federal Rules of Criminal Procedure <sup>do not</sup> ~~have never~~ explicitly acknowledged this function of the first appearance, this Court has interpreted them to require a determination of probable cause at that stage. Jaben v. United States, 381 U.S. 214 (1965); Mallory v. United States, 354 U.S. 449, 454 (1957).

Rev. 349,  
391 & n.  
408 (1974)

25

The determination we require under the Fourth Amendment is similar in some respects to the informal preliminary hearings that due process requires upon arrest leading to revocation of parole or probation. Morrissey v. Brewer, 408 U.S. 471 (1972); Gagnon v. Scarpelli, 411 U.S.



*Out*

determination following arrest, serve to justify detention pending a final determination in the case.

But there are differences. In Morrissey, the lead case, we said that at the preliminary hearing the parolee should be allowed to bring individuals who can give the parole officer relevant information on his behalf, and, on a qualified basis, should be able to insist that a person who had given adverse information be made available for questioning in his presence. 408 U.S. at 487. The ~~greater~~ provision for live testimony is justified by the differences between proceedings leading up to revocation of probation or parole and those preceding a criminal trial. In the first place, when criminal proceedings are instituted by information the prosecutor makes an official oath that he is satisfied ~~at~~ <sup>that</sup> probable <sup>exists.</sup> cause, Fla. R. Crim. P. 3.140(g). The formality attendant upon this procedure, as well as the professional responsibility of the prosecutor, afford <sup>significantly</sup> greater protection



against initial error than the more unstructured  
decision of a probation or parole officer. <sup>25</sup>

Moreover, <sup>as</sup> we noted in Morrissey, the parolee often is  
arrested "at a place distant" from the state or the  
institution to which he may be returned for the final  
revocation hearing. 408 U.S. at 485. In such a case  
it may be impossible or impractical to ensure the  
presence of witnesses at the final hearing. Criminal  
prosecutions, however, customarily are held near the  
place of the crime, and the Sixth Amendment protects  
the accused from testimony of witnesses who cannot be  
present at trial. As a result, there is less reason  
to use the preliminary hearing as a device for gathering  
and preserving live testimony. ]

There is no single proper method for making the  
probable cause determination required by the Fourth  
Amendment. The states have many different patterns of  
criminal procedure, and each may adapt its own to provide



27. 28

Florida requires every arrested person to be brought before a magistrate within 24 hours, unless sooner released. Fla. R. Crim. P. <sup>3.130(b)</sup> 3.130(b). At that appearance the defendant is told of the charges against him, furnished a copy of the complaint, advised of his constitutional rights, and provided counsel if he is indigent. The magistrate then sets bail or prescribes other conditions of pretrial release. One of the factors typically relied upon in making this decision is the weight of evidence against the accused. ABA Standards Relating to the Administration of Criminal Justice, Pretrial Release § 5.1 (1974); See 18 U.S.C. § 3146(b). Expanding that determination to a test of probable cause would be a natural way of integrating the probable cause decision with existing procedures.

In other states, existing procedures may satisfy the requirement of the Fourth Amendment. Some states already authorize a hearing on probable cause at or immediately



28. 29

following the suspect's first appearance. E.g., Colo. Rev. Stat. §39-2-7; Hawaii Rev. Stat. § 708-9. Others may choose simply to accelerate their existing preliminary hearings. What the Fourth Amendment requires for pretrial restraint on liberty <sup>26</sup> is a reliable determination of probable cause made either before or promptly after arrest, and preferably no later than the first appearance before a judicial officer. If made after arrest, the suspect must be allowed to be present. Each state may choose the procedure that best <sup>accommodates</sup> ~~integrates~~ this determination <sup>to</sup> into its existing practice. <sup>27</sup>

IV (ctw)

We agree with the Court of Appeals that the Fourth Amendment requires a timely judicial determination of probable cause as a prerequisite to detention, and we accordingly affirm that much of the judgment. As we do not agree that the Fourth Amendment requires the adversary hearing outlined in the District Court's



### FOOTNOTES

1. Respondent Pugh was arrested on March 3, 1971.

On March 16 an information was filed charging him with robbery, carrying a concealed weapon, and possession of a firearm during commission of a felony. Respondent Henderson was arrested March 2, and charged by information on March 19 with the offenses of breaking and entering and assault and battery. The record does not indicate whether either was arrested under a warrant.

2. ~~The Florida courts had also held that persons~~ <sup>law also denies preliminary</sup> ~~hearings to persons~~ <sup>confined under an indictment, had no right to a preliminary</sup> ~~hearing~~ <sup>hearing</sup> Sangaree v. Hamlin, 235 So. 2d 729 (Fla. 1970), <sup>Fla. R. Crim. P. 3.131,</sup> but that procedure is not challenged in this case.

3. The complaint was framed under 42 U.S.C. § 1983, and jurisdiction in the District Court was based on 28 U.S.C. § 1343(3).



4. Respondents did not ask for release from state custody, even as an alternate remedy. They only asked that the state authorities be ordered to give them a probable cause determination. This was also the only relief that the District Court ordered for the named respondents. \_\_\_\_F. Supp.\_\_\_\_. Because release was neither asked nor ordered, the lawsuit did not come within the class of cases for which habeas corpus is the exclusive remedy. Preiser v. Rodriguez, 411 U.S. 475 (1973); see Wolff v. McDonnell, 94 S. Ct. 2963, 2973-2974 (1974).

5. Turner was being held on a charge of auto theft, following arrest on March 11, 1971. Faulk was arrested on March 19 on charges of soliciting a ride and possession of marijuana.

6. The named defendants included justices of the peace and judges of small-claims courts, who were authorized to hold preliminary hearings in criminal cases, and a group of law enforcement officers with power to



7. The District Court correctly held that respondents' claim for relief was not barred by the equitable restrictions on federal intervention in state prosecutions, Younger v. Harris, 401 U.S. 37 (1971). The injunction was not directed at the state prosecutions as such, but only at the legality

of pretrial detention without a judicial hearing, <sup>an issue that</sup> ~~The~~ could not be raised in defense to the criminal prosecution. The order to hold preliminary hearings could not prejudice See Conover v. Montemuro, 477 F.2d 1073, 1082 (CA3 1973); the conduct of trial on the merits. cf. Perez v. Ledesma,

401 U.S. 82 (1971); Stefanelli v. Minard, 342 U.S. 117

(1951). ~~But even if the principle of Younger v. Harris,~~

~~401 U.S. 37 (1971), were deemed to apply, this case would qualify as one in which equitable relief could be granted. Illegal detention is an irreparable injury, "both great and immediate," and the threat it poses to a suspect's rights "cannot be eliminated by his defense against a single criminal prosecution." Id. at 46; see Conover v. Montemuro, 477 F. 2d 1073, 1082 (3rd Cir. 1973).~~



8.

~~20.~~ Fla. Stat. Ann. § 907.045 (1973), seems to provide that every defendant confined for 30 days is entitled to a mandatory preliminary hearing upon application for writ of habeas corpus, but it apparently has been construed to vest trial courts with discretion to deny the hearing. See Evans v. State, 197 So. 2d 323 (Fla. <sup>Ct.</sup> App. 1967). But cf. Karz v. Overton, 249 So. 2d 763 (Fla. Ct. App. 1971).

9. Although this ruling held a statewide "legislative rule" ~~10. This order was not outside the jurisdiction~~ unconstitutional, it was not outside the jurisdiction of a single judge by virtue of 28 U.S.C. § 2281. The original complaint did not ask for an injunction against enforcement of any state statute or legislative rule of statewide application, since the practice of denying preliminary hearings to persons charged by information was then embodied only in judicial decisions. ~~See note 2~~



9 cont'd

had jurisdiction over the appeal. On remand, the constitutionality of a state "statute" was drawn into question for the first time when the criminal rules were amended. The District Court ~~declared several aspects of those rules unconstitutional, but did not amend its injunctive decree to incorporate that holding. Its~~

supplemental opinion can fairly be read as a declaratory

judgment that the amended rules were unconstitutional;

*the injunctive decree was never amended to incorporate that holding;*  
 and the opinion in the Court of Appeals is not

*the conclusion that the District Court did not*  
 inconsistent with ~~this construction~~. See 483 F. 2d at 788.

*enjoin enforcement of the statewide rule. See 483 F. 2d, at 788.*

Accordingly, a district court of three judges was not

required for the issuance of this order. See Kennedy v.

Mendoza-Martinez, 372 U.S. 144, 152-55 (1963); Flemming v.

Nestor, 363 U.S. 603, 606-08 (1960).



10.  
 11. The major difference between the District Court's order and that of the Court of Appeals centered on the question whether a probable cause hearing is required for all arrested persons <sup>charged by information</sup> or only for those confined pending trial. The District Court's original decree required preliminary hearings for all arrested persons. <sup>332 F. Supp., at —.</sup> On remand, the District Court made an exception for persons charged with misdemeanors who neither suffered pretrial detention nor faced imprisonment upon conviction. <sup>355 F. Supp., at —.</sup> The Court of Appeals explicitly limited the hearing right for misdemeanor defendants to those <sup>483 F.2d, at 789.</sup> who are jailed pending trial. <sup>Its</sup> opinion also suggests, without <sup>stating</sup> ~~saying~~ explicitly, that the hearing right is similarly limited to felony defendants who are confined pending trial. <sup>Id., at 787, 789.</sup>

The Court of Appeals vacated both the portion of the District Court's order that prescribed ~~different~~ <sup>different</sup> time periods <sup>from</sup> those ~~contained~~ in the amended rules, and the ~~terms providing~~ sanctions for failure to comply



10 contd

7.

It affirmed the District Court's holding on remand that the amended rule's extended time periods for capital and life-imprisonment offenses was a violation of equal protection. ~~In light of our disposition of the case~~ <sup>makes it unnecessary to</sup> ~~we need not~~ address the specific terms of the District Court's decree.

**II.** At oral argument counsel informed us that the named respondents have been convicted. Their <sup>pretrial detention</sup> ~~deprivation of which they complained~~ therefore has ended, but this case belongs to that narrow class of cases in which the termination of a class representative's claim does not moot the claims of the unnamed members of the class. See Sosna v. Iowa, No. 73-762. Pretrial detention is by nature temporary, and it is most unlikely that any <sup>given</sup> ~~single~~ individual could have his constitutional claim decided on appeal before he is either released or convicted. The individual <sup>could</sup> ~~may~~ nonetheless suffer repeated deprivations, and it is certain that other persons <sup>similarly situated</sup> will be detained under the



11 contd

allegedly unconstitutional procedures. The claim, in short, is one that is <sup>distinctly</sup> "capable of repetition, yet evading review."

At the time the complaint was filed, the named respondents were members of a class of persons detained without a judicial probable cause determination. ~~The District Court subsequently certified the class action on behalf of those who suffered a similar deprivation,~~

but <sup>them</sup> the record does not indicate whether any of ~~the named~~ respondents were still in custody awaiting trial <sup>when the</sup> ~~at that~~

~~District Court certified the class action.~~

~~time~~ Despite the absence of such a showing, which would <sup>to avoid mootness</sup> ordinarily be required <sup>under</sup> Sosna, this case is not

moot. The length of pretrial custody cannot be ascertained at the outset, and it may be ended at any time by release on recognizance, dismissal of the charges, or a guilty plea, as well as by acquittal or conviction after trial.

It is by no means certain that any given individual would

be in pretrial custody long enough for a district judge



11 cont'd

to certify a class action. <sup>Moreover,</sup> ~~Nonetheless,~~ this is the kind of case in which the constant existence of a class of persons suffering the deprivation is certain. The attorney representing the named respondents is a public defender, and <sup>we may safely assume that he</sup> ~~he almost certainly~~ has other clients with a continuing live interest in the case. <sup>This</sup> ~~The~~ <sup>Sosna</sup> ~~case~~ <sup>controversy,</sup> therefore, is a suitable exception to the <sup>rule</sup> that <sup>class action that is</sup> ~~subsequent~~ mootness of a "capable of repetition, yet evading review" <sup>ordinarily</sup> ~~class action~~ is governed by determining whether the named representatives were members of the class at the time of certification. See Sosna, supra, at \_\_\_\_; cf. Rivera v. Freeman, 469 F. 2d 1159 <sup>(CA9</sup> ~~(9th Cir.~~ 1972).

**12.** Another aspect of Trupiano was overruled in United States v. Rabinowitz, 339 U.S. 56 (1950), which was overruled in turn by Chimel v. California, 395 U.S. 752.

The issue of warrantless arrest that has generated the most controversy, and which remains unsettled, is whether and under what circumstances an officer may enter



12

10.

Coolidge v. New Hampshire, 403 U.S. 443, 474 (1971); id.

at 510-512 (White, J., dissenting); Jones v. United States  
357 U.S. 493, 499-500 (1958).

13.

The primary motivation for the requirement seems to have been the penalty for allowing an offender to escape, if he had in fact committed the crime, and the fear of liability for false imprisonment, if he had not. But Hale also recognized that a judicial warrant of commitment, called a mittimus, was required for more than brief detention.

"When a private person hath arrested a felon, or one suspected of a felony, he may detain him in custody till he can reasonably dismiss himself of him; but with as much speed as conveniently he can, he may do either of these things.

1. He may carry him to the common gaol, . . . but that is now rarely done.

2. He may deliver him to the constable of the vill, who may either carry him to the common gaol, . . . or to a justice of peace to be examined, and farther proceeded against as case shall require . . . .

3. Or he may carry him immediately to any justice of peace of the county where he is taken, who upon examination may discharge, bail, or commit him, as the case shall require.

And the bringing the offender either by the constable or private person to a justice of peace is most usual and safe, because a gaoler will expect a Mittimus for his warrant of detaining.



14  
~~13B.~~

The examination of the prisoner was inquisitorial, and the examination of the witnesses was conducted outside the prisoner's presence. The process was considered quite harsh until statutory reform was accomplished in 1848, 1 J. Stephen, at 225, but it was well established that if the investigation turned up insufficient evidence of the prisoner's guilt, he was entitled to be discharged.

15.

In Ex Parte Bollman, two men charged in the Aaron Burr treason were committed following an examination in the circuit court of the District of Columbia. They filed a petition for writ of habeas corpus in the Supreme Court. The Court, in an opinion by Chief Justice Marshall, affirmed its jurisdiction to issue habeas corpus to persons in custody by order of federal trial courts. Then, following arguments on the Fourth Amendment requirement of probable cause, the Court surveyed the evidence against the prisoners and held that it did not establish probable cause that they were guilty of treason. The prisoners



Although most arrests, especially for street crimes, are made without a warrant,

12.

15. A similar procedure at common law, the warrant for recovery of stolen goods, is said to have furnished the model for a "reasonable" search under the Fourth Amendment. The victim was required to appear before a justice of the peace and make an oath of probable cause that his goods could be found in a particular place. After the warrant was executed, and the goods seized, the victim and the alleged thief would appear before the justice of the peace for a prompt determination of the cause for seizure of the goods and detention of the thief. 2 Hale, supra at 149-52; T. Taylor, Two Studies in Constitutional Interpretation 24-25, 39-40 (1969); see Boyd v. United States, 116 U.S. 616, 626-629 (1886).

3.120

16. Fla. R. Crim. P./governs the procedure for

*when this is possible.*  
~~issuing arrest warrants.~~ A warrant may be issued upon a

sworn complaint that states facts showing that the suspect

has committed a crime. The magistrate may also take

testimony under oath to determine if there is reasonable

A person arrested under warrant would, of course, have the benefit of a prior determination of probable cause.



~~9.~~  
~~17.~~ Fla. Stat. Ann. § 907.045 (1973), seems to provide that every defendant confined for 30 days is entitled to a mandatory preliminary hearing upon application for writ of habeas corpus, but it apparently has been construed to vest trial courts with discretion to deny the hearing. See Evans v. State, 197 So. 2d 323 (Fla. Ct. App. 1967). But cf. Karz v. Overton, 249 So. 2d 763 (Fla. Ct. App. 1971).

18. The District Court found that the procedures used in filing informations allow a delay of a month or more between arrest and arraignment. First, processing of the information does not begin until the arresting officer appears before an assistant state attorney and files an affidavit of facts. This appearance is delayed anywhere from 24 hours to two weeks after arrest. If the state attorney decides to file an information, the papers are prepared and the information is filed and set for arraignment. The average delay from the time the arresting



(18)

officer appears and the time of arraignment is ten to fifteen days.

The Court of Appeals assumed, for purposes of this case, that the defendant would have an opportunity to challenge the probable cause underlying the information at his arraignment, <sup>but</sup> ~~The basis for that assumption was the provision for a bill of particulars. It noted~~ that if ~~the~~ assumption was groundless, a person charged by information would have no opportunity to challenge probable cause before trial. 483 F. 2d, at 781, n. 8. The Florida rule governing arraignment does not suggest that the procedure contemplates a challenge to probable cause or any consideration of pretrial custody. It merely provides that the arraignment shall consist of reading the indictment or information to the defendant and calling upon him to plead. Fla. R<sup>ule</sup> Crim. P. <sup>3.160</sup>.



19. By contrast, the Court has held that an indictment, "fair upon its face," and returned by a "properly constituted grand jury" conclusively determines the existence of probable cause and requires issuance of an arrest warrant without further inquiry. Ex Parte United States, 287 U.S. 241, 250 (1932). See also Giordenello v. United States, 357 U.S. 480, 487 (1958). The willingness to let a grand jury's judgment substitute for that of a neutral and detached magistrate is attributable to the grand jury's relationship to the courts and its historical role of protecting individuals from unjust prosecution. See United States v. Calandra, 414 U.S. 338, 342-46 (1974).



20. The Court had earlier reached a different result in Ocampo v. United States, 234 U.S. 91 (1914), a criminal <sup>appeal</sup> ~~case~~ from the Phillipine Islands. Under a statutory guarantee substantially identical to the Fourth Amendment, Act of July 1, 1902, ch. 1369, § 5, 32 Stat. 693-694, the Court held that an arrest warrant could issue solely upon a prosecutor's information. The Court has since held that interpretation of a statutory guarantee applicable to the Phillipines <sup>is</sup> ~~does~~ <sup>conclusive for</sup> not ~~govern~~ interpretation of a cognate provision in the federal Constitution, Green v. United States, 355 U.S. 184, 194-<sup>1</sup>98 (1957). <sup>Even if it were,</sup> ~~Moreover,~~ the result reached in Ocampo is incompatible with the later holdings of Albrecht, Coolidge, and Shadwick.

21. See also Beck v. Washington, 369 U.S. 541 (1962).

The opinion in Beck cites Ocampo v. United States, 234 U.S. 91 (1914), for the same proposition, but the validity of prosecution by information without a preliminary hearing was not at issue in that case. The only issues were whether



22.

~~21A.~~

Because the standards are identical, there is no need for further investigation ~~following arrest~~ before the probable cause determination can be made.

5/2 "Presumably, whenever the police arrest they must arrest on "probable cause." It is not the function of the police to arrest, as it were, at large and to use an interrogating process at police headquarters in order to determine whom they should charge before a committing magistrate on "probable cause." 22

Mallory v. United States, 354 U.S. 449, 456 (1957).



23.

^ In Morrissey v. Brewer, 408 U.S. 471 (1972), and Gagnon v. Scarpelli, 411 U.S. 778 (1973), we held that a parolee or probationer arrested prior to revocation is entitled to an informal preliminary hearing at the place of arrest, with some provision for live testimony. 408 U.S., at 487; 411 U.S., at 786. That preliminary hearing, more than the probable cause determination required by the Fourth ~~Amendment~~ Amendment, serves the purpose of gathering and preserving live testimony, since the final revocation hearing <sup>frequently</sup> is held at some distance from the place where the violation occurred. 408 U.S., at 485; 411 U.S., at 872-873 n.5. Moreover, revocation proceedings may offer less protection from initial error than the more formal criminal process, where violations are defined by statute and the prosecutor has a professional duty ~~to~~ not to charge a ~~man~~ suspect with crime <sup>unless he is satisfied of</sup> ~~without making an independent assessment of~~ probable cause. See ABA Code of Professional Responsibility, D.R. 7-103(A) (the prosecutor has a professional responsibility "not [to] institute or cause to be instituted criminal charges



22 cont'd

Code of Trial Conduct, rule 4(c).

~~24-23~~ The procedures suggested in the Uniform Rules of Criminal Procedure (Proposed Final Draft 1974) and the A.L.I. Model Code of Pre-arraignment Procedure (Tent. Draft<sup>No.</sup> 5, 1972, and Tent. Draft<sup>No.</sup> 5A, 1973) are instructive. Under the Uniform Rules, a person arrested without a warrant is entitled, "without unnecessary delay," to a first appearance before a magistrate and a determination that grounds exist for issuance of an arrest warrant. The determination may be made on affidavits or testimony, in the presence of the accused. Rule 311. Persons who remain in custody for inability to qualify for pretrial release are offered another opportunity for a probable cause determination at the detention hearing, held no more than 5 days after arrest. This is an adversary hearing, and the parties may summon witnesses, but reliable hearsay



(24)

may be considered. Rule 344.

The Model Code of Pre-arraignment Procedure also provides a first appearance, at which a warrantless arrest must be supported by a reasonably detailed written statement of facts. § 310. The magistrate may make a determination of probable cause to hold the accused, but he is not required to do so and the accused may request an attorney for an "adjourned session" of the first appearance to be held within 2 "court days". At that session, the magistrate makes a determination of probable cause upon a combination of written and live testimony:

"The arrested person may present written and testimonial evidence and arguments for his discharge and the state may present additional written and testimonial evidence and arguments that there is reasonable cause to believe that he has committed the crime of which he is accused. The state's submission may be made by means of affidavits, and no witnesses shall be required to appear unless the court, in the light of the evidence and arguments submitted by the parties, determines that there is a basis for believing that the appearance of one or more witnesses for whom the arrested person seeks subpoenas might lead to a finding that there is no reasonable cause.



25.

~~24.~~In an amicus brief filed on behalf of theUnited States, the Solicitor General suggested that McNabb

(and that actual practice is otherwise.

v. Mallory had mistaken the purpose of the first appearance.

Cf. Note, Probable Cause at the Initial Appearance in Warrantless Arrests, 45 So. Cal. L. Rev. 1128 (1972).

McNabb, of course, was decided before the adoption of the

Federal Rules of Criminal Procedure. It interpreted a

statutory requirement that an arrested person be brought before

a magistrate without unnecessary delay. 318 U.S., at 342.

Mallory was decided after the federal rules were adopted,

and although the interpretation of the federal rules was

dictum, it clearly outlined the Court's view:

"The scheme for initiating a federal prosecution is plainly defined. The police may not arrest upon mere suspicion but only on "probable cause." The next step in the proceeding is to arraign the arrested person before a judicial officer as quickly as possible so that he may be advised of his rights ~~and~~ and so that the issue of probable cause may be promptly determined."

354 U.S., at 454. (The use of the word "arraign" was

in error, mistaken, as arraignment occurs later in the process. Fed.

Rule Crim. P. 10.



12/12/74

CHAMBERS DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-477

Richard E. Gerstein, State At- torney for Eleventh Judicial Circuit of Florida, Petitioner, v. Robert Pugh et al.	}	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.
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[December —, 1974]

MR. JUSTICE POWELL delivered the opinion of the Court.

The issue in this case is whether a person arrested under a prosecutor's information is constitutionally entitled to a judicial determination of probable cause for pretrial restraint of liberty.

I

In March 1971 respondents Pugh and Henderson were arrested in Dade County, Florida. Each was charged with several offenses under a prosecutor's information.<sup>1</sup> Pugh was denied bail because one of the charges against him carried a potential life sentence, and Henderson was held in custody because he was unable to post a \$4,500 bond.

<sup>1</sup> Respondent Pugh was arrested on March 3, 1971. On March 16 an information was filed charging him with robbery, carrying a concealed weapon, and possession of a firearm during commission of a felony. Respondent Henderson was arrested March 2, and charged by information on March 19 with the offenses of breaking and entering and assault and battery. The record does not indicate whether either was arrested under a warrant.



In Florida, indictments are required only for prosecution of offenses punishable by death. All other criminal offenses may be prosecuted by information, and violations of municipal ordinances may be prosecuted by a simple affidavit or docket entry. Fla. Rule Crim. Proc. 3.140 (Supp. 1974). At the time respondents were arrested, Florida's rules of criminal procedure authorized only one method for determining the existence of probable cause to hold a suspect in jail pending trial. Fla. Rule Crim. Proc. 1.122 (amended 1972). This proceeding, an adversary preliminary hearing, was not available to a suspect who had already been charged by information. See *Bradley v. State*, 265 So. 2d 533 (Fla.), cert. denied, 411 U. S. 916 (1973); *State ex rel. Hardy v. Blount*, 261 So. 2d 172 (Fla. 1972).<sup>2</sup> In those instances when a preliminary hearing was held and the suspect discharged, the prosecutor could reinstate the charge and return him to custody by filing an information. See *Montgomery v. State*, 176 So. 2d 331 (Fla. 1965); *Baugus v. State*, 141 So. 2d 264 (Fla. 1962). As a result, a person charged by information could be detained pending trial solely on the decision of a prosecutor.

Respondents Pugh and Henderson filed a class action against Dade County officials in the Federal District Court,<sup>3</sup> claiming a constitutional right to a judicial hearing on the issue of probable cause and requesting declaratory and injunctive relief.<sup>4</sup> Respondents Turner and

<sup>2</sup> Florida law also denies preliminary hearings to persons confined under indictment, *Sangaree v. Hamlin*, 235 So. 2d 729 (Fla. 1970), Fla. Rule Crim. Proc. 3.131, but that procedure is not challenged in this case.

<sup>3</sup> The complaint was framed under 42 U. S. C. § 1983, and jurisdiction in the District Court was based on 28 U. S. C. § 1343 (3).

<sup>4</sup> Respondents did not ask for release from state custody, even as an alternate remedy. They only asked that the state authorities be ordered to give them a probable cause determination. This was



Faulk, also in custody under informations, subsequently intervened.<sup>5</sup> Petitioner Gerstein, the State Attorney for Dade County, was one of several defendants.<sup>6</sup>

After an initial delay while the Florida legislature considered a bill that would have afforded preliminary hearings to persons charged by information, the District Court granted the relief sought. *Pugh v. Rainwater*, 332 F. Supp. 1107 (SD Fla. 1971). After certifying the case as a class action under Fed. Rule Civ. Proc. 23 (b)(2), the Court held that the Fourth and Fourteenth Amendments give all arrested persons charged by information a right to a judicial hearing on the question of probable cause. The District Court ordered the Dade County defendants to give the named plaintiffs an immediate preliminary hearing to determine probable cause for further detention.<sup>7</sup> It also ordered them to submit a

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also the only relief that the District Court ordered for the named respondents. — F. Supp. —. Because release was neither asked nor ordered, the lawsuit did not come within the class of cases for which habeas corpus is the exclusive remedy. *Preiser v. Rodriguez*, 411 U. S. 475 (1973); see *Wolff v. McDonnell*, 94 S. Ct. 2963, 2973-2974 (1974).

<sup>5</sup> Turner was being held on a charge of auto theft, following arrest on March 11, 1971. Faulk was arrested on March 19 on charges of soliciting a ride and possession of marijuana.

<sup>6</sup> The named defendants included justices of the peace and judges of small-claims courts, who were authorized to hold preliminary hearings in criminal cases, and a group of law enforcement officers with power to make arrests in Dade County. Gerstein was the only one who petitioned for certiorari following the Court of Appeals' decision.

<sup>7</sup> The District Court correctly held that respondents' claim for relief was not barred by the equitable restrictions on federal intervention in state prosecutions, *Younger v. Harris*, 401 U. S. 37 (1971). The injunction was not directed at the state prosecutions as such, but only at the legality of pretrial detention without a judicial hearing, an issue that could not be raised in defense to the criminal prosecution. The order to hold preliminary hearings could not



plan providing preliminary hearings in all cases instituted by information.

Only one such plan was submitted, and the District Court adopted it with modifications. The final order prescribed a detailed post-arrest procedure. 336 F. Supp. 490. Upon arrest the accused would be taken before a magistrate for a "first appearance hearing." The magistrate would explain the charges, advise the accused of his rights, appoint counsel if he was indigent, and proceed with a probable cause determination unless either the prosecutor or the accused was unprepared. If either asked for more time, the magistrate would set the date for a "preliminary hearing," to be held no more than four days later if the accused was in custody and no more than 10 days later if he had been released pending trial. At the hearing the accused would be entitled to counsel, and he would be allowed to confront and cross-examine adverse witnesses, to summon favorable witnesses, and to have a transcript made on request. If the magistrate found no probable cause, the accused would be discharged. He then could not be charged with the same offense by complaint or information, but only by indictment returned within 30 days. The plan also provided sanctions for failure to hold hearings at the prescribed times.

The Court of Appeals for the Fifth Circuit stayed the District Court's order pending appeal, but while the case was awaiting decision, the Dade County judiciary voluntarily adopted a similar procedure of its own. Upon learning of this development, the Court of Appeals remanded the case for specific findings on the constitutionality of the new Dade County system. Before the District Court issued its findings, however, the Florida

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prejudice the conduct of trial on the merits. See *Conover v. Montemuro*, 477 F. 2d 1073, 1082 (CA3 1973); cf. *Perez v. Ledesma*, 401 U. S. 82 (1971); *Stefanelli v. Minard*, 342 U. S. 117 (1951).



Supreme Court amended the procedural rules governing preliminary hearings statewide, and the parties agreed that the District Court should direct its inquiry to the new rules rather than the Dade County procedures.

Under the amended rules every arrested person must be taken before a judicial officer within 24 hours. Fla. Rule Crim. Proc. 3.130. This "first appearance" is similar to the "first appearance hearing" ordered by the District Court in all respects but the crucial one: the magistrate does not make a determination of probable cause. The rule amendments also changed the procedure for preliminary hearings, restricting them to felony charges and codifying the rule that no hearings are available to persons charged by information or indictment. Rule 3.131; see *In re Rule 3.131 (b)*, *Florida Rules of Criminal Procedure*, 282 So. 2d — (Fla. 1972).<sup>8</sup>

In a supplemental opinion the District Court held that the amended rules had not answered the basic constitutional objection, since a defendant charged by information still could be detained pending trial without a judicial determination of probable cause. 355 F. Supp. 1286. Reaffirming the original ruling, the District Court declared that the continuation of this practice was unconstitutional.<sup>9</sup> The Court of Appeals affirmed, 483 F. 2d

<sup>8</sup> Fla. Stat. Ann. § 907.045 (1973), seems to provide that every defendant confined for 30 days is entitled to a mandatory preliminary hearing upon application for writ of habeas corpus, but it apparently has been construed to vest trial courts with discretion to deny the hearing. See *Evans v. State*, 197 So. 323 (Fla. Ct. App. 1967). But cf. *Karz v. Overton*, 249 So. 2d 763 (Fla. Ct. App. 1971).

<sup>9</sup> Although this ruling held a statewide "legislative rule" unconstitutional, it was not outside the jurisdiction of a single judge by virtue of 28 U. S. C. § 2281. The original complaint did not ask for an injunction against enforcement of any state statute or legislative rule of statewide application, since the practice of denying preliminary hearings to persons charged by information was then em-



778, modifying the District Court's decree in minor particulars and suggesting that the form of preliminary hearing provided by the amended Florida rules would be acceptable, as long as it was provided to all defendants in custody pending trial. *Id.*, at 788.<sup>10</sup> State Attorney

bodied only in judicial decisions. The District Court therefore had jurisdiction to issue the initial injunction, and the Court of Appeals had jurisdiction over the appeal. On remand, the constitutionality of a state "statute" was drawn into question for the first time when the criminal rules were amended. The District Court's supplemental opinion can fairly be read as a declaratory judgment that the amended rules were unconstitutional; the injunctive decree was never amended to incorporate that holding; and the opinion in the Court of Appeals is not inconsistent with the conclusion that the District Court did not enjoin enforcement of the statewide rule. See 483 F. 2d, at 788. Accordingly, a district court of three judges was not required for the issuance of this order. See *Kennedy v. Mendoza-Martinez*, 372 U. S. 144, 152-155 (1963); *Flemming v. Nestor*, 363 U. S. 603, 606-608 (1960).

<sup>10</sup> The major difference between the District Court's order and that of the Court of Appeals centered on the question whether a probable cause hearing is required for all arrested persons charged by information or only for those confined pending trial. The District Court's original decree required preliminary hearings for all arrested persons. 332 F. Supp., at —. On remand, the District Court made an exception for persons charged with misdemeanors who neither suffered pretrial detention nor faced imprisonment upon conviction. 355 F. Supp., at —. The Court of Appeals explicitly limited the hearing right for misdemeanor defendants to those who are jailed pending trial. 483 F. 2d, at 789. Its opinion also suggests, without stating explicitly, that the hearing right is similarly limited to felony defendants who are confined pending trial. *Id.*, at 787, 789.

The Court of Appeals vacated both the portion of the District Court's order that prescribed time periods different from those in the amended rules, and the sanctions for failure to comply with the hearing requirements. It affirmed the District Court's holding on remand that the amended rules' extended time periods for capital and life-imprisonment offenses was a violation of equal protection. Our disposition of the case makes it unnecessary to address the specific terms of the District Court's decree.



Gerstein petitioned for review, and we granted certiorari because of the importance of the issue.<sup>11</sup> We affirm in part and reverse in part.

## II

As framed by the proceedings below, this case presents two issues: whether a person arrested and held for trial

<sup>11</sup> At oral argument counsel informed us that the named respondents have been convicted. Their pretrial detention therefore has ended, but this case belongs to that narrow class of cases in which the termination of a class representative's claim does not moot the claims of the unnamed members of the class. See *Sosna v. Iowa*, No. 73-762. Pretrial detention is by nature temporary, and it is most unlikely that any given individual could have his constitutional claim decided on appeal before he is either released or convicted. The individual could nonetheless suffer repeated deprivations, and it is certain that other persons similarly situated will be detained under the allegedly unconstitutional procedures. The claim, in short, is one that is distinctly "capable of repetition, yet evading review."

At the time the complaint was filed, the named respondents were members of a class of persons detained without a judicial probable cause determination, but the record does not indicate whether any of them respondents were still in custody awaiting trial when the District Court certified the classification. Despite the absence of such a showing, which would ordinarily be required to avoid mootness under *Sosna*, this case is not moot. The length of pretrial custody cannot be ascertained at the outset, and it may be ended at any time by release on recognizance, dismissal of the charges, or a guilty plea, as well as by acquittal or conviction after trial. It is by no means certain that any given individual would be in pretrial custody long enough for a district judge to certify a class action. Moreover, this is the kind of case in which the constant existence of a class of persons suffering the deprivation is certain. The attorney representing the named respondents is a public defender, and we may safely assume that he has other clients with a continuing live interest in the case. This controversy, therefore, is a suitable exception to the *Sosna* rule that mootness of a class action that is "capable of repetition, yet evading review" ordinarily is governed by determining whether the named representatives were members of the class at the time of certification. See *Sosna*, *supra*, at —; cf. *Rivera v. Freeman*, 469 F.2d 1159 (CA9 1972).



on an information is entitled to a judicial determination of probable cause for detention, and if so, whether the adversary hearing ordered by the District Court and approved by the Court of Appeals is required by the Constitution.

## A

Both the standards and procedures for arrest and detention have been derived from the Fourth Amendment and its common-law antecedents. See *Cupp v. Murphy*, 412 U. S. 291, 294-295 (1973); *Ex parte Bollman*, 8 U. S. (4 Cranch) 75 (1807); *Ex parte Burford*, 7 U. S. (3 Cranch) 447 (1806). 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." *Beck v. Ohio*, 479 U. S. 89, 91 (1964). See also *Henry v. United States*, 361 U. S. 98 (1959); *Brinegar v. United States*, 338 U. S. 160, 175-176 (1949); *Johnson v. United States*, 333 U. S. 10 (1948). This standard represents a compromise between the individual's right to liberty and the community's responsibility for controlling crime.

"These long-prevailing standards seek to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime. They also seek to give fair leeway for enforcing the law in the community's protection. Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability. The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating these often opposing interests.



Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice." *Brinegar v. United States*, *supra*, at 176.

To implement the Fourth Amendment's protection against unfounded invasions of liberty and privacy, the Court has required that the existence of probable cause be decided by a neutral and detached magistrate whenever possible. The classic statement of this principle appears in *Johnson v. United States*, *supra*, at 13-14:

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

See also *Terry v. Ohio*, 392 U. S. 1, 20-22 (1968).

Maximum protection of individual rights could be assured by requiring a magistrate's review of the factual justification prior to any arrest, but such a requirement would severely handicap legitimate law enforcement. In striking a balance between these opposing interests, the Court has expressed a preference for the use of arrest warrants when possible, *Beck v. Ohio*, 379 U. S. 89, 96 (1964); *Wong Sun v. United States*, 371 U. S. 471, 479-482 (1963), but it has never invalidated an arrest supported by probable cause solely because the officers had failed to secure a warrant. See *Ker v. California*, 374 U. S. 23 (1963); *Draper v. United States*, 358 U. S. 307 (1959); *Trupiano v. United States*, 334 U. S. 699, 705 (1948).<sup>12</sup>

<sup>12</sup> Another aspect of *Trupiano* was overruled in *United States v.*



Under this practical compromise, a policeman's on-the-scene assessment of probable cause is legal justification for arresting a person suspected of crime. The policeman's judgment also justifies a brief period of detention to take the administrative steps necessary for arrest, but once the suspect is in custody the reasons that justify dispensing with the magistrate's neutral judgment evaporate. There is no longer any danger that the suspect will escape or commit further crimes while the police submit their evidence to a magistrate. And, from the suspect's point of view, the consequences of prolonged detention may be more serious than the interference occasioned by arrest. Pretrial confinement may imperil the suspect's job, interrupt his source of income, and impair his family relationships. Even pretrial release may be accompanied by burdensome conditions that effect a significant restraint on liberty. See R. Goldfarb, *Ransom* 32-91 (1965); L. Katz, *Justice Is the Crime* 51-62 (1972). When the stakes are this high, the detached judgment of a neutral magistrate is essential if the Fourth Amendment is to furnish meaningful protection from unfounded interference with liberty. Accordingly, we hold that the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint on liberty following arrest.

This result has historical support in the common law that has guided interpretation of the Fourth Amendment. See *Carroll v. United States*, 267 U. S. 132, 149

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*Rabinowitz*, 339 U. S. 56 (1950), which was overruled in turn by *Chimel v. California*, 395 U. S. 752.

The issue of warrantless arrest that has generated the most controversy, and which remains unsettled, is whether and under what circumstances an officer may enter a suspect's home to make a warrantless arrest. See *Coolidge v. New Hampshire*, 403 U. S. 443, 474 (1971); *id.*, at 510-512 (WHITE, J., dissenting); *Jones v. United States*, 357 U. S. 493, 499-500 (1958).



(1925). At common law it was customary, if not obligatory, for an arrested person to be brought before a justice of the peace shortly after arrest. 2 Hale, Pleas of the Crown 77, 81, 95 (1736); 2 Hawkins, Pleas of the Crown 116-117 (4th ed. 1762). See also *Kurtz v. Moffitt*, 115 U. S. 478, 498-499 (1885).<sup>13</sup> The justice of the peace would "examine" the prisoner and the witnesses to determine whether there was reason to believe the prisoner had committed a crime. If there was, the suspect would be committed to jail or bailed pending trial. If not, he would be discharged from custody. 1 Hale, *supra*, at 583-585; 2 Hawkins, *supra*, at 116-119; 1 J. Stephen, History of the Criminal Law of England 233 (1883).<sup>14</sup>

<sup>13</sup> The primary motivation for the requirement seems to have been the penalty for allowing an offender to escape, if he had in fact committed the crime, and the fear of liability for false imprisonment, if he had not. But Hale also recognized that a judicial warrant of commitment, called a *mittimus*, was required for more than brief detention.

"When a private person hath arrested a felon, or one suspected of a felony, he may detain him in custody till he can reasonably dismiss himself of him; but with as much speed as conveniently he can, he may do either of these things.

"1. He may carry him to the common goal, . . . but that is now rarely done.

"2. He may deliver him to the constable of the vill, who may either carry him to the common gaol, . . . ore to a justice of the peace to be examined, and farther proceeded against as case shall require . . .

"3. Or he may carry him immediately to any justice of peace of the county where he is taken, who upon examination may discharge, bail, or commit him, as the case shall require.

"And the bringing the offender either by the constable or private person to a justice of peace is most usual and safe, because a gaoler will expect a *Mittimus* for his warrant of detaining."

1 *id.*, at 589-590.

<sup>14</sup> The examination of the prisoner was inquisitorial, and the examination of the witnesses was conducted outside the prisoner's presence. The process was considered quite harsh until statutory reform



The initial determination of probable cause also could be reviewed by higher courts on a writ of habeas corpus. 2 Hawkins, *supra*, at 112-115; 1 J. Stephen, *supra*, at 243; see *Ex parte Bollman*, 8 U. S. (4 Cranch) 75, 97-101 (1807). This practice furnished the model for criminal procedure in America immediately following the adoption of the Fourth Amendment, see *Ex parte Bollman*, 8 U. S. (4 Cranch) 75 (1807); <sup>18</sup> *Ex parte Burford*, 7 U. S. (3 Cranch) 447 (1806); *Ex parte Hamilton*, 3 U. S. (3 Dall.) 17 (1795), and there are indications that the Framers of the Bill of Rights regarded it as a model for a "reasonable" seizure. See *Draper v. United States*, 358 U. S. 307, 317-320 (1959) (DOUGLAS, J., dissenting).<sup>19</sup>

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was accomplished in 1848, 1 J. Stephen, at 225, but it was well established that if the investigation turned up insufficient evidence of the prisoner's guilt, he was entitled to be discharged.

<sup>18</sup> In *Ex parte Bollman*, two men charged in the Aaron Burr treason were committed following an examination in the circuit court of the District of Columbia. They filed a petition for writ of habeas corpus in the Supreme Court. The Court, in an opinion by Chief Justice Marshall, affirmed its jurisdiction to issue habeas corpus to persons in custody by order of federal trial courts. Then, following arguments on the Fourth Amendment requirement of probable cause, the Court surveyed the evidence against the prisoners and held that it did not establish probable cause that they were guilty of treason. The prisoners were discharged.

<sup>19</sup> A similar procedure at common law, the warrant for recovery of stolen goods, is said to have furnished the model for a "reasonable" search under the Fourth Amendment. The victim was required to appear before a justice of the peace and make an oath of probable cause that his goods could be found in a particular place. After the warrant was executed, and the goods seized, the victim and the alleged thief would appear before the justice of the peace for a prompt determination of the cause for seizure of the goods and detention of the thief. 2 Hale, *supra*, at 149-152; T. Taylor, Two Studies in Constitutional Interpretation 24-25, 39-40 (1969); see *Boyd v. United States*, 116 U. S. 616, 626-629 (1886).



## B

Under the Florida procedures challenged here, a person arrested without a warrant and charged by information may be jailed or subjected to other restraints pending trial without any opportunity for a probable cause determination.<sup>17</sup> There is no provision for a test of probable cause at the first appearance before a magistrate or at the hearing to set bail, Fla. Rule Crim. Proc. 3.130; see *Pugh v. Rainwater*, 483 F. 2d 778, 781 n. 8 (CA5 1973), and the suspect cannot demand a preliminary hearing. Fla. Rule Crim. Proc. 3.131 (a). The Florida Supreme Court has held that habeas corpus cannot be used to test the probable cause for detention under an information. *Sullivan v. State ex rel. McCrory*, 49 So. 2d 794 (Fla. 1951). The arraignment may be delayed as much as a month, and it is not clear that the issue of probable cause may be raised then.<sup>18</sup>

<sup>17</sup> A person arrested under a warrant would have received a prior judicial determination of probable cause. Under Fla. Rule Crim. Proc. 3.120, a warrant may be issued upon a sworn complaint that states facts showing that the suspect has committed a crime. The magistrate may also take testimony under oath to determine if there is reasonable ground to believe the complaint is true.

<sup>18</sup> The District Court found that the procedures used in filing informations allow a delay of a month or more between arrest and arraignment. First, processing of the information does not begin until the arresting officer appears before an assistant state attorney and files an affidavit of facts. This appearance is delayed anywhere from 24 hours to two weeks after arrest. If the state attorney decides to file an information, the papers are prepared and the information is filed and set for arraignment. The average delay from the time the arresting officer appears and the time of arraignment is 10 to 15 days.

The Court of Appeals assumed, for purposes of this case, that the defendant would have an opportunity to challenge the probable cause underlying the information at his arraignment, but noted that if the assumption was groundless, a person charged by informa-



Petitioner defends this practice on the ground that the prosecutor's decision to file an information is itself a determination of probable cause and that furnishes sufficient reason to detain a defendant pending trial. Although a conscientious decision that the evidence warrants affords a measure of protection against unfounded detention, we do not think prosecutorial judgment standing alone meets the requirements of the Fourth Amendment. Indeed, we think the Court's previous decisions compel disapproval of the Florida procedure. In *Albrecht v. United States*, 273 U. S. 1, 5 (1927), the Court held that an arrest warrant issued solely upon a United States Attorney's information was invalid because the accompanying affidavits were defective. Although the Court's opinion did not explicitly state that the prosecutor's official oath could not furnish probable cause, that conclusion was implicit in the judgment that the arrest was illegal under the Fourth Amendment.<sup>10</sup> More recently, in *Coolidge v. New Hampshire*, 403 U. S. 443, 449-453 (1971), the Court held that a prosecutor's

tion would have no opportunity to challenge probable cause before trial, 483 F. 2d, at 781, n. 2. The Florida rule governing arraignment does not suggest that the procedure contemplates a challenge to probable cause or any consideration of pretrial custody. It merely provides that the arraignment shall consist of reading the indictment or information to the defendant and calling upon him to plead. Fla. Rule Crim. Proc. 3.160.

<sup>10</sup> By contrast, the Court has held that an indictment, "fair upon its face," and returned by a "properly constituted grand jury" conclusively determines the existence of probable cause and requires issuance of an arrest warrant without further inquiry. *Ex parte United States*, 287 U. S. 241, 250 (1932). See also *Giordenello v. United States*, 357 U. S. 480, 487 (1958). The willingness to let a grand jury's judgment substitute for that of a neutral and detached magistrate is attributable to the grand jury's relationship to the courts and its historical role of protecting individuals from unjust prosecution. See *United States v. Calandra*, 414 U. S. 338, 342-346 (1974).



responsibility to law enforcement is inconsistent with the constitutional role of a neutral and detached magistrate. We reaffirmed that principle in *Shadwick v. City of Tampa*, 407 U. S. 345 (1972), and held that probable cause for the issuance of an arrest warrant must be determined by someone independent of police and prosecution.<sup>20</sup> The reason for this separation of functions was expressed by Justice Frankfurter in a similar context:

"A democratic society, in which respect for the dignity of all men is central, naturally guards against the misuse of the law enforcement process. Zeal in tracking down crime is not in itself an assurance of soberness of judgment. Disinterestedness in law enforcement does not alone prevent disregard of cherished liberties. Experience has therefore counseled that safeguards must be provided against the dangers of the overzealous as well as the despotic. The awful instruments of the criminal law cannot be entrusted to a single functionary. The complicated process of criminal justice is therefore divided into different parts, responsibility for which is separately vested in the various participants upon whom the criminal law relies for its vindication." *McNabb v. United States*, 318 U. S. 332, 343 (1943).

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<sup>20</sup> The Court had earlier reached a different result in *Ocampo v. United States*, 234 U. S. 91 (1914), a criminal appeal from the Philippine Islands. Under a statutory guarantee substantially identical to the Fourth Amendment, Act of July 1, 1902, c. 1369, § 5, 32 Stat. 693-694, the Court held that an arrest warrant could issue solely upon a prosecutor's information. The Court has since held that interpretation of a statutory guarantee applicable to the Philippines is not conclusive for interpretation of a cognate provision in the Federal Constitution, *Green v. United States*, 355 U. S. 184, 194-198 (1957). Even if it were, the result reached in *Ocampo* is incompatible with the later holdings of *Albrecht*, *Coolidge*, and *Shadwick*.



In holding that the prosecutor's assessment of probable cause is not sufficient alone to justify restraint on liberty pending trial, we do not imply that the accused is entitled to judicial oversight or review of a prosecutor's decision to prosecute. Instead, we adhere to the Court's prior holding that a judicial hearing is not prerequisite to prosecution by information. *Lem Woon v. Oregon*, 229 U. S. 586 (1913).<sup>21</sup> Nor do we retreat from the established rule that illegal arrest or detention does not void a subsequent conviction. *Frisbie v. Collins*, 342 U. S. 519 (1952); *Ker v. Illinois*, 119 U. S. 436 (1886). Thus, as the Court of Appeals noted below, a suspect who is presently detained may challenge the probable cause for that confinement, but a conviction will not be vacated on the ground that the defendant was detained pending trial without probable cause. 483 F. 2d, at 786-787. Compare *Scarborough v. Dutton*, 393 F. 2d 6 (CA5 1968), with *Brown v. Fauntleroy*, — U. S. App. D. C. —, 442 F. 2d 838 (1971), and *Cooley v. Stone*, — U. S. App. D. C. —, 414 F. 2d 1213 (1969).

### III

Both the District Court and the Court of Appeals held that the determination of probable cause must be accompanied by the full panoply of adversary safeguards—counsel, confrontation, cross-examination, and compulsory process for witnesses. A full preliminary hearing of this sort is modeled after the procedure used in

<sup>21</sup> See also *Beck v. Washington*, 369 U. S. 541 (1962). The opinion in *Beck* cites *Ocampo v. United States*, 234 U. S. 91 (1914), for the same proposition, but the validity of prosecution by information without a preliminary hearing was not at issue in that case. The only issues were whether grand juries were required in the Philippines and, as discussed in n. 20, *supra*, whether the prosecutor's decision to file an information furnished sufficient probable cause for an arrest warrant.



many States to determine whether the evidence justifies going to trial under an information or presenting the case to a grand jury. See *Coleman v. Alabama*, 399 U. S. 1 (1970); Y Kamisar, W. LaFare & J. Israel, *Modern Criminal Procedure* 957-967, 996-1000 (4th ed. 1974). The standard of proof required of the prosecution is usually referred to as "probable cause," but it may approach a *prima facie* case of guilt. A. L. I. Model Code of Pre-arraignment Procedure, Commentary on Article 330, at 90-91 (Tent. Draft No. 5, 1972). When the hearing takes this form, adversary procedures are customarily employed. The importance of the issue to both the State and the accused justifies the presentation of witnesses and full exploration of their testimony on cross-examination. This kind of hearing also requires appointment of counsel for indigent defendants. *Coleman v. Alabama*, 399 U. S. 1 (1970). And, as the hearing assumes increased importance and the procedures become more complex, the less likely it is that it can be held promptly after arrest. See A. L. I. Model Code of Pre-arraignment Procedure, *supra*, at 33-34.

These adversary safeguards are not essential for the probable cause determination required by the Fourth Amendment. The sole issue is whether there is probable cause for detaining the arrested person pending such further proceedings as may be afforded by law. This issue can be determined reliably without a full adversary hearing. The standard is the same as that for arrest.<sup>22</sup>

<sup>22</sup> Because the standards are identical, there is no need for further investigation before the probable cause determination can be made. "Presumably, whomever the police arrest they must arrest on 'probable cause.' It is not the function of the police to arrest, as it were, at large and to use an interrogating process at police headquarters in order to determine whom they should charge before a committing magistrate on 'probable cause.'" *Mallory v. United States*, 354 U. S. 449, 456 (1957).



That standard—probable cause to believe the suspect has committed a crime—traditionally has been decided in nonadversary proceedings on hearsay and written testimony, and the Court has approved these informal modes of proof.

“Guilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined to that which long experience in the common-law tradition, to some extent embodied in the Constitution, has crystallized into rules of evidence consistent with that standard. These rules are historically grounded rights of our system, developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property.

“In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved.” *Brinegar v. United States*, 338 U. S. 160, 174-175 (1949).

Cf. *McCray v. Illinois*, 386 U. S. 300 (1967).

The use of these informal procedures is justified not only by the lesser consequences of a probable cause determination but also by the nature of the determination itself. It does not require the fine resolution of conflicting evidence that a reasonable-doubt or even a preponderance standard demands, and credibility determinations are seldom crucial in deciding whether the evidence supports a reasonable belief in guilt. See F. Miller, *The Decision to Charge a Suspect with a Crime* 64-109 (1969). This is not to say that Confrontation and cross-examination might not enhance the reliability of probable cause



determinations in some cases, but in most cases their value would be too slight to justify holding, as a matter of constitutional principle, that these formalities and safeguards designed for trial must also be employed in making the Fourth Amendment determination of probable cause.<sup>23</sup> Our system of criminal justice is already overburdened, and it is subject to valid criticism when overemphasis on procedural and evidentiary formalities results in delayed justice, repetitive trials, and burdensome expense for both the State and the accused.

Because of its limited function and its nonadversary character, the probable cause determination is not a "critical stage" in the prosecution that would require appointed counsel. We have identified as "critical stages" those pretrial procedures that would impair defense on the merits if the accused is required to proceed without counsel. *Coleman v. Alabama*, 399 U. S. 1

<sup>23</sup> In *Morrissey v. Brewer*, 408 U. S. 471 (1972), and *Gagnon v. Scarpelli*, 411 U. S. 778 (1973), we held that a parolee or probationer arrested prior to revocation is entitled to an informal preliminary hearing at the place of arrest, with some provision for live testimony. 408 U. S., at 487; 411 U. S., at 786. That preliminary hearing, more than the probable cause determination required by the Fourth Amendment, serves the purpose of gathering and preserving live testimony, since the final revocation hearing frequently is held at some distance from the place where the violation occurred. 408 U. S., at 485; 411 U. S., at 872-873 n. 5. Moreover, revocation proceedings may offer less protection from initial error than the more formal criminal process, where violations are defined by statute and the prosecutor has a professional duty not to charge a suspect with crime unless he is satisfied of probable cause. See ABA Code of Professional Responsibility, D. R. 7-103 (A) (the prosecutor has a professional responsibility "not [to] institute or cause to be instituted criminal charges when he knows or it is obvious that the charges are not supported by probable cause"); ABA Standards Relating to the Administration of Criminal Justice, The Prosecution Function, §§ 1.1, 3.4, 3.9 (1974); American College of Trial Lawyers, Code of Trial Conduct, rule 4 (c).



(1970); *United States v. Wade*, 388 U. S. 218, 226 (1967). In *Coleman v. Alabama*, where the Court held that a preliminary hearing was a critical stage of an Alabama prosecution, the majority and concurring opinions identified two critical factors that distinguish the Alabama preliminary hearing from the probable cause determination required by the Fourth Amendment. First, under Alabama law the function of the hearing was to determine whether the evidence justified charging the suspect with an offense. A finding of no probable cause could mean that he would not be tried at all. The Fourth Amendment probable cause determination is addressed only to pretrial custody. To be sure, pretrial custody may affect to some extent the defendant's ability to assist in preparation of his defense, but this is not the kind of substantial harm identified as controlling in *Wade* and *Coleman*. Second, Alabama allowed the suspect to confront and cross-examine prosecution witnesses at the preliminary hearing. The Court noted that the suspect's defense on the merits could be compromised if he had no legal assistance for exploring or preserving the witnesses' testimony. This consideration does not apply to the informal, nonadversary procedure required under the Fourth Amendment.

The reasons that make a nonadversary proceeding appropriate, however, do not justify denying the suspect an opportunity to be present and participate in the determination.<sup>24</sup> Our system of justice operates on the premise

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<sup>24</sup> The procedures suggested in the Uniform Rules of Criminal Procedure (Proposed Final Draft 1974) and the A. L. I. Model Code of Pre-arraignment Procedure (Tent. Draft No. 5, 1972, and Tent. Draft No. 5A, 1973) are instructive. Under the Uniform Rules, a person arrested without a warrant is entitled, "without unnecessary delay," to a first appearance before a magistrate and a determination that grounds exist for issuance of an arrest warrant. The determination may be made on affidavits or testimony, in the presence of



that the subject of a judicial proceeding is entitled to participate unless there is good reason to exclude him. See *Rees v. City of Watertown*, 86 U. S. (19 Wall.) 107, 122-123 (1873). The Fourth Amendment is not inconsistent with that concept. The procedures normally followed in applying for warrants are *ex parte* proceedings by necessity, as notifying the suspect would often frustrate the purpose of the warrant. See T. Taylor, *Two Studies in Constitutional Interpretation* 81-82 (1969). But when the suspect is already in custody, and the only issue is probable cause for detention, he should be allowed to participate in the determination. Allowing him to appear before the magistrate and giving him an opportunity

the accused. Rule 311. Persons who remain in custody for inability to qualify for pretrial release are offered another opportunity for a probable cause determination at the detention hearing, held no more than 5 days after arrest. This is an adversary hearing, and the parties may summon witnesses, but reliable hearsay may be considered. Rule 344.

The Model Code of Pre-arraignment Procedure also provides a first appearance, at which a warrantless arrest must be supported by a reasonably detailed written statement of facts. § 310. The magistrate may make a determination of probable cause to hold the accused, but he is not required to do so and the accused may request an attorney for an "adjourned session" of the first appearance to be held within 2 "court days." At that session, the magistrate makes a determination of probable cause upon a combination of written and live testimony:

"The arrested person may present written and testimonial evidence and arguments for his discharge and the state may present additional written and testimonial evidence and arguments that there is reasonable cause to believe that he has committed the crime of which he is accused. The state's submission may be made by means of affidavits, and no witnesses shall be required to appear unless the court, in the light of the evidence and arguments submitted by the parties, determines that there is a basis for believing that the appearance of one or more witnesses for whom the arrested person seeks subpoenas might lead to a finding that there is no reasonable cause." § 310.2 (2) (Tent. Draft No. 5A, 1973).



to speak or to submit written evidence for consideration along with the State's presentation could enhance both the reliability and the fairness of the proceeding. The burden on the State would be minimal. Virtually all jurisdictions require that arrested persons be presented to a judicial officer within a short time after arrest, see A. L. I., Model Code of Pre-arraignment Procedure 230-231 (Tent. Draft No. 1, 1966), and every jurisdiction makes some provision for setting bail or determining other conditions of pretrial release. See L. Katz, *Justice Is the Crime*, Appendix B, at 247-365 (1972). Since the defendant is already in the courtroom, the issue of probable cause may be decided at that time with little or no inconvenience to the State. In fact, the suspect's first appearance before a magistrate traditionally has been considered the proper time for determining whether there is probable cause for detention. 1 Hale, *Pleas of the Crown* 589-590 (1736); 2 *id.*, at 77-95; 2 Hawkins, *Pleas of the Crown* 116-117 (4th ed. 1762); see *McNabb v. United States*, 318 U. S. 332, 342-344 (1943); Amsterdam, *Perspective on the Fourth Amendment*, 58 Minn. L. Rev. 349, 391 & n. 408 (1974). Although the Federal Rules of Criminal Procedure do not explicitly acknowledge this function of the first appearance, this Court has interpreted them to require a determination of probable cause at that stage. *Jaben v. United States*, 381 U. S. 214 (1965); *Mallory v. United States*, 354 U. S. 449, 454 (1957).<sup>25</sup>

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<sup>25</sup> In an *amicus* brief filed on behalf of the United States, the Solicitor General suggested that *McNabb v. Mallory* had mistaken the purpose of the first appearance, and that actual practice is otherwise. Cf. Note, *Probable Cause at the Initial Appearance in Warrantless Arrests*, 45 So. Cal. L. Rev. 1128 (1972); *McNabb*, of course, was decided before the adoption of the Federal Rules of Criminal Procedure. It interpreted a statutory requirement that an arrested



There is no single proper method for making the probable cause determination required by the Fourth Amendment. The States have many different patterns of criminal procedure, and each may adapt its own to provide a swift and reliable probable cause determination with the least burden to its system. Like many jurisdictions, Florida requires every arrested person to be brought before a magistrate within 24 hours, unless sooner released. Fla. Rule Crim. Proc. 3.310 (b). At that appearance the defendant is told of the charges against him, furnished a copy of the complaint, advised of his constitutional rights, and provided counsel if he is indigent. The magistrate then sets bail or prescribes other conditions of pretrial release. One of the factors typically relied upon in making this decision is the weight of evidence against the accused. ABA Standards Relating to the Administration of Criminal Justice, Pretrial Release § 5.1 (1974); see 18 U. S. C. § 3146 (b). Expanding that determination to a test of probable cause would be a natural way of integrating the probable cause decision with existing procedures.

In other States, existing procedures may satisfy the requirement of the Fourth Amendment. Some States already authorize a hearing on probable cause at or immediately following the suspect's first appearance.

person be brought before a magistrate without unnecessary delay. 318 U. S., at 342. *Mallory* was decided after the federal rules were adopted, and although the interpretation of the federal rules was dictum, it clearly outlined the Court's view:

"The scheme for initiating a federal prosecution is plainly defined. The police may not arrest upon mere suspicion but only on 'probable cause.' The next step in the proceeding is to arraign the arrested person before a judicial officer as quickly as possible so that he may be advised of his rights and so that the issue of probable cause may be promptly determined." 354 U. S., at 464.

The use of the word "arraign" was in error, as arraignment occurs later in the process. Fed. Rule Crim. Proc. 10.



*E. g.*, Colo. Rev. Stat. § 39-2-7; Hawaii Rev. Stat. § 708-709. Others may choose simply to accelerate their existing preliminary hearings. What the Fourth Amendment requires for pretrial restraint on liberty<sup>26</sup> is a reliable determination of probable cause made either before or promptly after arrest, and preferably no later than the first appearance before a judicial officer. If made after arrest, the suspect must be allowed to be present. Each State may choose the procedure that best accommodates this determination to its existing practice.<sup>27</sup>

#### IV

We agree with the Court of Appeals that the Fourth Amendment requires a timely judicial determination of probable cause as a prerequisite to detention, and we accordingly affirm that much of the judgment. As we do not agree that the Fourth Amendment requires the adversary hearing outlined in the District Court's decree, we reverse in part and remand to the Court of Appeals for further proceedings consistent with this opinion.

<sup>26</sup> Because the probable cause determination is not a constitutional prerequisite to the charging decision, it is required only for those suspects who suffer restraints on liberty other than the condition that they appear for trial. There are many kinds of pretrial release and many degrees of conditional liberty. See 18 U. S. C. § 3146; ABA Standards Relating to the Administration of Criminal Justice, Pretrial Release § 5.2 (1974); Uniform Rules of Criminal Procedure, Rule 331 (Proposed Final Draft 1974). We cannot define specifically those that would require a prior probable cause determination, but the key factor is significant restraint on liberty.

<sup>27</sup> Of course, if the State incorporates the probable cause determination into a multipurpose hearing, the necessity for appointed counsel at the combined proceeding must be governed by the principle of *Coleman v. Alabama*, *supra*.



L.F.P.  
File

CHAMBERS DRAFT  
12/12/74  
SUPREME COURT OF THE UNITED STATES

No. 73-477

Richard E. Gerstein, State At-	}	On Writ of Certiorari
torney for Eleventh Judicial		
Circuit of Florida,		
Petitioner,		
v.		
Robert Pugh et al.		to the United States
		Court of Appeals for
		the Fifth Circuit.

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[December —, 1974]

MR. JUSTICE POWELL delivered the opinion of the Court.

The issue in this case is whether a person arrested under a prosecutor's information is constitutionally entitled to a judicial determination of probable cause for pretrial restraint of liberty.

I

In March 1971 respondents Pugh and Henderson were arrested in Dade County, Florida. Each was charged with several offenses under a prosecutor's information.<sup>1</sup> Pugh was denied bail because one of the charges against him carried a potential life sentence, and Henderson was held in custody because he was unable to post a \$4,500 bond.

<sup>1</sup> Respondent Pugh was arrested on March 3, 1971. On March 18 an information was filed charging him with robbery, carrying a concealed weapon, and possession of a firearm during commission of a felony. Respondent Henderson was arrested March 2, and charged by information on March 19 with the offenses of breaking and entering and assault and battery. The record does not indicate whether either was arrested under a warrant.



In Florida, indictments are required only for prosecution of offenses punishable by death. All other criminal offenses may be prosecuted by information, and violations of municipal ordinances may be prosecuted by a simple affidavit or docket entry. Fla. Rule Crim. Proc. 3.140 (Supp. 1974). At the time respondents were arrested, Florida's rules of criminal procedure authorized only one method for determining the existence of probable cause to hold a suspect in jail pending trial. Fla. Rule Crim. Proc. 1.122 (amended 1972). This proceeding, an adversary preliminary hearing, was not available to a suspect who had already been charged by information. See *Bradley v. State*, 265 So. 2d 533 (Fla.), cert. denied, 411 U. S. 916 (1973); *State ex rel. Hardy v. Blount*, 261 So. 2d 172 (Fla. 1972).<sup>2</sup> In those instances when a preliminary hearing was held and the suspect discharged, the prosecutor could reinstate the charge and return him to custody by filing an information. See *Montgomery v. State*, 176 So. 2d 331 (Fla. 1965); *Baugus v. State*, 141 So. 2d 264 (Fla. 1962). As a result, a person charged by information could be detained pending trial solely on the decision of a prosecutor.

Respondents Pugh and Henderson filed a class action against Dade County officials in the Federal District Court,<sup>3</sup> claiming a constitutional right to a judicial hearing on the issue of probable cause and requesting declaratory and injunctive relief.<sup>4</sup> Respondents Turner and

<sup>2</sup> Florida law also denies preliminary hearings to persons confined under indictment, *Sangaree v. Hamlin*, 235 So. 2d 729 (Fla. 1970), Fla. Rule Crim. Proc. 3.131, but that procedure is not challenged in this case.

<sup>3</sup> The complaint was framed under 42 U. S. C. § 1983, and jurisdiction in the District Court was based on 28 U. S. C. § 1343 (3).

<sup>4</sup> Respondents did not ask for release from state custody, even as an alternate remedy. They only asked that the state authorities be ordered to give them a probable cause determination. This was

Penny  
who was  
then available  
for? Indictments  
used only for  
capital offenses?  
I suppose  
the hearing  
was available  
only to those  
as to who no  
information  
had been  
issued -  
but Fla  
couldn't  
prosecute  
w/o an  
information  
or  
indictment



Faulk, also in custody under informations, subsequently intervened.<sup>5</sup> Petitioner Gerstein, the State Attorney for Dade County, was one of several defendants.<sup>6</sup>

lc

After an initial delay while the Florida legislature considered a bill that would have afforded preliminary hearings to persons charged by information, the District Court granted the relief sought. *Pugh v. Rainwater*, 332 F. Supp. 1107 (SD Fla. 1971). After certifying the case as a class action under Fed. Rule Civ. Proc. 23 (b)(2), the Court held that the Fourth and Fourteenth Amendments give all arrested persons charged by information a right to a judicial hearing on the question of probable cause. The District Court ordered the Dade County defendants to give the named plaintiffs an immediate preliminary hearing to determine probable cause for further detention.<sup>7</sup> It also ordered them to submit a

also the only relief that the District Court ordered for the named respondents. — F. Supp. —. Because release was neither asked nor ordered, the lawsuit did not come within the class of cases for which habeas corpus is the exclusive remedy. *Preiser v. Rodriguez*, 411 U. S. 475 (1973); see *Wolff v. McDonnell*, 94 S. Ct. 2963, 2973-2974 (1974).

<sup>5</sup> Turner was being held on a charge of auto theft, following arrest on March 11, 1971. Faulk was arrested on March 19 on charges of soliciting a ride and possession of marihuana.

<sup>6</sup> The named defendants included justices of the peace and judges of small-claims courts, who were authorized to hold preliminary hearings in criminal cases, and a group of law enforcement officers with power to make arrests in Dade County. Gerstein was the only one who petitioned for certiorari following the Court of Appeals' decision.<sup>8</sup>

<sup>7</sup> The District Court correctly held that respondents' claim for relief was not barred by the equitable restrictions on federal intervention in state prosecutions, *Younger v. Harris*, 401 U. S. 37 (1971). The injunction was not directed at the state prosecutions as such, but only at the legality of pretrial detention without a judicial hearing, an issue that could not be raised in defense of the criminal prosecution. The order to hold preliminary hearings could not

of



plan providing preliminary hearings in all cases instituted by information.

Only one such plan was submitted, and the District Court adopted it with modifications. The final order prescribed a detailed post-arrest procedure. 336 F. Supp. 490. Upon arrest the accused would be taken before a magistrate for a "first appearance hearing." The magistrate would explain the charges, advise the accused of his rights, appoint counsel if he was indigent, and proceed with a probable cause determination unless either the prosecutor or the accused was unprepared. If either asked for more time, the magistrate would set the date for a "preliminary hearing," to be held no more than four days later if the accused was in custody and no more than 10 days later if he had been released pending trial. At the hearing the accused would be entitled to counsel, and he would be allowed to confront and cross-examine adverse witnesses, to summon favorable witnesses, and to have a transcript made on request. If the magistrate found no probable cause, the accused would be discharged. He then could not be charged with the same offense by complaint or information, but only by indictment returned within 30 days. The plan also provided sanctions for failure to hold hearings at the prescribed times.

The Court of Appeals for the Fifth Circuit stayed the District Court's order pending appeal, but while the case was awaiting decision, the Dade County judiciary voluntarily adopted a similar procedure of its own. Upon learning of this development, the Court of Appeals remanded the case for specific findings on the constitutionality of the new Dade County system. Before the District Court issued its findings, however, the Florida

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prejudice the conduct of trial on the merits. See *Conover v. Montemuro*, 477 F. 2d 1073, 1082 (CA3 1973); cf. *Perez v. Ledesma*, 401 U. S. 82 (1971); *Stefanelli v. Minard*, 342 U. S. 117 (1951).



Supreme Court amended the procedural rules governing preliminary hearings statewide, and the parties agreed that the District Court should direct its inquiry to the new rules rather than the Dade County procedures.

Under the amended rules every arrested person must be taken before a judicial officer within 24 hours. Fla. Rule Crim. Proc. 3.130. This "first appearance" is similar to the "first appearance hearing" ordered by the District Court in all respects but the crucial one: the magistrate does not make a determination of probable cause. The rule amendments also changed the procedure for preliminary hearings, restricting them to felony charges and codifying the rule that no hearings are available to persons charged by information or indictment. Rule 3.131; see *In re Rule 3.131 (b)*, *Florida Rules of Criminal Procedure*, 282 So. 2d — (Fla. 1972).<sup>4</sup>

In a supplemental opinion the District Court held that the amended rules had not answered the basic constitutional objection, since a defendant charged by information still could be detained pending trial without a judicial determination of probable cause. 355 F. Supp. 1286. Reaffirming the original ruling, the District Court declared that the continuation of this practice was unconstitutional.<sup>5</sup> The Court of Appeals affirmed, 483 F. 2d

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<sup>4</sup> Fla. Stat. Ann. § 907.045 (1973), seems to provide that every defendant confined for 30 days is entitled to a mandatory preliminary hearing upon application for writ of habeas corpus, but it apparently has been construed to vest trial courts with discretion to deny the hearing. See *Evans v. State*, 197 So. 323 (Fla. Ct. App. 1967). But cf. *Karz v. Overton*, 249 So. 2d 763 (Fla. Ct. App. 1971).

<sup>5</sup> Although this ruling held a statewide "legislative rule" unconstitutional, it was not outside the jurisdiction of a single judge by virtue of 28 U. S. C. § 2281. The original complaint did not ask for an injunction against enforcement of any state statute or legislative rule of statewide application, since the practice of denying preliminary hearings to persons charged by information was then em-



778, modifying the District Court's decree in minor particulars and suggesting that the form of preliminary hearing provided by the amended Florida rules would be acceptable, as long as it was provided to all defendants in custody pending trial. *Id.*, at 788.<sup>10</sup> State Attorney

bodied only in judicial decisions. The District Court therefore had jurisdiction to issue the initial injunction, and the Court of Appeals had jurisdiction over the appeal. On remand, the constitutionality of a state "statute" was drawn into question for the first time when the criminal rules were amended. The District Court's supplemental opinion can fairly be read as a declaratory judgment that the amended rules were unconstitutional; the injunctive decree was never amended to incorporate that holding; and the opinion in the Court of Appeals is not inconsistent with the conclusion that the District Court did not enjoin enforcement of the statewide rule. See 483 F. 2d, at 788. Accordingly, a district court of three judges was not required for the issuance of this order. See *Kennedy v. Mendoza-Martinez*, 372 U. S. 144, 152-155 (1963); *Flemming v. Nestor*, 362 U. S. 603, 606-608 (1960).

<sup>10</sup> The major difference between the District Court's order and that of the Court of Appeals centered on the question whether a probable cause hearing is required for all arrested persons charged by information or only for those confined pending trial. The District Court's original decree required preliminary hearings for all arrested persons, 332 F. Supp., at —. On remand, the District Court made an exception for persons charged with misdemeanors who neither suffered pretrial detention nor faced imprisonment upon conviction, 355 F. Supp., at —. The Court of Appeals explicitly limited the hearing right for misdemeanor defendants to those who are jailed pending trial, 483 F. 2d, at 789. Its opinion also suggests, without stating explicitly, that the hearing right is similarly limited to felony defendants who are confined pending trial. *Id.*, at 787, 789.

The Court of Appeals vacated both the portion of the District Court's order that prescribed time periods different from those in the amended rules, and the sanctions for failure to comply with the hearing requirements. It affirmed the District Court's holding on remand that the amended rules' extended time periods for capital and life-imprisonment offenses was a violation of equal protection. Our disposition of the case makes it unnecessary to address the specific terms of the District Court's decree.



Gerstein petitioned for review, and we granted certiorari because of the importance of the issue.<sup>11</sup> We affirm in part and reverse in part.

## II

As framed<sup>2</sup> by the proceedings below, this case presents two issues: whether a person arrested and held for trial

<sup>11</sup> At oral argument counsel informed us that the named respondents have been convicted. Their pretrial detention therefore has ended, but this case belongs to that narrow class of cases in which the termination of a class representative's claim does not moot the claims of the unnamed members of the class. See *Sosna v. Iowa*, No. 73-762. Pretrial detention is by nature temporary, and it is most unlikely that any given individual could have his constitutional claim decided on appeal before he is either released or convicted. The individual could nonetheless suffer repeated deprivations, and it is certain that other persons similarly situated will be detained under the allegedly unconstitutional procedures. The claim, in short, is one that is distinctly "capable of repetition, yet evading review."

At the time the complaint was filed, the named respondents were members of a class of persons detained without a judicial probable cause determination, but the record does not indicate whether any of them ~~respondents~~ were still in custody awaiting trial when the District Court certified the ~~classification~~<sup>action</sup>. Despite the absence of such a showing, which would ordinarily be required to avoid mootness under *Sosna*, this case is not moot. The length of pretrial custody cannot be ascertained at the outset, and it may be ended at any time by release on recognizance, dismissal of the charges, or a guilty plea, as well as by acquittal or conviction after trial. It is by no means certain that any given individual would be in pretrial custody long enough for a district judge to certify a class action. Moreover, this is the kind of case in which the constant existence of a class of persons suffering the deprivation is certain. The attorney representing the named respondents is a public defender, and we may safely assume that he has other clients with a continuing live interest in the case. This controversy, therefore, is a suitable exception to the *Sosna* rule that mootness of a class action that is "capable of repetition, yet evading review" ordinarily is governed by determining whether the named representatives were members of the class at the time of certification. See *Sosna*, *supra*, at —; cf. *Rivera v. Freeman*, 469 F. 2d 1159 (CA9 1972).



on an information is entitled to a judicial determination of probable cause for detention, and if so, whether the adversary hearing ordered by the District Court and approved by the Court of Appeals is required by the Constitution.

## A

Both the standards and procedures for arrest and detention have been derived from the Fourth Amendment and its common-law antecedents. See *Cupp v. Murphy*, 412 U. S. 291, 294-295 (1973); *Ex parte Bollman*, 8 U. S. (4 Cranch) 75 (1807); *Ex parte Burford*, 7 U. S. (3 Cranch) 447 (1806). 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." *Beck v. Ohio*, 479 U. S. 89, 91 (1964). See also *Henry v. United States*, 361 U. S. 98 (1959); *Brinegar v. United States*, 338 U. S. 160, 175-176 (1949); *Johnson v. United States*, 333 U. S. 10 (1948). This standard represents a compromise between the individual's right to liberty and the community's responsibility for controlling crime.

"These long-prevailing standards seek to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime. They also seek to give fair leeway for enforcing the law in the community's protection. Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability. The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating these often opposing interests.

a necessary accommodation

State's duty

to control



Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice." *Brinegar v. United States, supra*, at 176.

To implement the Fourth Amendment's protection against unfounded invasions of liberty and privacy, the Court has required that the existence of probable cause be decided by a neutral and detached magistrate whenever possible. The classic statement of this principle appears in *Johnson v. United States, supra*, at 13-14:

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

See also *Terry v. Ohio*, 392 U. S. 1, 20-22 (1968).

Maximum protection of individual rights could be assured by requiring a magistrate's review of the factual justification prior to any arrest, but such a requirement ~~would severely handicap~~ legitimate law enforcement. In striking a balance between these opposing interests, the Court has expressed a preference for the use of arrest warrants when ~~possible~~, *Beck v. Ohio*, 379 U. S. 89, 96 (1964); *Wong Sun v. United States*, 371 U. S. 471, 479-482 (1963), but it has never invalidated an arrest supported by probable cause solely because the officers had failed to secure a warrant. See *Ker v. California*, 374 U. S. 23 (1963); *Draper v. United States*, 358 U. S. 307 (1959); *Trupiano v. United States*, 334 U. S. 699, 705 (1948).<sup>12</sup>

<sup>12</sup> Another aspect of *Trupiano* was overruled in *United States v.*

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constitute  
an intolerable  
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Under this practical compromise, a policeman's on-the-scene assessment of probable cause is legal justification for arresting a person suspected of crime. The policeman's judgment also justifies a brief period of detention to take the administrative steps necessary for arrest, but once the suspect is in custody the reasons that justify dispensing with the magistrate's neutral judgment evaporate. There is no longer any danger that the suspect will escape or commit further crimes while the police submit their evidence to a magistrate. And, from the suspect's point of view, the consequences of prolonged detention may be more serious than the interference occasioned by arrest. Pretrial confinement may imperil the suspect's job, interrupt his source of income, and impair his family relationships. Even pretrial release may be accompanied by burdensome conditions that effect a significant restraint on liberty. See R. Goldfarb, *Ransom* 32-91 (1965); L. Katz, *Justice Is the Crime* 51-62 (1972). When the stakes are this high, the detached judgment of a neutral magistrate is essential if the Fourth Amendment is to furnish meaningful protection from unfounded interference with liberty. Accordingly, we hold that the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint on liberty following arrest.

This result has historical support in the common law that has guided interpretation of the Fourth Amendment. See *Carroll v. United States*, 267 U. S. 132, 149

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*Rabinowitz*, 339 U. S. 56 (1950), which was overruled in turn by *Chimel v. California*, 395 U. S. 752.

The issue of warrantless arrest that has generated the most controversy, and which remains unsettled, is whether and under what circumstances an officer may enter a suspect's home to make a warrantless arrest. See *Coolidge v. New Hampshire*, 403 U. S. 443, 474 (1971); *id.*, at 510-512 (WHITE, J., dissenting); *Jones v. United States*, 357 U. S. 493, 499-500 (1958).



(1925). At common law it was customary, if not obligatory, for an arrested person to be brought before a justice of the peace shortly after arrest. 2 Hale, Pleas of the Crown 77, 81, 95 (1736); 2 Hawkins, Pleas of the Crown 116-117 (4th ed. 1762). See also *Kurtz v. Moffitt*, 115 U. S. 478, 498-499 (1885).<sup>13</sup> The justice of the peace would "examine" the prisoner and the witnesses to determine whether there was reason to believe the prisoner had committed a crime. If there was, the suspect would be committed to jail or bailed pending trial. If not, he would be discharged from custody. 1 Hale, *supra*, at 583-585; 2 Hawkins, *supra*, at 116-119; 1 J. Stephen, History of the Criminal Law of England 233 (1883).<sup>14</sup>

<sup>13</sup> The primary motivation for the requirement seems to have been the penalty for allowing an offender to escape, if he had in fact committed the crime, and the fear of liability for false imprisonment, if he had not. But Hale also recognized that a judicial warrant of commitment, called a *mittimus*, was required for more than brief detention.

"When a private person hath arrested a felon, or one suspected of a felony, he may detain him in custody till he can reasonably dismiss himself of him; but with as much speed as conveniently he can, he may do either of these things.

"1. He may carry him to the common goal, . . . but that is now rarely done.

"2. He may deliver him to the constable of the vill, who may either carry him to the common gaol, . . . or to a justice of the peace to be examined, and farther proceeded against as case shall require . . .

"3. Or he may carry him immediately to any justice of peace of the county where he is taken, who upon examination may discharge, bail, or commit him, as the case shall require.

"And the bringing the offender either by the constable or private person to a justice of peace is most usual and safe, because a gaoler will expect a *Mittimus* for his warrant of detaining."

1 *id.*, at 589-590.

<sup>14</sup> The examination of the prisoner was inquisitorial, and the examination of the witnesses was conducted outside the prisoner's presence. The process was considered quite harsh until statutory reform

Penny -  
Have you  
looked at  
Hale, Hawkins  
& Stephen  
(I never  
have!)

further?



The initial determination of probable cause also could be reviewed by higher courts on a writ of habeas corpus. 2 Hawkins, *supra*, at 112-115; 1 J. Stephen, *supra*, at 243; see *Ex parte Bollman*, 8 U. S. (4 Cranch) 75, 97-101 (1807). This practice furnished the model for criminal procedure in America immediately following the adoption of the Fourth Amendment, see *Ex parte Bollman*, 8 U. S. (4 Cranch) 75 (1807); <sup>15</sup> *Ex parte Burford*, 7 U. S. (3 Cranch) 447 (1806); *Ex parte Hamilton*, 3 U. S. (3 Dall.) 17 (1795), and there are indications that the Framers of the Bill of Rights regarded it as a model for a "reasonable" seizure. See *Draper v. United States*, 358 U. S. 307, 317-320 (1959) (DOUGLAS, J., dissenting).<sup>16</sup>

the prisoner

was accomplished in 1848, 1 J. Stephen, at 225, but it was well established that if the investigation turned up insufficient evidence of ~~the~~ <sup>probable</sup> ~~prisoner's~~ <sup>the</sup> guilt, ~~he~~ <sup>he</sup> was entitled to be discharged.

<sup>15</sup> In *Ex parte Bollman*, two men charged in the Aaron Burr treason were committed following an examination in the circuit court of the District of Columbia. They filed a petition for writ of habeas corpus in the Supreme Court. The Court, in an opinion by Chief Justice Marshall, affirmed its jurisdiction to issue habeas corpus to persons in custody by order of federal trial courts. Then, following arguments on the Fourth Amendment requirement of probable cause, the Court surveyed the evidence against the prisoners and held that it did not establish probable cause that they were guilty of treason. The prisoners were discharged.

<sup>16</sup> A similar procedure at common law, the warrant for recovery of stolen goods, is said to have furnished the model for a "reasonable" search under the Fourth Amendment. The victim was required to appear before a justice of the peace and make an oath of probable cause that his goods could be found in a particular place. After the warrant was executed, and the goods seized, the victim and the alleged thief would appear before the justice of the peace for a prompt determination of the cause for seizure of the goods and detention of the thief. 2 Hale, *supra*, at 149-152; T. Taylor, Two Studies in Constitutional Interpretation 24-25, 39-40 (1909); see *Boyd v. United States*, 116 U. S. 616, 626-629 (1886).



## B

Under the Florida procedures challenged here, a person arrested without a warrant and charged by information may be jailed or subjected to other restraints pending trial without any opportunity for a probable cause determination.<sup>17</sup> There is no provision for a test of probable cause at the first appearance before a magistrate or at the hearing to set bail, Fla. Rule Crim. Proc. 3.130; see *Pugh v. Rainwater*, 483 F. 2d 778, 781 n. 8 (CA5 1973), and the suspect cannot demand a preliminary hearing. Fla. Rule Crim. Proc. 3.131 (a). The Florida Supreme Court has held that habeas corpus cannot be used to test the probable cause for detention under an information. *Sullivan v. State ex rel. McCrory*, 49 So. 2d 794 (Fla. 1951). The arraignment may be delayed as much as a month, and it is not clear that the issue of probable cause may be raised then.<sup>18</sup>

<sup>17</sup> A person arrested under a warrant would have received a prior judicial determination of probable cause. Under Fla. Rule Crim. Proc. 3.120, a warrant may be issued upon a sworn complaint that states facts showing that the suspect has committed a crime. The magistrate may also take testimony under oath to determine if there is reasonable ground to believe the complaint is true.

<sup>18</sup> The District Court found that the procedures used in filing informations allow a delay of a month or more between arrest and arraignment. First, processing of the information does not begin until the arresting officer appears before an assistant state attorney and files an affidavit of facts. This appearance is delayed anywhere from 24 hours to two weeks after arrest. If the state attorney decides to file an information, the papers are prepared and the information is filed and set for arraignment. The average delay from the time the arresting officer appears and the time of arraignment is 10 to 15 days.

The Court of Appeals assumed, for purposes of this case, that the defendant would have an opportunity to challenge the probable cause underlying the information at his arraignment, but noted that if the assumption was groundless, a person charged by informa-

What happens  
at "first  
appearance"?

Penny -  
specifically,  
what other  
restraints?  
Should we  
add a note?



prosecution

Petitioner defends this practice on the ground that the prosecutor's decision to file an information is itself a determination of probable cause and that furnishes sufficient reason to detain a defendant pending trial. Although a conscientious decision that the evidence warrants affords a measure of protection against unfounded detention, we do not think prosecutorial judgment standing alone meets the requirements of the Fourth Amendment. Indeed, we think the Court's previous decisions compel disapproval of the Florida procedure. In *Albrecht v. United States*, 273 U. S. 1, 5 (1927), the Court held that an arrest warrant issued solely upon a United States Attorney's information was invalid because the accompanying affidavits were defective. Although the Court's opinion did not explicitly state that the prosecutor's official oath could not furnish probable cause, that conclusion was implicit in the judgment that the arrest was illegal under the Fourth Amendment.<sup>10</sup> More recently, in *Coolidge v. New Hampshire*, 403 U. S. 443, 449-453 (1971), the Court held that a prosecutor's

tion would have no opportunity to challenge probable cause before trial. 483 F. 2d, at 781, n. 2. The Florida rule governing arraignment does not suggest that the procedure contemplates a challenge to probable cause or any consideration of pretrial custody. It merely provides that the arraignment shall consist of reading the indictment or information to the defendant and calling upon him to plead. Fla. Rule Crim. Proc. 3.160.

<sup>10</sup> By contrast, the Court has held that an indictment, "fair upon its face," and returned by a "properly constituted grand jury" conclusively determines the existence of probable cause and requires issuance of an arrest warrant without further inquiry. *Ex parte United States*, 287 U. S. 241, 250 (1932). See also *Giordenello v. United States*, 357 U. S. 480, 487 (1958). The willingness to let a grand jury's judgment substitute for that of a neutral and detached magistrate is attributable to the grand jury's relationship to the courts and its historical role of protecting individuals from unjust prosecution. See *United States v. Calandra*, 414 U. S. 338, 342-346 (1974).



responsibility to law enforcement is inconsistent with the constitutional role of a neutral and detached magistrate. We reaffirmed that principle in *Shadwick v. City of Tampa*, 407 U. S. 345 (1972), and held that probable cause for the issuance of an arrest warrant must be determined by someone independent of police and prosecution.<sup>20</sup> The reason for this separation of functions was expressed by Justice Frankfurter in a similar context:

"A democratic society, in which respect for the dignity of all men is central, naturally guards against the misuse of the law enforcement process. Zeal in tracking down crime is not in itself an assurance of soberness of judgment. Disinterestedness in law enforcement does not alone prevent disregard of cherished liberties. Experience has therefore counseled that safeguards must be provided against the dangers of the overzealous as well as the despotic. The awful instruments of the criminal law cannot be entrusted to a single functionary. The complicated process of criminal justice is therefore divided into different parts, responsibility for which is separately vested in the various participants upon whom the criminal law relies for its vindication." *McNabb v. United States*, 318 U. S. 332, 343 (1943).

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<sup>20</sup> The Court had earlier reached a different result in *Ocampo v. United States*, 234 U. S. 91 (1914), a criminal appeal from the Philippine Islands. Under a statutory guarantee substantially identical to the Fourth Amendment, Act of July 1, 1902, c. 1369, § 5, 32 Stat. 693-694, the Court held that an arrest warrant could issue solely upon a prosecutor's information. The Court has since held that interpretation of a statutory guarantee applicable to the Philippines is not conclusive for interpretation of a cognate provision in the Federal Constitution, *Green v. United States*, 355 U. S. 184, 194-198 (1957). Even if it were, the result reached in *Ocampo* is incompatible with the later holdings of *Albrecht*, *Coolidge*, and *Shadwick*.



In holding that the prosecutor's assessment of probable cause is not sufficient alone to justify restraint on liberty pending trial, we do not imply that the accused is entitled to judicial oversight or review of a prosecutor's decision to prosecute. Instead, we adhere to the Court's prior holding that a judicial hearing is not prerequisite to prosecution by information. *Lem Woon v. Oregon*, 229 U. S. 586 (1913).<sup>21</sup> Nor do we retreat from the established rule that illegal arrest or detention does not void a subsequent conviction. *Frisbie v. Collins*, 342 U. S. 519 (1952); *Ker v. Illinois*, 119 U. S. 436 (1886). Thus, as the Court of Appeals noted below, a suspect who is presently detained may challenge the probable cause for that confinement, but a conviction will not be vacated on the ground that the defendant was detained pending trial without probable cause. 483 F. 2d, at 786-787. Compare *Scarborough v. Dutton*, 393 F. 2d 6 (CA5 1968), with *Brown v. Fauntleroy*, — U. S. App. D. C. —, 442 F. 2d 838 (1971), and *Cooley v. Stone*, — U. S. App. D. C. —, 414 F. 2d 1213 (1969).

### III

Both the District Court and the Court of Appeals held that the determination of probable cause must be accompanied by the full panoply of adversary safeguards—counsel, confrontation, cross-examination, and compulsory process for witnesses. A full preliminary hearing of this sort is modeled after the procedure used in

<sup>21</sup> See also *Beck v. Washington*, 369 U. S. 541 (1962). The opinion in *Beck* cites *Ocampo v. United States*, 234 U. S. 91 (1914), for the same proposition, but the validity of prosecution by information without a preliminary hearing was not at issue in that case. The only issues were whether grand juries were required in the Philippines and, as discussed in n. 20, *supra*, whether the prosecutor's decision to file an information furnished sufficient probable cause for an arrest warrant.



?  
 many States to determine whether the evidence justifies going to trial under an information or presenting the case to a grand jury. See *Coleman v. Alabama*, 399 U. S. 1 (1970); Y. Kamisar, W. LaFare & J. Israel, *Modern Criminal Procedure* 957-967, 996-1000 (4th ed. 1974). The standard of proof required of the prosecution is usually referred to as "probable cause," but it may approach a prima facie case of guilt. A. L. I. Model Code of Pre-arraignment Procedure, Commentary on Article 330, at 90-91 (Tent. Draft No. 5, 1972). When the hearing takes this form, adversary procedures are customarily employed. The importance of the issue to both the State and the accused justifies the presentation of witnesses and full exploration of their testimony on cross-examination. This kind of hearing also requires appointment of counsel for indigent defendants. *Coleman v. Alabama*, 399 U. S. 1 (1970). And, as the hearing assumes increased importance and the procedures become more complex, the less likely it is that it can be held promptly after arrest. See A. L. I. Model Code of Pre-arraignment Procedure, *supra*, at 33-34.

and  
 These adversary safeguards are not essential for the probable cause determination required by the Fourth Amendment. The sole issue is whether there is probable cause for detaining the arrested person pending such further proceedings as may be afforded by law. This issue can be determined reliably without a full adversary hearing. The standard is the same as that for arrest.<sup>22</sup>

<sup>22</sup> Because the standards are identical, there is no need for further investigation before the probable cause determination can be made. "Presumably, whomever the police arrest they must arrest on 'probable cause.' It is not the function of the police to arrest, as it were, at large and to use an interrogating process at police headquarters in order to determine whom they should charge before a committing magistrate on 'probable cause.'" *Mallory v. United States*, 354 U. S. 449, 456 (1957).

Passing  
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 to G. J.?  
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 by getting  
 an  
 indictment  
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 ordinarily



That standard—probable cause to believe the suspect has committed a crime—traditionally has been decided in nonadversary proceedings on hearsay and written testimony, and the Court has approved these informal modes of proof.

“Guilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined to that which long experience in the common-law tradition, to some extent embodied in the Constitution, has crystallized into rules of evidence consistent with that standard. These rules are historically grounded rights of our system, developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property.

“In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved.” *Brinegar v. United States*, 338 U. S. 160, 174-175 (1949).

Cf. *McCray v. Illinois*, 386 U. S. 300 (1967).

The use of these informal procedures is justified not only by the lesser consequences of a probable cause determination but also by the nature of the determination itself. It does not require the fine resolution of conflicting evidence that a reasonable-doubt or even a preponderance standard demands, and credibility determinations are seldom crucial in deciding whether the evidence supports a reasonable belief in guilt. See F. Miller, *The Decision to Charge a Suspect with a Crime* 64-109 (1969). This is not to say that <sup>the</sup> Confrontation and cross-examination might not enhance the reliability of probable cause

Prosecution:



determinations in some cases, but in most cases their value would be too slight to justify holding, as a matter of constitutional principle, that these formalities and safeguards designed for trial must also be employed in making the Fourth Amendment determination of probable cause.<sup>23</sup>

Our system of criminal justice is already overburdened, and it is subject to valid criticism when overemphasis on procedural and evidentiary formalities results in delayed justice, repetitive trials, and burdensome expense for both the State and the accused.

Because of its limited function and its nonadversary character, the probable cause determination is not a "critical stage" in the prosecution that would require appointed counsel. We have identified as "critical stages" those pretrial procedures that would impair defense on the merits if the accused is required to proceed without counsel. *Coleman v. Alabama*, 399 U. S. 1

The Court has

<sup>23</sup> In *Morrissey v. Brewer*, 408 U. S. 471 (1972), and *Gagnon v. Scarpelli*, 411 U. S. 778 (1973), we held that a parolee or probationer arrested prior to revocation is entitled to an informal preliminary hearing at the place of arrest, with some provision for live testimony. 408 U. S., at 487; 411 U. S., at 786. That preliminary hearing, more than the probable cause determination required by the Fourth Amendment, serves the purpose of gathering and preserving live testimony, since the final revocation hearing frequently is held at some distance from the place where the violation occurred. 408 U. S., at 485; 411 U. S., at 872-873 n. 5. Moreover, revocation proceedings may offer less protection from initial error than the more formal criminal process, where violations are defined by statute and the prosecutor has a professional duty not to charge a suspect with crime unless he is satisfied of probable cause. See ABA Code of Professional Responsibility, D. R. 7-103 (A) (the prosecutor has a professional responsibility "not [to] institute or cause to be instituted criminal charges when he knows or it is obvious that the charges are not supported by probable cause"); ABA Standards Relating to the Administration of Criminal Justice, The Prosecution Function, §§ 1.1, 3.4, 3.9 (1974); American College of Trial Lawyers, Code of Trial Conduct, rule 4 (c).

Penny -  
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better.  
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have to  
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but you  
have  
put this  
very well



preliminary

(1970); *United States v. Wade*, 388 U. S. 218, 226 (1967). In *Coleman v. Alabama*, where the Court held that a preliminary hearing was a critical stage of an Alabama prosecution, the majority and concurring opinions identified two critical factors that distinguish the Alabama preliminary hearing from the probable cause determination required by the Fourth Amendment. First, under Alabama law the function of the hearing was to determine whether the evidence justified charging the suspect with an offense. A finding of no probable cause could mean that he would not be tried at all. The Fourth Amendment probable cause determination is addressed only to pretrial custody. To be sure, pretrial custody may affect to some extent the defendant's ability to assist in preparation of his defense, but this is not the kind of substantial harm identified as controlling in *Wade* and *Coleman*. Second, Alabama allowed the suspect to confront and cross-examine prosecution witnesses at the preliminary hearing. The Court noted that the suspect's defense on the merits could be compromised if he had no legal assistance for exploring or preserving the witnesses' testimony. This consideration does not apply to the informal, nonadversary procedure required under the Fourth Amendment.

The reasons that make a nonadversary proceeding appropriate, however, do not justify denying the suspect an opportunity to be present and participate in the determination.<sup>24</sup> Our system of justice operates on the premise

<sup>24</sup> The procedures suggested in the Uniform Rules of Criminal Procedure (Proposed Final Draft 1974) and the A. L. I. Model Code of Pre-arraignment Procedure (Tent. Draft No. 5, 1972, and Tent. Draft No. 5A, 1973) are instructive. Under the Uniform Rules, a person arrested without a warrant is entitled, "without unnecessary delay," to a first appearance before a magistrate and a determination that grounds exist for issuance of an arrest warrant. The determination may be made on affidavits or testimony, in the presence of



that the subject of a judicial proceeding is entitled to participate unless there is good reason to exclude him. See *Rees v. City of Watertown*, 86 U. S. (19 Wall.) 107, 122-123 (1873). The Fourth Amendment is not inconsistent with that concept. The procedures normally followed in applying for warrants are *ex parte* proceedings by necessity, as notifying the suspect would often frustrate the purpose of the warrant. See T. Taylor, *Two Studies in Constitutional Interpretation* 81-82 (1969). But when the suspect is already in custody, and the only issue is probable cause for detention, he should be allowed to participate in the determination. Allowing him to appear before the magistrate and giving him an opportunity

the accused. Rule 311. Persons who remain in custody for inability to qualify for pretrial release are offered another opportunity for a probable cause determination at the detention hearing, held no more than 5 days after arrest. This is an adversary hearing, and the parties may summon witnesses, but reliable hearsay may be considered. Rule 344.

The Model Code of Pre-arraignment Procedure also provides a first appearance, at which a warrantless arrest must be supported by a reasonably detailed written statement of facts. § 310. The magistrate may make a determination of probable cause to hold the accused, but he is not required to do so and the accused may request an attorney for an "adjourned session" of the first appearance to be held within 2 "court days." At that session, the magistrate makes a determination of probable cause upon a combination of written and live testimony:

"The arrested person may present written and testimonial evidence and arguments for his discharge and the state may present additional written and testimonial evidence and arguments that there is reasonable cause to believe that he has committed the crime of which he is accused. The state's submission may be made by means of affidavits, and no witnesses shall be required to appear unless the court, in the light of the evidence and arguments submitted by the parties, determines that there is a basis for believing that the appearance of one or more witnesses for whom the arrested person seeks subpoenas might lead to a finding that there is no reasonable cause." § 310.2 (2) (Tent. Draft No. 5A, 1973).

Penney —  
Is there a  
reason for  
this  
sentence?



to speak or to submit written evidence for consideration along with the State's presentation could enhance both the reliability and the fairness of the proceeding. The burden on the State would be minimal. Virtually all jurisdictions require that arrested persons be presented to a judicial officer within a short time after arrest, see A. L. I., Model Code of Pre-arraignment Procedure 230-231 (Tent. Draft No. 1, 1966), and every jurisdiction makes some provision for setting bail or determining other conditions of pretrial release. See L. Katz, *Justice Is the Crime*, Appendix B, at 247-365 (1972). Since the defendant is already in the courtroom, the issue of probable cause may be decided at that time with little or no inconvenience to the State. In fact, the suspect's first appearance before a magistrate traditionally has been considered the proper time for determining whether there is probable cause for detention. 1 Hale, *Pleas of the Crown* 589-590 (1736); 2 *id.*, at 77-95; 2 Hawkins, *Pleas of the Crown* 116-117 (4th ed. 1762); see *McNabb v. United States*, 318 U. S. 332, 342-344 (1943); Amsterdam, *Perspective on the Fourth Amendment*, 58 Minn. L. Rev. 349, 391 & n. 408 (1974). Although the Federal Rules of Criminal Procedure do not explicitly acknowledge this function of the first appearance, this Court has interpreted them to require a determination of probable cause at that stage. *Jaben v. United States*, 381 U. S. 214 (1965); *Mallory v. United States*, 354 U. S. 449, 454 (1957).<sup>25</sup>

<sup>25</sup> In an *amicus* brief filed on behalf of the United States, the Solicitor General suggested that *McNabb* <sup>and</sup> ~~and~~ *Mallory* had mistaken the purpose of the first appearance, and that actual practice is otherwise. Cf. Note, *Probable Cause at the Initial Appearance in Warrantless Arrests*, 45 So. Cal. L. Rev. 1128 (1972); *McNabb*, of course, was decided before the adoption of the Federal Rules of Criminal Procedure. It interpreted a statutory requirement that an arrested



There is no single proper method for making the probable cause determination required by the Fourth Amendment. The States have many different patterns of criminal procedure, and each may adapt its own to provide a swift and reliable probable cause determination with the least burden to its system. Like many jurisdictions, Florida requires every arrested person to be brought before a magistrate within 24 hours, unless sooner released. Fla. Rule Crim. Proc. 3.310 (b). At that appearance the defendant is told of the charges against him, furnished a copy of the complaint, advised of his constitutional rights, and provided counsel if he is indigent. The magistrate then sets bail or prescribes other conditions of pretrial release. One of the factors typically relied upon in making this decision is the weight of evidence against the accused. ABA Standards Relating to the Administration of Criminal Justice, Pretrial Release § 5.1 (1974); see 18 U. S. C. § 3146 (b). Expanding that determination to a test of probable cause would be a natural way of integrating the probable cause decision with existing procedures.

In other States, existing procedures may satisfy the requirement of the Fourth Amendment. Some States already authorize a hearing on probable cause at or immediately following the suspect's first appearance.

person be brought before a magistrate without unnecessary delay. 318 U. S., at 342. *Mallory* was decided after the federal rules were adopted, and although the interpretation of the federal rules was dictum, it clearly outlined the Court's view:

"The scheme for initiating a federal prosecution is plainly defined. The police may not arrest upon mere suspicion but only on 'probable cause.' The next step in the proceeding is to arraign the arrested person before a judicial officer as quickly as possible so that he may be advised of his rights and so that the issue of probable cause may be promptly determined." 354 U. S., at 454.

The use of the word "arraign" was in error, as arraignment occurs later in the process. Fed. Rule Crim. Proc. 10.



*E. g.*, Colo. Rev. Stat. § 39-2-7; Hawaii Rev. Stat. § 708-709. Others may choose simply to accelerate their existing preliminary hearings. What the Fourth Amendment requires for pretrial restraint on liberty<sup>26</sup> is a reliable determination of probable cause made either before or promptly after arrest, and preferably no later than the first appearance before a judicial officer. If made after arrest, the suspect must be allowed to be present. Each State may choose the procedure that best accommodates this determination to its existing practice.<sup>27</sup>

*and to be heard.*

## IV

We agree with the Court of Appeals that the Fourth Amendment requires a timely judicial determination of probable cause as a prerequisite to detention, and we accordingly affirm that much of the judgment. As we do not agree that the Fourth Amendment requires the adversary hearing outlined in the District Court's decree, we reverse in part and remand to the Court of Appeals for further proceedings consistent with this opinion.

<sup>26</sup> Because the probable cause determination is not a constitutional prerequisite to the charging decision, it is required only for those suspects who suffer restraints on liberty other than the condition that they appear for trial. There are many kinds of pretrial release and many degrees of conditional liberty. See 18 U. S. C. § 3146; ABA Standards Relating to the Administration of Criminal Justice, Pretrial Release § 5.2 (1974); Uniform Rules of Criminal Procedure, Rule 321 (Proposed Final Draft 1974). We cannot define specifically those that would require a prior probable cause determination, but the key factor is significant restraint on liberty.

<sup>27</sup> Of course, if the State incorporates the probable cause determination into a multipurpose hearing, the necessity for appointed counsel at the combined proceeding must be governed by the principles of *Coleman v. Alabama*, *supra*.

*United States v. Wade and*



LFP  
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12/16

CHAMBERS DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-477

Richard E. Gerstein, State At- torney for Eleventh Judicial Circuit of Florida, Petitioner, v. Robert Pugh et al.	}	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.
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[December —, 1974]

MR. JUSTICE POWELL delivered the opinion of the Court.

The issue in this case is whether a person arrested under a prosecutor's information is constitutionally entitled to a judicial determination of probable cause for pretrial restraint of liberty.

I

In March 1971 respondents Pugh and Henderson were arrested in Dade County, Florida. Each was charged with several offenses under a prosecutor's information.<sup>1</sup> Pugh was denied bail because one of the charges against him carried a potential life sentence, and Henderson was ~~held~~ *remained* in custody because he was unable to post a \$4,500 bond.

<sup>1</sup> Respondent Pugh was arrested on March 3, 1971. On March 16 an information was filed charging him with robbery, carrying a concealed weapon, and possession of a firearm during commission of a felony. Respondent Henderson was arrested March 2, and charged by information on March 19 with the offenses of breaking and entering and assault and battery. The record does not indicate whether ~~either was arrested under a warrant.~~

*There was an arrest warrant in either case.*



Footnote 2A:

Two other procedures may provide an opportunity to challenge probable cause ~~after~~<sup>g</sup> about a month after arrest. One, Fla. Stat. Ann. § 907.045 (1973), seems to provide that every defendant confined for 30 days is entitled to a ~~mandatory~~<sup>g</sup> preliminary hearing upon application for writ of habeas corpus. It has apparently been construed to vest trial courts with discretion to deny the hearing. See Evans v. State, 197 So.<sup>2d</sup> 323 (Fla. Ct. App. 1967). But cf. Karx v. Overton, 249 So. 2d 763 (Fla. Ct. App. 1971). ~~The State~~<sup>g</sup> Counsel for Petitioner ~~also~~<sup>g</sup> represented at oral argument that arraignment afforded<sup>g</sup> the suspect an opportunity to "attack the sufficiency of the evidence ~~and~~<sup>g</sup> to hold him." Tr. Oral Argument, Mar. 25, 1974, at 17. This may in fact be the practice, although the Florida rules provide no support for it, <sup>see</sup> Fla. Rule Crim. Proc. 3.160, ~~but~~<sup>g</sup> The District Court found that the procedures used in filing informations allow a delay of a month or more ~~and~~<sup>g</sup> between arrest and arraignment. 332 F. Supp., at \_\_\_\_\_. <sup>Thus, even</sup> For



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p. 2

In Florida, indictments are required only for prosecution of offenses punishable by death. Prosecutors may charge all other crimes by information, without a prior preliminary hearing and without obtaining leave of court. Fla. Rule Crim. Proc. 3.140 (Supp. 1974); Montgomery v. State, 176 So. 2d 331 (Fla. 1965); Baugus v. State, 141 So. 2d 264 (Fla. 1962). At the time respondents were arrested, a Florida rule seemed to authorize ~~adversary~~ preliminary hearings to test probable cause for detention in all cases. Fla. Rule Crim. Proc. 1.122 (amended 1972). But the Florida courts had held that the filing of an information foreclosed the suspect's right to a preliminary hearing. See Bradley v. State, 265 So. 2d 533 (Fla.), cert. denied, 411 U.S. 916 (1973); State ex rel. Hardy v. Blount, 261 So. 2d 172 (Fla. 1972). ~~The State offered~~ ~~no other procedure was~~ ~~provided by which~~ ~~a person charged by information~~ ~~to~~ ~~could~~ obtain a judicial determination of probable cause for detention. See Sullivan v. State ex rel. McCrory, ~~a person charged by information~~



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In Florida, indictments are required only for prosecution of offenses punishable by death. All other criminal offenses may be prosecuted by information, and violations of municipal ordinances may be prosecuted by a simple affidavit or docket entry. Fla. Rule Crim. Proc. 3.140 (Supp. 1974). At the time respondents were arrested, Florida's rules of criminal procedure authorized only one method for determining the existence of probable cause to hold a suspect in jail pending trial. Fla. Rule Crim. Proc. 1.122 (amended 1972). This proceeding, an adversary preliminary hearing, was not available to a suspect who had already been charged by information. See *Bradley v. State*, 265 So. 2d 533 (Fla.), cert. denied, 411 U. S. 916 (1973); *State ex rel. Hardy v. Blount*, 261 So. 2d 172 (Fla. 1972).<sup>2</sup> Moreover, in those instances when a preliminary hearing was held and the suspect discharged, the prosecutor could reinstate the charge and return him to custody by filing an information. See *Montgomery v. State*, 176 So. 2d 331 (Fla. 1965); *Baugus v. State*, 141 So. 2d 264 (Fla. 1962). As a result, a person charged by information could be detained pending trial solely on the decision of a prosecutor.

Respondents Pugh and Henderson filed a class action against Dade County officials in the Federal District Court,<sup>3</sup> claiming a constitutional right to a judicial hearing on the issue of probable cause and requesting declaratory and injunctive relief.<sup>4</sup> Respondents Turner and

<sup>2</sup> Florida law also denies preliminary hearings to persons confined under indictment, *Sangaree v. Hamlin*, 235 So. 2d 729 (Fla. 1970), Fla. Rule Crim. Proc. 3.131, but that procedure is not challenged in this case.

<sup>3</sup> The complaint was framed under 42 U. S. C. § 1983, and jurisdiction in the District Court was based on 28 U. S. C. § 1343 (3).

<sup>4</sup> Respondents did not ask for release from state custody, even as an alternate remedy. They only asked that the state authorities be ordered to give them a probable cause determination. This was



Faulk, also in custody under informations, subsequently intervened.<sup>5</sup> Petitioner Gerstein, the State Attorney for Dade County, was one of several defendants.<sup>6</sup>

After an initial delay while the Florida legislature considered a bill that would have afforded preliminary hearings to persons charged by information, the District Court granted the relief sought. *Pugh v. Rainwater*, 332 F. Supp. 1107 (SD Fla. 1971). ~~After certifying the case as a class action under Fed. Rule Civ. Proc. 23 (b) (2), the Court held that the Fourth and Fourteenth Amendments give all arrested persons charged by information a right to a judicial hearing on the question of probable cause. The District Court ordered the Dade County defendants to give the named plaintiffs an immediate preliminary hearing to determine probable cause for further detention.~~<sup>7</sup> It also ordered them to submit a

also the only relief that the District Court ordered for the named respondents. — F. Supp. —. Because release was neither asked nor ordered, the lawsuit did not come within the class of cases for which habeas corpus is the exclusive remedy. *Preiser v. Rodriguez*, 411 U. S. 475 (1973); see *Wolff v. McDonnell*, 94 S. Ct. 2963, 2973-2974 (1974).

<sup>5</sup> Turner was being held on a charge of auto theft, following arrest on March 11, 1971. Faulk was arrested on March 19 on charges of soliciting a ride and possession of marihuana.

<sup>6</sup> The named defendants included justices of the peace and judges of small-claims courts, who were authorized to hold preliminary hearings in criminal cases, and a group of law enforcement officers with power to make arrests in Dade County. Gerstein was the only one who petitioned for certiorari following the Court of Appeals' decision.

<sup>7</sup> The District Court correctly held that respondents' claim for relief was not barred by the equitable restrictions on federal intervention in state prosecutions, *Younger v. Harris*, 401 U. S. 37 (1971). The injunction was not directed at the state prosecutions as such, but only at the legality of pretrial detention without a judicial hearing, an issue that could not be raised in defense ~~of~~ the criminal prosecution. The order to hold preliminary hearings could not

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plan providing preliminary hearings in all cases instituted by information.

~~Only one such plan was submitted~~, and the District Court adopted it with modifications. The final order prescribed a detailed post-arrest procedure. 336 F. Supp. 490. Upon arrest the accused would be taken before a magistrate for a "first appearance hearing." The magistrate would explain the charges, advise the accused of his rights, appoint counsel if he was indigent, and proceed with a probable cause determination unless either the prosecutor or the accused was unprepared. If either <sup>requested</sup> ~~asked for~~ more time, the magistrate would set the date for a "preliminary hearing," to be held ~~no more than~~ <sup>within</sup> four days ~~later~~ if the accused was in custody and ~~no more than~~ <sup>within</sup> 10 days ~~later~~ if he had been released pending trial.

~~At the hearing~~ the accused would be entitled to counsel, and he would be allowed to confront and cross-examine adverse witnesses, to summon favorable witnesses, and to have a transcript made on request. If the magistrate found no probable cause, the accused would be discharged. He then could not be charged with the same offense by complaint or information, but only by indictment returned within 30 days. ~~The plan also provided sanctions for failure to hold hearings at the prescribed times.~~

The Court of Appeals for the Fifth Circuit stayed the District Court's order pending appeal, but while the case was awaiting decision, the Dade County judiciary voluntarily adopted a similar procedure of its own. Upon learning of this development, the Court of Appeals remanded the case for specific findings on the constitutionality of the new Dade County system. Before the District Court issued its findings, however, the Florida

prejudice the conduct of trial on the merits. See *Conover v. Montemuro*, 477 F. 2d 1073, 1082 (CA5 1973); cf. *Perez v. Ledesma*, 401 U. S. 82 (1971); *Stefanelli v. Minard*, 342 U. S. 117 (1951).

The order provided sanctions for failure to hold the hearings at prescribed times. At the "preliminary hearing"

→ The defendants submitted a plan authored by Sheriff E. Wilson Purdy,



Supreme Court amended the procedural rules governing preliminary hearings statewide, and the parties agreed that the District Court should direct its inquiry to the new rules rather than the Dade County procedures.

Under the amended rules every arrested person must be taken before a judicial officer within 24 hours. Fla. Rule Crim. Proc. 3.130. This "first appearance" is similar to the "first appearance hearing" ordered by the District Court in all respects but the crucial one: the magistrate does not make a determination of probable cause. The rule amendments also changed the procedure for preliminary hearings, restricting them to felony charges and codifying the rule that no hearings are available to persons charged by information or indictment. Rule 3.131; see *In re Rule 3.131 (b)*, *Florida Rules of Criminal Procedure*, 282 So. 2d — (Fla. 1972).<sup>a</sup>

In a supplemental opinion the District Court held that the amended rules had not answered the basic constitutional objection, since a defendant charged by information still could be detained pending trial without a judicial determination of probable cause. 355 F. Supp. 1286. Reaffirming ~~the~~ original ruling, the District Court declared that the continuation of this practice was unconstitutional.<sup>b</sup> The Court of Appeals affirmed, 483 F. 2d

<sup>a</sup> Fla. Stat. Ann. § 907.045 (1973), seems to provide that every defendant confined for 30 days is entitled to a mandatory preliminary hearing upon application for writ of habeas corpus, but it apparently has been construed to vest trial courts with discretion to deny the hearing. See *Evans v. State*, 197 So. 323 (Fla. Ct. App. 1967). But cf. *Karz v. Overton*, 249 So. 2d 763 (Fla. Ct. App. 1971).

<sup>b</sup> Although this ruling held a statewide "legislative rule" unconstitutional, it was not outside the jurisdiction of a single judge by virtue of 28 U. S. C. § 2281. The original complaint did not ask for an injunction against enforcement of any state statute or legislative rule of statewide application, since the practice of denying preliminary hearings to persons charged by information was then em-

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778, modifying the District Court's decree in minor particulars and suggesting that the form of preliminary hearing provided by the amended Florida rules would be acceptable, as long as it was provided to all defendants in custody pending trial. *Id.*, at 788.<sup>30</sup> State Attorney

bodied only in judicial decisions. The District Court therefore had jurisdiction to issue the initial injunction, and the Court of Appeals had jurisdiction over the appeal. On remand, the constitutionality of a state "statute" was drawn into question for the first time when the criminal rules were amended. The District Court's supplemental opinion can fairly be read as a declaratory judgment that the amended rules were unconstitutional; the injunctive decree was never amended to incorporate that holding; and the opinion in the Court of Appeals is not inconsistent with the conclusion that the District Court did not enjoin enforcement of the statewide rule. See 483 F. 2d, at 788. Accordingly, a district court of three judges was not required for the issuance of this order. See *Kennedy v. Mendoza-Martinez*, 372 U. S. 144, 152-155 (1963); *Flemming v. Nestor*, 363 U. S. 603, 606-608 (1960).

<sup>30</sup> The major difference between the District Court's order and that of the Court of Appeals centered on the question whether a probable cause hearing is required for all arrested persons charged by information or only for those confined pending trial. The District Court's original decree required preliminary hearings for all arrested persons. 332 F. Supp., at —. On remand, the District Court made an exception for persons charged with misdemeanors who neither suffered pretrial detention nor faced imprisonment upon conviction. 355 F. Supp., at —. The Court of Appeals explicitly limited the hearing right for misdemeanor defendants to those who are jailed pending trial. 483 F. 2d, at 789. Its opinion also suggests, without stating explicitly, that the hearing right is similarly limited to felony defendants who are confined pending trial. *Id.*, at 787, 789.

The Court of Appeals vacated ~~both the portion of~~ the District Court's order that prescribed time periods different from those in the amended rules, and ~~the~~ sanctions for failure to comply with the hearing requirements. ~~It affirmed the District Court's holding on remand that the amended rules' extended time periods for capital and life imprisonment offenses was a violation of equal protection.~~ Our disposition of the case makes it unnecessary to address the specific terms of the District Court's decree.

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Gerstein petitioned for review, and we granted certiorari because of the importance of the issue.<sup>11</sup> We affirm in part and reverse in part.

## II

As framed by the proceedings below, this case presents two issues: whether a person arrested and held for trial

<sup>11</sup> At oral argument counsel informed us that the named respondents have been convicted. Their pretrial detention ~~therefore~~ has ended, but this case belongs to that narrow class of cases in which the termination of a class representative's claim does not moot the claims of the unnamed members of the class. See *Sosna v. Iowa*, No. 73-762. Pretrial detention is by nature temporary, and it is most unlikely that any given individual could have his constitutional claim decided on appeal before he is either released or convicted. The individual could nonetheless suffer repeated deprivations, and it is certain that other persons similarly situated will be detained under the allegedly unconstitutional procedures. The claim, in short, is one that is distinctly "capable of repetition, yet evading review."

At the time the complaint was filed, the named respondents were members of a class of persons detained without a judicial probable cause determination, but the record does not indicate whether any of them ~~respondents~~ were still in custody awaiting trial when the District Court certified the class ~~action~~. Despite the absence of such a showing, ~~which would ordinarily be required to avoid mootness under Sosna, this case is not moot.~~ The length of pretrial custody cannot be ascertained at the outset, and it may be ended at any time by release on recognizance, dismissal of the charges, or a guilty plea, as well as by acquittal or conviction after trial. It is by no means certain that any given individual would be in pretrial custody long enough for a district judge to certify a class action. Moreover, ~~this is the kind of case in which the constant existence of a class of persons suffering the deprivation is certain. The attorney representing the named respondents is a public defender, and we may safely assume that he has other clients with a continuing live interest in the case. This controversy, therefore, is a suitable exception to the Sosna rule that mootness of a class action that is "capable of repetition, yet evading review" ordinarily is governed by determining whether the named representatives were members of the class at the time of certification. See Sosna, supra, at —; cf. Rivera v. Freeman, 460 F.2d 1159 (CA9 1972).~~

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exception to  
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See *Sosna*,  
*supra* at —  
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*Rivera v.*  
*Freeman*,  
469 F.2d 1159  
(CA9 1972).



on an information is entitled to a judicial determination of probable cause for detention, and if so, whether the adversary hearing ordered by the District Court and approved by the Court of Appeals is required by the Constitution.

## A

Both the standards and procedures for arrest and detention have been derived from the Fourth Amendment and its common-law antecedents. See *Cupp v. Murphy*, 412 U. S. 291, 294-295 (1973); *Ex parte Bollman*, 8 U. S. (4 Cranch) 75 (1807); *Ex parte Burford*, 7 U. S. (3 Cranch) 447 (1806). 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." *Beck v. Ohio*, 479 U. S. 89, 91 (1964). See also *Henry v. United States*, 361 U. S. 98 (1959); *Brinegar v. United States*, 338 U. S. 160, 175-176 (1949); *Johnson v. United States*, 333 U. S. 10 (1948).

This standard represents a compromise between the individual's right to liberty and the community's responsibility for controlling crime.

These long-prevailing standards seek to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime. They also seek to give fair leeway for enforcing the law in the community's protection. Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability. The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating these often opposing interests.

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Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice." *Brinegar v. United States*, *supra*, at 176.

To implement the Fourth Amendment's protection against unfounded invasions of liberty and privacy, the Court has required that the existence of probable cause be decided by a neutral and detached magistrate whenever possible. The classic statement of this principle appears in *Johnson v. United States*, *supra*, at 13-14:

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

See also *Terry v. Ohio*, 392 U. S. 1, 20-22 (1968).

Maximum protection of individual rights could be assured by requiring a magistrate's review of the factual justification prior to any arrest, but such a requirement would severely handicap legitimate law enforcement. ~~In striking a balance between these opposing interests,~~ the Court has expressed a preference for the use of arrest warrants when possible. *Beck v. Ohio*, 379 U. S. 89, 96 (1964); *Wong Sun v. United States*, 371 U. S. 471, 479-482 (1963), ~~but~~ it has never invalidated an arrest supported by probable cause solely because the officers had failed to secure a warrant. See *Ker v. California*, 374 U. S. 23 (1963); *Draper v. United States*, 358 U. S. 307 (1959); *Trupiano v. United States*, 334 U. S. 699, 705 (1948).<sup>22</sup>

<sup>22</sup> Another aspect of *Trupiano* was overruled in *United States v.*

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Under this practical compromise, a policeman's on-the-scene assessment of probable cause is legal justification for arresting a person suspected of crime. ~~The police-~~ <sup>and for</sup> ~~man's judgment also justifies~~ a brief period of detention to take ~~the~~ administrative steps ~~necessary for arrest, but~~ <sup>incident to</sup> once the suspect is in custody, the reasons that justify dispensing with the magistrate's neutral judgment evaporate. There ~~is~~ <sup>is</sup> no longer any danger that the suspect will escape or commit further crimes while the police submit their evidence to a magistrate. ~~And, from the suspect's point of view,~~ the consequences of prolonged detention may be more serious than the interference occasioned by arrest. Pretrial confinement may imperil the suspect's job, interrupt his source of income, and impair his family relationships. Even pretrial release may be accompanied by burdensome conditions that effect a significant restraint on liberty. See R. Goldfarb, Ransom 32-91 (1965); L. Katz, Justice Is the Crime 51-62 (1972). When the stakes are this high, the detached judgment of a neutral magistrate is essential if the Fourth Amendment is to furnish meaningful protection from unfounded interference with liberty. Accordingly, we hold that the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint on liberty following arrest.

And, while the state's reasons for taking summary action subside, the suspect's need for a neutral determination of probable cause increases significantly.

This result has historical support in the common law that has guided interpretation of the Fourth Amendment. See *Carroll v. United States*, 267 U. S. 132, 149

*Rabinowitz*, 339 U. S. 56 (1950), which was overruled in turn by *Chimel v. California*, 395 U. S. 752.

The issue of warrantless arrest that has generated the most controversy, and which remains unsettled, is whether and under what circumstances an officer may enter a suspect's home to make a warrantless arrest. See *Coolidge v. New Hampshire*, 403 U. S. 443, 474 (1971); *id.*, at 510-512 (WHITE, J., dissenting); *Jones v. United States*, 357 U. S. 493, 499-500 (1958).



(1925). At common law it was customary, if not obligatory, for an arrested person to be brought before a justice of the peace shortly after arrest. 2 Hale, Pleas of the Crown 77, 81, 95 (1736); 2 Hawkins, Pleas of the Crown 116-117 (4th ed. 1762). See also *Kurtz v. Moffitt*, 115 U. S. 478, 498-499 (1885).<sup>13</sup> The justice of the peace would "examine" the prisoner and the witnesses to determine whether there was reason to believe the prisoner had committed a crime. If there was, the suspect would be committed to jail or bailed pending trial. If not, he would be discharged from custody. 1 Hale, *supra*, at 583-585; 2 Hawkins, *supra*, at 116-119; 1 J. Stephen, History of the Criminal Law of England 233 (1883).<sup>14</sup>

<sup>13</sup> The primary motivation for the requirement seems to have been the penalty for allowing an offender to escape, if he had in fact committed the crime, and the fear of liability for false imprisonment, if he had not. But Hale also recognized that a judicial warrant of commitment, called a *mittimus*, was required for more than brief detention.

"When a private person hath arrested a felon, or one suspected of a felony, he may detain him in custody till he can reasonably dismiss himself of him; but with as much speed as conveniently he can, he may do either of these things.

"1. He may carry him to the common <sup>gaol</sup> ~~goal~~, . . . but that is now rarely done.

"2. He may deliver him to the constable of the vill, who may either carry him to the common gaol, . . . or to a justice of the peace to be examined, and farther proceeded against as case shall require . . .

"3. Or he may carry him immediately to any justice of peace of the county where he is taken, who upon examination may discharge, bail, or commit him, as the case shall require.

"And the bringing the offender either by the constable or private person to a justice of peace is most usual and safe, because a gaoler will expect a *Mittimus* for his warrant of detaining."

1 *id.*, at 589-590.

<sup>14</sup> The examination of the prisoner was inquisitorial, and the ~~examination of the witnesses was conducted~~ outside the prisoner's presence. ~~The process was considered quite harsh, until statutory reform.~~

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The initial determination of probable cause also could be reviewed by higher courts on a writ of habeas corpus. 2 Hawkins, *supra*, at 112-115; 1 J. Stephen, *supra*, at 243; see *Ex parte Bollman*, 8 U. S. (4 Cranch) 75, 97-101 (1807). This practice furnished the model for criminal procedure in America immediately following the adoption of the Fourth Amendment, see *Ex parte Bollman*, 8 U. S. (4 Cranch) 75 (1807); <sup>15</sup> *Ex parte Burford*, 7 U. S. (3 Cranch) 447 (1806); *Ex parte Hamilton*, 3 U. S. (3 Dall.) 17 (1795), and there are indications that the Framers of the Bill of Rights regarded it as a model for a "reasonable" seizure. See *Draper v. United States*, 358 U. S. 307, 317-320 (1959) (DOUGLAS, J., dissenting).<sup>16</sup>

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~~was accomplished in 1849~~, 1 J. Stephen, at 225, but it was well established that if the investigation turned up insufficient evidence of ~~the~~ his prisoner's guilt, ~~he was entitled to be discharged.~~

<sup>15</sup> In *Ex parte Bollman*, two men charged in the Aaron Burr ~~case~~ <sup>case</sup> ~~treason~~ were committed following an examination in the circuit court of the District of Columbia. They filed a petition for writ of habeas corpus in the Supreme Court. The Court, in an opinion by Chief Justice Marshall, affirmed its jurisdiction to issue habeas corpus to persons in custody by order of federal trial courts. Then, following arguments on the Fourth Amendment requirement of probable cause, the Court surveyed the evidence against the prisoners and held that it did not establish probable cause that they were guilty of treason. The prisoners were discharged.

<sup>16</sup> A similar procedure at common law, the warrant for recovery of stolen goods, is said to have furnished the model for a "reasonable" search under the Fourth Amendment. The victim was required to appear before a justice of the peace and make an oath of probable cause that his goods could be found in a particular place. After the warrant was executed, and the goods seized, the victim and the alleged thief would appear before the justice of the peace for a prompt determination of the cause for seizure of the goods and detention of the thief. 2 Hale, *supra*, at 149-152; T. Taylor, Two Studies in Constitutional Interpretation 24-25, 39-40 (1969); see *Boyd v. United States*, 116 U. S. 616, 626-629 (1886).



## B

Under the Florida procedures challenged here, a person arrested without a warrant and charged by information may be jailed or subjected to other restraints pending trial without any opportunity for a probable cause determination.<sup>17</sup> There is no provision for a test of probable cause at the first appearance before a magistrate or at the hearing to set bail. Fla. Rule Crim. Proc. 3.130; see *Pugh v. Rainwater*, 483 F. 2d 778, 781 n. 8 (CA5 1973), and the suspect cannot demand a preliminary hearing. Fla. Rule Crim. Proc. 3.131 (a). The Florida Supreme Court has held that habeas corpus cannot be used to test the probable cause for detention under an information. *Sullivan v. State ex rel. McCrory*, 49 So. 2d 794 (Fla. 1951). The arraignment may be delayed as much as a month, and it is not clear that the issue of probable cause can be raised then.<sup>18</sup>

Finally, the

<sup>17</sup> A person arrested under a warrant would have received a prior judicial determination of probable cause. Under Fla. Rule Crim. Proc. 3.120, a warrant may be issued upon a sworn complaint that states facts showing that the suspect has committed a crime. The magistrate may also take testimony under oath to determine if there is reasonable ground to believe the complaint is true.

The District Court found that the procedures used in filing informations allow a delay of a month or more between arrest and arraignment. First, processing of the information does not begin until the arresting officer appears before an assistant state attorney and files an affidavit of facts. This appearance is delayed anywhere from 24 hours to two weeks after arrest. If the state attorney decides to file an information, the papers are prepared and the information is filed and set for arraignment. The average delay from the time the arresting officer appears and the time of arraignment is 10 to 15 days.

The Court of Appeals assumed, for purposes of this case, that the defendant would have an opportunity to challenge the probable cause underlying the information at his arraignment, but noted that if the assumption was groundless, a person charged by informa-

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## GERSTEIN v. PUGH

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Prosecutor

Petitioner defends this practice on the ground that the prosecutor's decision to file an information is itself a determination of probable cause and that furnishes sufficient reason to detain a defendant pending trial. Although a conscientious decision that the evidence warrants affords a measure of protection against unfounded detention, we do not think prosecutorial judgment standing alone meets the requirements of the Fourth Amendment. Indeed, we think the Court's previous decisions compel disapproval of the Florida procedure. In *Albrecht v. United States*, 273 U. S. 1, 5 (1927), the Court held that an arrest warrant issued solely upon a United States Attorney's information was invalid because the accompanying affidavits were defective. Although the Court's opinion did not explicitly state that the prosecutor's official oath could not furnish probable cause, that conclusion was implicit in the judgment that the arrest was illegal under the Fourth Amendment.<sup>19</sup> More recently, in *Coolidge v. New Hampshire*, 403 U. S. 443, 449-453 (1971), the Court held that a prosecutor's

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~~tion would have no opportunity to challenge probable cause before trial. 483 F.2d, at 781, n. 2. The Florida rule governing arraignment does not suggest that the procedure contemplates a challenge to probable cause, or any consideration of pretrial custody. It merely provides that the arraignment shall consist of reading the indictment or information to the defendant and calling upon him to plead. Fla. Rule Crim. Proc. 3.190.~~

<sup>19</sup> By contrast, the Court has held that an indictment, "fair upon its face," and returned by a "properly constituted grand jury" conclusively determines the existence of probable cause and requires issuance of an arrest warrant without further inquiry. *Ex parte United States*, 287 U. S. 241, 250 (1932). See also *Giordenello v. United States*, 357 U. S. 480, 487 (1958). The willingness to let a grand jury's judgment substitute for that of a neutral and detached magistrate is attributable to the grand jury's relationship to the courts and its historical role of protecting individuals from unjust prosecution. See *United States v. Calandra*, 414 U. S. 338, 342-346 (1974).



responsibility to law enforcement is inconsistent with the constitutional role of a neutral and detached magistrate. We reaffirmed that principle in *Shadwick v. City of Tampa*, 407 U. S. 345 (1972), and held that probable cause for the issuance of an arrest warrant must be determined by someone independent of police and prosecution.<sup>20</sup> The reason for this separation of functions was expressed by Justice Frankfurter in a similar context:

"A democratic society, in which respect for the dignity of all men is central, naturally guards against the misuse of the law enforcement process. Zeal in tracking down crime is not in itself an assurance of soberness of judgment. Disinterestedness in law enforcement does not alone prevent disregard of cherished liberties. Experience has therefore counseled that safeguards must be provided against the dangers of the overzealous as well as the despotic. The awful instruments of the criminal law cannot be entrusted to a single functionary. The complicated process of criminal justice is therefore divided into different parts, responsibility for which is separately vested in the various participants upon whom the criminal law relies for its vindication." *McNabb v. United States*, 318 U. S. 332, 343 (1943).

Interpreting

<sup>20</sup> The Court had earlier reached a different result in *Ocampo v. United States*, 234 U. S. 91 (1914), a criminal appeal from the Philippine Islands. ~~Under~~ a statutory guarantee substantially identical to the Fourth Amendment, Act of July 1, 1902, c. 1369, § 5, 32 Stat. 693-694, the Court held that an arrest warrant could issue solely upon a prosecutor's information. The Court has since held that interpretation of a statutory guarantee applicable to the Philippines is not conclusive for interpretation of a cognate provision in the Federal Constitution, *Green v. United States*, 355 U. S. 184, 194-198 (1957). Even if it were, the result reached in *Ocampo* is incompatible with the later holdings of *Albrecht*, *Coolidge*, and *Shadwick*.



In holding that the prosecutor's assessment of probable cause is not sufficient ~~alone~~ to justify restraint on liberty pending trial, we do not imply that the accused is entitled to judicial oversight or review of a prosecutor's decision to prosecute. Instead, we adhere to the Court's prior holding that a judicial hearing is not prerequisite to prosecution by information. *Lem Woon v. Oregon*, 229 U. S. 586 (1913).<sup>21</sup> Nor do we retreat from the established rule that illegal arrest or detention does not void a subsequent conviction. *Frisbie v. Collins*, 342 U. S. 519 (1952); *Ker v. Illinois*, 119 U. S. 436 (1886). Thus, as the Court of Appeals noted below, ~~a~~ <sup>although</sup> a suspect who is presently detained may challenge the probable cause for that confinement, ~~but~~ a conviction will not be vacated on the ground that the defendant was detained pending trial without probable cause. 483 F. 2d, at 786-787. Compare *Scarborough v. Dutton*, 393 F. 2d 6 (CA5 1968), with *Brown v. Fauntleroy*, — U. S. App. D. C. —, 442 F. 2d 838 (1971), and *Cooley v. Stone*, — U. S. App. D. C. —, 414 F. 2d 1213 (1969).

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### III

Both the District Court and the Court of Appeals held that the determination of probable cause must be accompanied by the full panoply of adversary safeguards—counsel, confrontation, cross-examination, and compulsory process for witnesses. A full preliminary hearing of this sort is modeled after the procedure used in

<sup>21</sup> See also *Beck v. Washington*, 369 U. S. 541 (1962). The opinion in *Beck* cites *Ocampo v. United States*, 234 U. S. 91 (1914), for the same proposition, but the validity of prosecution by information without a preliminary hearing was not at issue in that case. The only issues were whether grand juries were required in the Philippines and, as discussed in n. 20, *supra*, whether the prosecutor's decision to file an information furnished sufficient probable cause for an arrest warrant.



many States to determine whether the evidence justifies going to trial under an information or presenting the case to a grand jury. See *Coleman v. Alabama*, 399 U. S. 1 (1970); Y Kamisar, W. LaFare & J. Israel, *Modern Criminal Procedure* 957-967, 996-1000 (4th ed. 1974). The standard of proof required of the prosecution is usually referred to as "probable cause," but it may approach a prima facie case of guilt. A. L. I. Model Code of Pre-arraignment Procedure, Commentary on Article 330, at 90-91 (Tent. Draft No. 5, 1972). When the hearing takes this form, adversary procedures are customarily employed. The importance of the issue to both the State and the accused justifies the presentation of witnesses and full exploration of their testimony on cross-examination. This kind of hearing also requires appointment of counsel for indigent defendants. *Coleman v. Alabama*, 399 U. S. 1 (1970). And, as the hearing assumes increased importance and the procedures become more complex, the <sup>likelihood</sup> less likely it is that it can be held promptly after arrest. See A. L. I. Model Code of Pre-arraignment Procedure, *supra*, at 33-34.

in some  
jurisdictions

diminishes.

These adversary safeguards are not essential for the probable cause determination required by the Fourth Amendment. The sole issue is whether there is probable cause for detaining the arrested person pending ~~such~~<sup>a</sup> further proceedings ~~as may be afforded by law~~. This issue can be determined reliably without a full adversary hearing. The standard is the same as that for arrest.<sup>22</sup>

ordinarily

<sup>22</sup> Because the standards are identical, there is no need for further investigation before the probable cause determination can be made. "Presumably, whenever the police arrest they must arrest on 'probable cause.' It is not the function of the police to arrest, as it were, at large and to use an interrogating process at police headquarters in order to determine whom they should charge before a committing magistrate on 'probable cause.'" *Mallory v. United States*, 354 U. S. 449, 456 (1957).

ident



That standard—probable cause to believe the suspect has committed a crime—traditionally has been decided in nonadversary proceedings on hearsay and written testimony, and the Court has approved these informal modes of proof.

“Guilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined to that which long experience in the common-law tradition, to some extent embodied in the Constitution, has crystallized into rules of evidence consistent with that standard. These rules are historically grounded rights of our system, developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property.

“In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved.” *Brinegar v. United States*, 338 U. S. 160, 174–175 (1949).

Cf. *McCray v. Illinois*, 386 U. S. 300 (1967).

The use of these informal procedures is justified not only by the lesser consequences of a probable cause determination but also by the nature of the determination itself. It does not require the fine resolution of conflicting evidence that a reasonable-doubt or even a preponderance standard demands, and credibility determinations are seldom crucial in deciding whether the evidence supports a reasonable belief in guilt. See F. Miller, *The Decision to Charge a Suspect with a Crime* 64–109 (1969).

This is not to say that confrontation and cross-examination might not enhance the reliability of probable cause



determinations in some cases, <sup>however,</sup> but in most cases, their value would be too slight to justify holding, as a matter of constitutional principle, that these formalities and safeguards designed for trial must also be employed in making the Fourth Amendment determination of probable cause.<sup>23</sup> Our system of criminal justice is already overburdened, and it is subject to valid criticism when overemphasis on procedural and evidentiary formalities results in delayed justice, repetitive trials, and burdensome expense for both the State and the accused.

Because of its limited function and its nonadversary character, the probable cause determination is not a "critical stage" in the prosecution that would require appointed counsel. We have identified as "critical stages" those pretrial procedures that would impair defense on the merits if the accused is required to proceed without counsel. *Coleman v. Alabama*, 399 U. S. 1

The Court has

<sup>23</sup> In *Morrissey v. Brewer*, 408 U. S. 471 (1972), and *Gagnon v. Scarpelli*, 411 U. S. 778 (1973), we held that a parolee or probationer arrested prior to revocation is entitled to an informal preliminary hearing at the place of arrest, with some provision for live testimony. 408 U. S., at 487; 411 U. S., at 786. That preliminary hearing, more than the probable cause determination required by the Fourth Amendment, serves the purpose of gathering and preserving live testimony, since the final revocation hearing frequently is held at some distance from the place where the violation occurred. 408 U. S., at 485; 411 U. S., at 872-873 n. 5. Moreover, revocation proceedings may offer less protection from initial error than the more formal criminal process, where violations are defined by statute and the prosecutor has a professional duty not to charge a suspect with crime unless he is satisfied of probable cause. See ABA Code of Professional Responsibility, D. R. 7-103 (A) (the prosecutor has a professional responsibility "not [to] institute or cause to be instituted criminal charges when he knows or it is obvious that the charges are not supported by probable cause"); ABA Standards Relating to the Administration of Criminal Justice, The Prosecution Function, §§ 1.1, 3.4, 3.9 (1974); American College of Trial Lawyers, Code of Trial Conduct, rule 4 (c).

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(1970); *United States v. Wade*, 388 U. S. 218, 226 (1967). In *Coleman v. Alabama*, where the Court held that a preliminary hearing was a critical stage of an Alabama prosecution, the majority and concurring opinions identified two critical factors that distinguish the Alabama preliminary hearing from the probable cause determination required by the Fourth Amendment. First, under Alabama law the function of the hearing was to determine whether the evidence justified charging the suspect with an offense. A finding of no probable cause could mean that he would not be tried at all. The Fourth Amendment probable cause determination is addressed only to pretrial custody. To be sure, pretrial custody may affect to some extent the defendant's ability to assist in preparation of his defense, but this is not the kind of substantial harm identified as controlling in *Wade* and *Coleman*. Second, Alabama allowed the suspect to confront and cross-examine prosecution witnesses at the preliminary hearing. The Court noted that the suspect's defense on the merits could be compromised if he had no legal assistance for exploring or preserving the witnesses' testimony. This consideration does not apply to the informal, nonadversary procedure required under the Fourth Amendment.

The reasons that make a nonadversary proceeding appropriate, however, do not justify denying the suspect an opportunity to be present and participate in the determination.<sup>24</sup> Our system of justice operates on the premise

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<sup>24</sup> The procedures suggested in the Uniform Rules of Criminal Procedure (Proposed Final Draft 1974) and the A. L. I. Model Code of Pre-arraignment Procedure (Tent. Draft No. 5, 1972, and Tent. Draft No. 5A, 1973) are instructive. Under the Uniform Rules, a person arrested without a warrant is entitled, "without unnecessary delay," to a first appearance before a magistrate and a determination that grounds exist for issuance of an arrest warrant. The determination may be made on affidavits or testimony, in the presence of



that the subject of a judicial proceeding is entitled to participate unless there is good reason to exclude him. See *Rees v. City of Watertown*, 86 U. S. (19 Wall.) 107, 122-123 (1873). ~~The Fourth Amendment is not inconsistent with that concept.~~ The procedures normally followed in applying for warrants are *ex parte* proceedings by necessity, as notifying the suspect would often frustrate the purpose of the warrant. See T. Taylor, *Two Studies in Constitutional Interpretation* 81-82 (1969). But when the suspect is already in custody, and the only issue is probable cause for detention, he should be allowed to participate in the determination. Allowing him to appear before the magistrate and giving him an opportunity

the accused. Rule 311. Persons who remain in custody for inability to qualify for pretrial release are offered another opportunity for a probable cause determination at the detention hearing, held no more than 5 days after arrest. This is an adversary hearing, and the parties may summon witnesses, but reliable hearsay <sup>evidence</sup> may be considered. Rule 344.

The Model Code of Pre-arraignment Procedure also provides a first appearance, at which a warrantless arrest must be supported by a reasonably detailed written statement of facts. § 310. The magistrate may make a determination of probable cause to hold the accused, but he is not required to do so and the accused may request an attorney for an "adjourned session" of the first appearance to be held within 2 "court days." At that session, the magistrate makes a determination of probable cause upon a combination of written and live testimony:

"The arrested person may present written and testimonial evidence and arguments for his discharge and the state may present additional written and testimonial evidence and arguments that there is reasonable cause to believe that he has committed the crime of which he is accused. The state's submission may be made by means of affidavits, and no witnesses shall be required to appear unless the court, in the light of the evidence and arguments submitted by the parties, determines that there is a basis for believing that the appearance of one or more witnesses for whom the arrested person seeks subpoenas might lead to a finding that there is no reasonable cause." § 310.2 (2) (Tent. Draft No. 5A, 1973).



to speak or to submit written evidence for consideration along with the State's presentation could enhance both the reliability and the fairness of the proceeding. ~~The burden on the State would be minimal.~~ Virtually all jurisdictions require that arrested persons be presented to a judicial officer within a short time after arrest, see A. L. I., Model Code of Pre-arraignment Procedure 230-231 (Tent. Draft No. 1, 1966), and every jurisdiction makes some provision for setting bail or determining other conditions of pretrial release. See L. Katz, *Justice Is the Crime*, Appendix B, at 247-365 (1972). Since the defendant is already in the courtroom, the issue of probable cause may be decided at that time with little or no inconvenience to the State. In fact, the suspect's first appearance before a magistrate traditionally has been considered the proper time for determining whether there is probable cause for detention. 1 Hale, *Pleas of the Crown* 589-590 (1736); 2 *id.*, at 77-95; 2 Hawkins, *Pleas of the Crown* 116-117 (4th ed. 1762); see *McNabb v. United States*, 318 U. S. 332, 342-344 (1943); Amsterdam, *Perspective on the Fourth Amendment*, 58 Minn. L. Rev. 349, 391 & n. 408 (1974). Although the Federal Rules of Criminal Procedure do not explicitly acknowledge this function of the first appearance, this Court has interpreted them to require a determination of probable cause at that stage. *Jaben v. United States*, 381 U. S. 214 (1965); *Mallory v. United States*, 354 U. S. 449, 454 (1957).<sup>25</sup>

The suspect's presence and participation would impose only a slight burden on the State.

no significant

<sup>25</sup> In an *amicus* brief filed on behalf of the United States, the Solicitor General suggested that *McNabb v. Mallory* had mistaken the purpose of the first appearance, and that actual practice is otherwise. Cf. Note, *Probable Cause at the Initial Appearance in Warrantless Arrests*, 45 So. Cal. L. Rev. 1128 (1972); *McNabb*, of course, was decided before the adoption of the Federal Rules of Criminal Procedure. It interpreted a statutory requirement that an arrested



There is no single proper method for making the probable cause determination required by the Fourth Amendment. The States have many different patterns of criminal procedure, and each may adapt its own to provide a swift and reliable probable cause determination with the least burden to its system. Like many jurisdictions, Florida requires every arrested person to be brought before a magistrate within 24 hours, unless sooner released. Fla. Rule Crim. Proc. 3.310 (b). At that appearance the defendant is told of the charges against him, furnished a copy of the complaint, advised of his constitutional rights, and provided counsel if he is indigent. The magistrate then sets bail or prescribes other conditions of pretrial release. One of the factors typically relied upon in making this decision is the weight of evidence against the accused. ABA Standards Relating to the Administration of Criminal Justice, Pretrial Release § 5.1 (1974); see 18 U. S. C. § 3146 (b). Expanding that determination to a test of probable cause would be a natural way of integrating the probable cause decision with existing procedures.

In other States, existing procedures may satisfy the requirement of the Fourth Amendment. Some States already authorize a hearing on probable cause at or immediately following the suspect's first appearance.

person be brought before a magistrate without unnecessary delay. 318 U. S., at 342. *Mallory* was decided after the federal rules were adopted, and although the interpretation of the federal rules was dictum, it clearly outlined the Court's view:

"The scheme for initiating a federal prosecution is plainly defined. The police may not arrest upon mere suspicion but only on 'probable cause.' The next step in the proceeding is to arraign the arrested person before a judicial officer as quickly as possible so that he may be advised of his rights and so that the issue of probable cause may be promptly determined." 354 U. S., at 454.

The use of the word "arraign" was in error, as arraignment occurs later in the process. Fed. Rule Crim. Proc. 10.

encompass



*given an opportunity* ~~E. g., Colo. Rev. Stat. § 39-2-7; Hawaii Rev. Stat. § 708-709. Others may choose simply to accelerate their existing preliminary hearings. What the Fourth Amendment requires for pretrial restraint on liberty<sup>26</sup> is a reliable determination of probable cause made either before or promptly after arrest, and preferably no later than the first appearance before a judicial officer. If made after arrest, the suspect must be ~~allowed~~ to be present. Each State may choose the procedure that best accommodates this determination to its existing practice.<sup>27</sup>~~

*and to be heard.*

## IV

We agree with the Court of Appeals that the Fourth Amendment requires a timely judicial determination of probable cause as a prerequisite to detention, and we accordingly affirm that much of the judgment. As we do not agree that the Fourth Amendment requires the adversary hearing outlined in the District Court's decree, we reverse in part and remand to the Court of Appeals for further proceedings consistent with this opinion.

<sup>26</sup> Because the probable cause determination is not a constitutional prerequisite to the charging decision, it is required only for those suspects who suffer restraints on liberty other than the condition that they appear for trial. There are many kinds of pretrial release and many degrees of conditional liberty. See 18 U. S. C. § 3146; ABA Standards Relating to the Administration of Criminal Justice, Pretrial Release § 5.2 (1974); Uniform Rules of Criminal Procedure, Rule 331 (Proposed Final Draft 1974). We cannot define specifically those that would require a prior probable cause determination, but the key factor is significant restraint on liberty.

<sup>27</sup> Of course, if the State incorporates the probable cause determination into a multipurpose hearing, the necessity for appointed counsel at the combined proceeding must be governed by the principles of *Coleman v. Alabama*, *supra*.

*United States  
v. Wade and*



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~~CHAMBERS DRAFT~~

# SUPREME COURT OF THE UNITED STATES

No. 73-477

Richard E. Gerstein, State At- torney for Eleventh Judicial Circuit of Florida, Petitioner, v. Robert Pugh et al.	}	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.
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[December —, 1974]

MR. JUSTICE POWELL delivered the opinion of the Court.

The issue in this case is whether a person arrested under a prosecutor's information is constitutionally entitled to a judicial determination of probable cause for pretrial restraint of liberty.

## I

In March 1971 respondents Pugh and Henderson were arrested in Dade County, Florida. Each was charged with several offenses under a prosecutor's information.<sup>1</sup> Pugh was denied bail because one of the charges against him carried a potential life sentence, and Henderson was ~~held~~ <sup>remained</sup> in custody because he was unable to post a \$4,500 bond.

<sup>1</sup> Respondent Pugh was arrested on March 3, 1971. On March 16 an information was filed charging him with robbery, carrying a concealed weapon, and possession of a firearm during commission of a felony. Respondent Henderson was arrested ~~March 2~~ <sup>on</sup> March 2, and charged by information on March 19 with the offenses of breaking and entering and assault and battery. The record does not indicate whether ~~either was arrested under a warrant~~ <sup>there was an arrest</sup> ~~warrant in either case.~~



INSERT A, p. 2

In Florida, indictments are required only for prosecution of capital offenses. Prosecutors may charge all other crimes by information, without a prior preliminary hearing and without obtaining leave of court. Fla. Rule Crim. Proc. 3.140(a); State v. Hernandez, 217 So. 2d 109 (Fla. 1968); Di Bona v. State, 121 So. 2d 192 (Fla. Ct. App. 1960). At the time respondents were arrested, a Florida rule seemed to authorize adversary preliminary hearings to test probable cause for detention in all cases. Fla. Rule Crim. Proc. 1.122 (amended 1972). But the Florida courts had held that the filing of an information foreclosed the suspect's right to a preliminary hearing. See State ex rel. Hardy v. Blount, 261 So. 2d 172 (Fla. 1972).<sup>2</sup> They had also held that habeas corpus could not be used, except perhaps in exceptional circumstances, to test the probable cause for detention under an information. See Sullivan v. State ex rel. McCrory, 29 So. 2d 794, 797 (Fla. 1951). The only possible methods for obtaining a judicial determination of probable cause were a special statute allowing a preliminary hearing after <sup>30</sup>~~thirty~~ days, Fla. Stat. Ann. § 907.045 (1973),<sup>3</sup> and arraignment, which the District Court found was often delayed a month or more after arrest. Pugh v. Reinwater, 332 F. Supp. 1107, 1110 (S.D. Fla. 1971).<sup>4</sup> As a result, a person charged by information could be detained for a substantial period solely on the decision of a prosecutor.



3 This statute may have been construed to make the hearing permissive instead of mandatory. See Evans v. State, 197 So. 2d 323 (Fla. Ct. App. 1967); Fla. Op. Atty Gen. 067-29 (1967). But cf. Karz v. Overton, 249 So. 2d 763 (Fla. Ct. App. 1971). It may also have been superseded by the subsequent amendments to the rules of criminal procedure. In re Florida Rules of Criminal Procedure, 272 So. 2d 65 (1972).

~~It is not necessary to say that~~

4 The Florida rules do not suggest that the issue of probable cause can be raised at arraignment, Fla. Rule Crim. Proc. 3.160, but counsel for Petitioner represented at oral argument that arraignment affords the suspect an opportunity to "attack the sufficiency of the evidence to hold ~~in~~ him." Tr. <sup>of</sup> Oral Argument, Mar. 25, 1974, at 17. The Court of Appeals assumed, without deciding, that this was true. 483 F.2d <sup>778,</sup> ~~at~~ 781 n.8.



INSERT  
A →

In Florida, indictments are required only for prosecution of offenses punishable by death. All other criminal offenses may be prosecuted by information, and violations of municipal ordinances may be prosecuted by a simple affidavit or docket entry. Fla. Rule Crim. Proc. 3.140 (Supp. 1974). At the time respondents were arrested, Florida's rules of criminal procedure authorized only one method for determining the existence of probable cause to hold a suspect in jail pending trial. Fla. Rule Crim. Proc. 1.122 (amended 1972). This proceeding, an adversary preliminary hearing, was not available to a suspect who had already been charged by information. See *Bradley v. State*, 285 So. 2d 533 (Fla.), cert. denied, 411 U. S. 916 (1973); *State ex rel. Hardy v. Blount*, 261 So. 2d 172 (Fla. 1972).<sup>2</sup> In those instances when a preliminary hearing was held and the suspect discharged, the prosecutor could reinstate the charge and return him to custody by filing an information. See *Montgomery v. State*, 176 So. 2d 331 (Fla. 1965); *Baugus v. State*, 141 So. 2d 264 (Fla. 1962). As a result, a person charged by information could be detained pending trial solely on the decision of a prosecutor.

Respondents Pugh and Henderson filed a class action against Dade County officials in the Federal District Court,<sup>3</sup> claiming a constitutional right to a judicial hearing on the issue of probable cause and requesting declaratory and injunctive relief.<sup>4</sup> Respondents Turner and

See <sup>2</sup> Florida law also denies preliminary hearings to persons confined under indictment, *Sangaree v. Hamlin*, 235 So. 2d 729 (Fla. 1970), Fla. Rule Crim. Proc. 3.131, but that procedure is not challenged in this case.

<sup>3</sup> The complaint was framed under 42 U. S. C. § 1983, and jurisdiction in the District Court was based on 28 U. S. C. § 1343 (3).

<sup>4</sup> Respondents did not ask for release from state custody, even as an alternate remedy. They only asked that the state authorities be ordered to give them a probable cause determination. This was

(a),

Tn



7 Faulk, also in custody under informations, subsequently intervened.<sup>8</sup> Petitioner Gerstein, the State Attorney for Dade County, was one of several defendants.<sup>8</sup>

After an initial delay while the Florida legislature considered a bill that would have afforded preliminary hearings to persons charged by information, the District Court granted the relief sought. *Pugh v. Rainwater*, 332 F. Supp. 1107 (SD Fla. 1971). After certifying the case as a class action under Fed. Rule Civ. Proc. 23 (b)(2), and the Court held that the Fourth and Fourteenth Amendments give all arrested persons charged by information a right to a judicial hearing on the question of probable cause. The District Court ordered the Dade County defendants to give the named plaintiffs an immediate preliminary hearing to determine probable cause for further detention.<sup>9</sup> It also ordered them to submit a

*supra.*

The court certified

332 also the only relief that the District Court ordered for the named respondents. *F. Supp.* Because release was neither asked nor ordered, the lawsuit did not come within the class of cases for which habeas corpus is the exclusive remedy. *Preiser v. Rodriguez*, 411 U. S. 475 (1973); see *Wolff v. McDonnell*, 94 S. Ct. 2969, 2970, 2974 (1974).

at 1115-1116.

417 U.S. —, —

7 Turner was being held on a charge of auto theft, following arrest on March 11, 1971. Faulk was arrested on March 19 on charges of soliciting a ride and possession of marihuana.

8 The named defendants included justices of the peace and judges of small-claims courts, who were authorized to hold preliminary hearings in criminal cases, and a group of law enforcement officers with power to make arrests in Dade County. Gerstein was the only one who petitioned for certiorari, following the Court of Appeals' decision.<sup>9</sup>

9 The District Court correctly held that respondents' claim for relief was not barred by the equitable restrictions on federal intervention in state prosecutions, *Younger v. Harris*, 401 U. S. 37 (1971). The injunction was not directed at the state prosecutions as such, but only at the legality of pretrial detention without a judicial hearing, an issue that could not be raised in defense of the criminal prosecution. The order to hold preliminary hearings could not

of



plan providing preliminary hearings in all cases instituted by information.

~~Only one such plan was submitted~~ and the District Court adopted it with modifications. The final order prescribed a detailed post-arrest procedure, 336 F. Supp. 490. Upon arrest the accused would be taken before a magistrate for a "first appearance hearing." The magistrate would explain the charges, advise the accused of his rights, appoint counsel if he was indigent, and proceed with a probable cause determination unless either the prosecutor or the accused was unprepared. If ~~either asked for~~ more time, the magistrate would set the date for a "preliminary hearing," to be held ~~no more than~~ four days ~~later~~ if the accused was in custody and ~~no more~~ ~~than 10 days later~~ if he had been released pending trial. ~~At the hearing~~ the accused would be entitled to counsel, and he would be allowed to confront and cross-examine adverse witnesses, to summon favorable witnesses, and to have a transcript made on request. If the magistrate found no probable cause, the accused would be discharged. He then could not be charged with the same offense by complaint or information, but only by indictment returned within 30 days. ~~The plan also provided sanctions for failure to hold hearings at the prescribed times.~~

The Court of Appeals for the Fifth Circuit stayed the District Court's order pending appeal, but while the case was awaiting decision, the Dade County judiciary voluntarily adopted a similar procedure of its own. Upon learning of this development, the Court of Appeals remanded the case for specific findings on the constitutionality of the new Dade County system. Before the District Court issued its findings, however, the Florida

prejudice the conduct of trial on the merits. See *Conover v. Montemuro*, 477 F. 2d 1073, 1082 (CA3 1973); cf. *Perez v. Ledesma*, 401 U. S. 82 (1971); *Stefanelli v. Minard*, 342 U. S. 117 (1951).

The defendants submitted a plan authored by Sheriff E. Wilson Purdy.

requested

The order provided sanctions for failure to hold the hearings at prescribed times. At the "preliminary hearing"

within  
within



Supreme Court amended the procedural rules governing preliminary hearings statewide, and the parties agreed that the District Court should direct its inquiry to the new rules rather than the Dade County procedures.

(b) Under the amended rules every arrested person must be taken before a judicial officer within 24 hours. Fla. Rule Crim. Proc. 3.130<sup>1</sup> This "first appearance" is similar to the "first appearance hearing" ordered by the District Court in all respects but the crucial one: the magistrate does not make a determination of probable cause. The rule amendments also changed the procedure for preliminary hearings, restricting them to felony charges and codifying the rule that no hearings are available to persons charged by information or indictment. Rule 3.131; see *In re Rule 3.131 (b)*, *Florida Rules of Criminal Procedure*, 28<sup>1</sup> So. 2d<sup>1</sup> (Fla. 1974).<sup>4</sup>

3 In a supplemental opinion the District Court held that the amended rules had not answered the basic constitutional objection, since a defendant charged by information still could be detained pending trial without a judicial determination of probable cause. 355 F. Supp. 1286. Reaffirming ~~the~~ original ruling, the District Court <sup>its</sup> declared that the continuation of this practice was unconstitutional.<sup>10</sup> The Court of Appeals affirmed, 483 F. 2d

<sup>1</sup> Fla. Stat. Ann. § 907.045 (1975), seems to provide that every defendant confined for 30 days is entitled to a mandatory preliminary hearing upon application for writ of habeas corpus, but it apparently has been construed to vest trial courts with discretion to deny the hearing. See *Evans v. State*, 197 So. 323 (Fla. Ct. App. 1967). But cf. *Karr v. Overton*, 240 So. 2d 763 (Fla. Ct. App. 1971).

<sup>10</sup> Although this ruling held a statewide "legislative rule" unconstitutional, it was not outside the jurisdiction of a single judge by virtue of 28 U. S. C. § 2281. The original complaint did not ask for an injunction against enforcement of any state statute or legislative rule of statewide application, since the practice of denying preliminary hearings to persons charged by information was then em-



778, modifying the District Court's decree in minor particulars and suggesting that the form of preliminary hearing provided by the amended Florida rules would be acceptable, as long as it was provided to all defendants in custody pending trial. *Id.*, at 788. <sup>11</sup> State Attorney

788-789.

bodied only in judicial decisions. The District Court therefore had jurisdiction to issue the initial injunction, and the Court of Appeals had jurisdiction over the appeal. On remand, the constitutionality of a state "statute" was drawn into question for the first time when the criminal rules were amended. The District Court's supplemental opinion can fairly be read as a declaratory judgment that the amended rules were unconstitutional; the injunctive decree was never amended to incorporate that holding; and the opinion in the Court of Appeals is not inconsistent with the conclusion that the District Court did not enjoin enforcement of the statewide rule. See 483 F. 2d, at 788. Accordingly, a district court of three judges was not required for the issuance of this order. See *Kennedy v. Mendoza-Martinez*, 372 U. S. 144, 152-155 (1963); *Flemming v. Nestor*, 363 U. S. 603, 606-608 (1960).

-790.

<sup>11</sup> The major difference between the District Court's order and that of the Court of Appeals centered on the question whether a probable cause hearing is required for all arrested persons charged by information or only for those confined pending trial. The District Court's original decree required preliminary hearings for all arrested persons. 383 F. Supp., at A. On remand, the District Court made an exception for persons charged with misdemeanors who neither suffered pretrial detention nor faced imprisonment upon conviction. 355 F. Supp., at A. The Court of Appeals explicitly limited the hearing right for misdemeanor defendants to those who are jailed pending trial. 483 F. 2d, at 789. Its opinion also suggests, without stating explicitly, that the hearing right is similarly limited to felony defendants who are confined pending trial. *Id.*, at 787, 789.

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The Court of Appeals vacated both the portion of the District Court's order that prescribed time periods different from those in the amended rules, and the sanctions for failure to comply with the hearing requirements. It affirmed the District Court's holding on remand that the amended rules' extended time periods for capital and life imprisonment offenses was a violation of equal protection. Our disposition of the case makes it unnecessary to address the specific terms of the District Court's decree.



Gerstein petitioned for review, and we granted certiorari because of the importance of the issue. <sup>12</sup> We affirm in part and reverse in part.

424 U.S. 1062.

## II

As framed by the proceedings below, this case presents two issues: whether a person arrested and held for trial

<sup>12</sup> At oral argument counsel informed us that the named respondents have been convicted. Their pretrial detention therefore has ended, but this case belongs to that narrow class of cases in which the termination of a class representative's claim does not moot the claims of the unnamed members of the class. See *Sosna v. Iowa*, No. 73-709. Pretrial detention is by nature temporary, and it is most unlikely that any given individual could have his constitutional claim decided on appeal before he is either released or convicted. The individual could nonetheless suffer repeated deprivations, and it is certain that other persons similarly situated will be detained under the allegedly unconstitutional procedures. The claim, in short, is one that is distinctly "capable of repetition, yet evading review."

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(1975).

At the time the complaint was filed, the named respondents were members of a class of persons detained without a judicial probable cause determination, but the record does not indicate whether any of them ~~respondents~~ were still in custody awaiting trial when the District Court certified the ~~classification~~. Despite the absence of such a showing, which would (ordinarily) be required to avoid mootness under *Sosna*, ~~this case is not moot~~. The length of pretrial custody cannot be ascertained at the outset, and it may be ended at any time by release on recognizance, dismissal of the charges, or a guilty plea, as well as by acquittal or conviction after trial. It is by no means certain that any given individual would be in pretrial custody long enough for a district judge to certify a class action. Moreover, ~~this is the kind of case in which~~ the constant existence of a class of persons suffering the deprivation is certain. The attorney representing the named respondents is a public defender, and we ~~may~~ safely assume that he has other clients with a continuing live interest in the case. This controversy, therefore, is a suitable exception to the *Sosna* rule that mootness of a class action that is "capable of repetition, yet evading review" ordinarily is governed by determining whether the named representatives were members of the class at the time of certification. See *Sosna*, *supra*, at —; cf. *Rivera v. Freeman*, 469 F.2d 1159 (CA9 1972).

class.

the 3 named as plaintiffs

can

(But this case is a suitable exception to that requirement. See *Sosna*, *supra* at — n.11; cf. *Rivera v. Freeman*, 469 F.2d 1159, 1162-1163 (CA9 1972).)

in



on an information is entitled to a judicial determination of probable cause for detention, and if so, whether the adversary hearing ordered by the District Court and approved by the Court of Appeals is required by the Constitution.

## A

Both the standards and procedures for arrest and detention have been derived from the Fourth Amendment and its common-law antecedents. See *Cupp v. Murphy*, 412 U. S. 291, 294-295 (1973); *Ex parte Bollman*, 8 U. S. (4 Cranch) 75 (1807); *Ex parte Burford*, 7 U. S. (3 Cranch) 447 (1806). 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." *Beck v. Ohio*, 379 U. S. 89, 91 (1964). See also *Henry v. United States*, 361 U. S. 98 (1959); *Brinegar v. United States*, 338 U. S. 160, 175-176 (1949); *Johnson v. United States*, 333 U. S. 10 (1948).

This standard represents a compromise between the individual's right to liberty and the community's responsibility for controlling crime.

"These long-prevailing standards seek to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime. They also seek to give fair leeway for enforcing the law in the community's protection. Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability. The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating these often opposing interests.

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Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice." *Brinegar v. United States*, *supra*, at 176.

To implement the Fourth Amendment's protection against unfounded invasions of liberty and privacy, the Court has required that the existence of probable cause be decided by a neutral and detached magistrate whenever possible. The classic statement of this principle appears in *Johnson v. United States*, *supra*, at 13-14.

333 U.S. 10,  
(1948):

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

See also *Terry v. Ohio*, 392 U. S. 1, 20-22 (1968).<sup>13</sup>

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Maximum protection of individual rights could be assured by requiring a magistrate's review of the factual justification prior to any arrest, but such a requirement would severely handicap legitimate law enforcement. In striking a balance between these opposing interests, the Court has expressed a preference for the use of arrest warrants when possible. *Beck v. Ohio*, 379 U. S. 89, 96 (1964); *Wong Sun v. United States*, 371 U. S. 471, 479-482 (1963), but it has never invalidated an arrest supported by probable cause solely because the officers had failed to secure a warrant. See *Ker v. California*, 374 U. S. 23 (1963); *Draper v. United States*, 358 U. S. 307 (1959); *Trupiano v. United States*, 334 U. S. 699, 705 (1948).<sup>14</sup>

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<sup>14</sup> Another aspect of *Trupiano* was overruled in *United States v.*



Under this practical compromise, a policeman's on-the-scene assessment of probable cause ~~is~~ legal justification for arresting a person suspected of crime. ~~The policeman's judgment also justifies a brief period of detention to take the administrative steps necessary for arrest, but once the suspect is in custody the reasons that justify dispensing with the magistrate's neutral judgment evaporate.~~ ~~There is no longer any danger that the suspect will escape or commit further crimes while the police submit their evidence to a magistrate.~~ ~~And, from the suspect's point of view, the consequences of prolonged detention may be more serious than the interference occasioned by arrest.~~ Pretrial confinement may imperil the suspect's job, interrupt his source of income, and impair his family relationships. ~~Even pretrial release may be accompanied by burdensome conditions that effect a significant restraint on liberty.~~ See R. Goldfarb, Ransom 32-91 (1965); L. Katz, Justice Is the Crime 51-62 (1972). When the stakes are this high, the detached judgment of a neutral magistrate is essential if the Fourth Amendment is to furnish meaningful protection from unfounded interference with liberty. Accordingly, we hold that the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint on liberty following arrest.

This result has historical support in the common law that has guided interpretation of the Fourth Amendment. See *Carroll v. United States*, 267 U. S. 132, 149

*Rabinowitz*, 339 U. S. 56 (1950), which was overruled in turn by *Chimel v. California*, 395 U. S. 752

The issue of warrantless arrest that has generated the most controversy, and which remains unsettled, is whether and under what circumstances an officer may enter a suspect's home to make a warrantless arrest. See *Coolidge v. New Hampshire*, 403 U. S. 443, 474 (1971); *id.*, at 510-512 (WHITE, J., dissenting); *Jones v. United States*, 357 U. S. 493, 499-500 (1958).

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And, while the state's reasons for taking summary action subside, the suspect's need for a neutral determination of probable cause increases significantly.

See, e.g., 18 U.S.C. § 3146(a)(2), (5).

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(1969).

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We reiterated <sup>this</sup> ~~that~~ principle in United States v. United States ~~Dist~~ District Court, 407 U.S. 297 (1972). In ~~the context of electronic surveillance~~ terms that apply equally to arrests, we described the "very heart of the Fourth Amendment directive" as a requirement that "where practical, a governmental search and seizure should represent both the efforts of the officer to gather evidence of wrongful acts and the judgment of the magistrate that the collected evidence is sufficient to justify invasion of a citizen's private premises or conversation." Id. at 316. ~~See also~~ See also Terry v. Ohio, 392 U.S. 1, 20-22 (1968).



5121 (1925). At common law it was customary, if not obliga-  
 tory, for an arrested person to be brought before a justice  
 of the peace shortly after arrest. 2 Hale, Pleas of the  
 Crown 77, 81, 95 (1736); 2 Hawkins, Pleas of the Crown  
 116-117 (4th ed. 1762). See also *Kurtz v. Moffitt*, 115  
 U. S. 478, 498-499 (1885).<sup>15</sup> The justice of the peace  
 would "examine" the prisoner and the witnesses to deter-  
 mine whether there was reason to believe the prisoner  
 had committed a crime. If there was, the suspect would  
 be committed to jail or bailed pending trial. If not, he  
 would be discharged from custody. 1 Hale, *supra*, at  
 583-584; 2 Hawkins, *supra*, at 116-119; 1 J. Stephen,  
 History of the Criminal Law of England 233 (1883).<sup>16</sup>

<sup>15</sup> The primary motivation for the requirement seems to have  
 been the penalty for allowing an offender to escape, if he had in fact  
 committed the crime, and the fear of liability for false imprisonment,  
 if he had not. But Hale also recognized that a judicial warrant of  
 commitment, called a *mittimus*, was required for more than brief  
 detention.

"When a private person hath arrested a felon, or one suspected  
 of a felony, he may detain him in custody till he can reasonably dis-  
 miss himself of him; but with as much speed as conveniently he can,  
 he may do either of these things.

"1. He may carry him to the common gaol, . . . but that is now  
 rarely done.

"2. He may deliver him to the constable of the vill, who may either  
 carry him to the common gaol, . . . or to a justice of the peace to  
 be examined, and farther proceeded against as case shall require. . . .

"3. Or he may carry him immediately to any justice of peace of the  
 county where he is taken, who upon examination may discharge, bail,  
 or commit him, as the case shall require.

"And the bringing the offender either by the constable or private  
 person to a justice of peace is most usual and safe, because a gaoler  
 will expect a *Mittimus* for his warrant of detaining."

1 Hale, *supra*, at 589-590.

<sup>16</sup> The examination of the prisoner was inquisitorial, and the ex-  
 amination of the witnesses was conducted outside the prisoner's pres-  
 ence. The process was considered quite harsh until statutory reform.

M. Hale,  
*supra*,

Although this  
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were questioned



W. — The initial determination of probable cause also could be reviewed by higher courts on a writ of habeas corpus. 2 Hawkins, *supra*, at 112-115; 1 J. Stephen, *supra*, at 243; see *Ex parte Bollman*, 8 U. S. (4 Cranch) 75, 97-101 (1807). This practice furnished the model for criminal procedure in America immediately following the adoption of the Fourth Amendment, see *Ex parte Boll-* 17  
 8 — *man*, 8 U. S. (4 Cranch) 75 (1807); *Ex parte Burford*, 7 U. S. (3 Cranch) 441 (1806); *Ex parte Hamilton*, 3 U. S. (3 Dall.) 17 (1795), and there are indications that the Framers of the Bill of Rights regarded it as a model for a "reasonable" seizure. See *Draper v. United States*, 358 U. S. 307, 317-320 (1959) (DOUGLAS, J., dissenting). 12

United States v.

the prisoner was entitled to be discharged

was accomplished in 1848, 1 J. Stephen, at 225, but it was well established that if the investigation turned up insufficient evidence of the prisoner's guilt, he was entitled to be discharged.

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Id. at 233.

his

17 In *Ex parte Bollman*, two men charged in the Aaron Burr case were committed following an examination in the circuit court of the District of Columbia. They filed a petition for writ of habeas corpus in the Supreme Court. The Court, in an opinion by Chief Justice Marshall, affirmed its jurisdiction to issue habeas corpus to persons in custody by order of federal trial courts. Then, following arguments on the Fourth Amendment requirement of probable cause, the Court surveyed the evidence against the prisoners and held that it did not establish probable cause that they were guilty of treason. The prisoners were discharged.

18 A similar procedure at common law, the warrant for recovery of stolen goods, is said to have furnished the model for a "reasonable" search under the Fourth Amendment. The victim was required to appear before a justice of the peace and make an oath of probable cause that his goods could be found in a particular place. After the warrant was executed, and the goods seized, the victim and the alleged thief would appear before the justice of the peace for a prompt determination of the cause for seizure of the goods and detention of the thief. 2 Hale, *supra*, at 149-152; T. Taylor, Two Studies in Constitutional Interpretation 24-25, 39-40 (1969); see *Boyd v. United States*, 116 U. S. 616, 626-629 (1886).

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See also N. Lasson, The History and Development of the Fourth Amendment to the United States Constitution 15-16 (1937).



## B

Under the Florida procedures challenged here, a person arrested without a warrant and charged by information may be jailed or subjected to other restraints pending trial without any opportunity for a probable cause determination.<sup>19</sup>

~~There is no provision for a test of probable cause at the first appearance before a magistrate or at the hearing to set bail, Fla. Rule Crim. Proc. 3.130; see *Pugh v. Rainwater*, 483 F.2d 778, 781 n. 8 (CA5 1973), and the suspect cannot demand a preliminary hearing. Fla. Rule Crim. Proc. 3.131 (a). The Florida Supreme Court has held that habeas corpus cannot be used to test the probable cause for detention under an information. *Sullivan v. State ex rel. McGrory*, 49 So. 2d 794 (Fla. 1961). The arraignment may be delayed as much as a month, and it is not clear that the issue of probable cause may be raised then.<sup>20</sup>~~

<sup>19</sup> A person arrested under a warrant would have received a prior judicial determination of probable cause. Under Fla. Rule Crim. Proc. 3.120, a warrant may be issued upon a sworn complaint that states facts showing that the suspect has committed a crime. The magistrate may also take testimony under oath to determine if there is reasonable ground to believe the complaint is true.

~~<sup>20</sup> The District Court found that the procedures used in filing informations allow a delay of a month or more between arrest and arraignment. First, processing of the information does not begin until the arresting officer appears before an assistant state attorney and files an affidavit of facts. This appearance is delayed anywhere from 24 hours to two weeks after arrest. If the state attorney decides to file an information, the papers are prepared and the information is filed and set for arraignment. The average delay from the time the arresting officer appears and the time of arraignment is 10 to 15 days.~~

The Court of Appeals assumed, for purposes of this case, that the defendant would have an opportunity to challenge the probable cause underlying the information at his arraignment, but noted that if the assumption was groundless, a person charged by informa-



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prosecution

Petitioner defends this practice on the ground that the prosecutor's decision to file an information is itself a determination of probable cause ~~and~~ that furnishes sufficient reason to detain a defendant pending trial. Although a conscientious decision that the evidence warrants affords a measure of protection against unfounded detention, we do not think prosecutorial judgment standing alone meets the requirements of the Fourth Amendment. Indeed, we think the Court's previous decisions compel disapproval of the Florida procedure. In *Albrecht v. United States*, 273 U. S. 1, 5 (1927), the Court held that an arrest warrant issued solely upon a United States Attorney's information was invalid because the accompanying affidavits were defective. Although the Court's opinion did not explicitly state that the prosecutor's official oath could not furnish probable cause, that conclusion was implicit in the judgment that the arrest was illegal under the Fourth Amendment. <sup>20</sup> More recently, in *Coolidge v. New Hampshire*, 403 U. S. 443, 449-453 (1971), the Court held that a prosecutor's

~~tion would have no opportunity to challenge probable cause before trial. 483 F. 2d, at 781, n. 2. The Florida rule governing arraignment does not suggest that the procedure contemplates a challenge to probable cause or any consideration of pretrial custody. It merely provides that the arraignment shall consist of reading the indictment or information to the defendant and calling upon him to plead. Fla. Rule Crim. Proc. 3.160.~~

<sup>20</sup> By contrast, the Court has held that an indictment, "fair upon its face," and returned by a "properly constituted grand jury" conclusively determines the existence of probable cause and requires issuance of an arrest warrant without further inquiry. *Ex parte United States*, 287 U. S. 241, 250 (1932). See also *Giordenello v. United States*, 357 U. S. 480, 487 (1958). The willingness to let a grand jury's judgment substitute for that of a neutral and detached magistrate is attributable to the grand jury's relationship to the courts and its historical role of protecting individuals from unjust prosecution. See *United States v. Calandra*, 414 U. S. 338, 342-346 (1974).



responsibility to law enforcement is inconsistent with the constitutional role of a neutral and detached magistrate. We reaffirmed that principle in *Shadwick v. City of Tampa*, 407 U. S. 345 (1972), and held that probable cause for the issuance of an arrest warrant must be determined by someone independent of police and prosecution.<sup>21</sup> The reason for this separation of functions was expressed by Justice Frankfurter in a similar context:

"A democratic society, in which respect for the dignity of all men is central, naturally guards against the misuse of the law enforcement process. Zeal in tracking down crime is not in itself an assurance of soberness of judgment. Disinterestedness in law enforcement does not alone prevent disregard of cherished liberties. Experience has therefore counseled that safeguards must be provided against the dangers of the overzealous as well as the despotic. The awful instruments of the criminal law cannot be entrusted to a single functionary. The complicated process of criminal justice is therefore divided into different parts, responsibility for which is separately vested in the various participants upon whom the criminal law relies for its vindication." *McNabb v. United States*, 318 U. S. 332, 343 (1943).

See also *United States v. United States District Court*, 407 U.S. 297, 317 (1972).

Interpreting

<sup>21</sup> The Court had earlier reached a different result in *Ocampo v. United States*, 234 U. S. 91 (1914), a criminal appeal from the Philippine Islands. ~~Under~~ a statutory guarantee substantially identical to the Fourth Amendment, Act of July 1, 1902, c. 1369, § 5, 32 Stat. 693-694, the Court held that an arrest warrant could issue solely upon a prosecutor's information. The Court has since held that interpretation of a statutory guarantee applicable to the Philippines is not conclusive for interpretation of a cognate provision in the Federal Constitution, *Green v. United States*, 355 U. S. 184, 194-198 (1957). Even if it were, the result reached in *Ocampo* is incompatible with the later holdings of *Albrecht*, *Coolidge*, and *Shadwick*.



In holding that the prosecutor's assessment of probable cause is not sufficient alone to justify restraint on liberty pending trial, we do not imply that the accused is entitled to judicial oversight or review of a prosecutor's decision to prosecute. Instead, we adhere to the Court's prior holding that a judicial hearing is not prerequisite to prosecution by information. *Lem Woon v. Oregon*, 229 U. S. 586 (1913). Nor do we retreat from the established rule that illegal arrest or detention does not void a subsequent conviction. *Frisbie v. Collins*, 342 U. S. 519 (1952); *Ker v. Illinois*, 119 U. S. 436 (1886). Thus, as the Court of Appeals noted below, a suspect who is presently detained may challenge the probable cause for that confinement, ~~but~~ a conviction will not be vacated on the ground that the defendant was detained pending trial without probable cause. 483 F. 2d, at 786-787. Compare *Scarborough v. Dutton*, 393 F. 2d 6 (CA5 1968), with *Brown v. Fauntleroy*, — U. S. App. D. C. —, 442 F. 2d 838 (1971), and *Cooley v. Stone*, — U. S. App. D. C. —, 414 F. 2d 1213 (1969).

*Beck v. Washington*,  
369 U.S.  
541, 545  
(1962).

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### III

Both the District Court and the Court of Appeals held that the determination of probable cause must be accompanied by the full panoply of adversary safeguards—counsel, confrontation, cross-examination, and compulsory process for witnesses. A full preliminary hearing of this sort is modeled after the procedure used in

~~\* See also *Beck v. Washington*, 369 U. S. 541 (1962). The opinion in *Beck* cites *Ocampo v. United States*, 234 U. S. 91 (1914), for the same proposition, but the validity of prosecution by information without a preliminary hearing was not at issue in that case. The only issues were whether grand juries were required in the Philippines and, as discussed in n. 20, *supra*, whether the prosecutor's decision to file an information furnished sufficient probable cause for an arrest warrant.~~



many States to determine whether the evidence justifies going to trial under an information or presenting the case to a grand jury. See *Coleman v. Alabama*, 399 U. S. 1 (1970); <sup>①</sup>Y. Kamisar, W. LaFare & J. Israel, *Modern Criminal Procedure* 957-967, 996-1000 (4th ed. 1974). The standard of proof required of the prosecution is usually referred to as "probable cause," but it may approach a prima facie case of guilt. A. L. I. Model Code of Pre-arraignment Procedure, Commentary on Article 330, at 90-91 (Tent. Draft No. 5, 1972). When the hearing takes this form, adversary procedures are customarily employed. The importance of the issue to both the State ~~and~~ the accused justifies the presentation of witnesses and full exploration of their testimony on cross-examination. This kind of hearing also requires appointment of counsel for indigent defendants. *Coleman v. Alabama*, ~~399~~ U. S. 1 (1970). <sup>supra</sup>② And, as the hearing assumes increased importance and the procedures become more complex, the ~~less likely it is~~ that it can be held promptly after arrest. See A. L. I. Model Code of Pre-arraignment Procedure, *supra*, at 33-34.

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These adversary safeguards are not essential for the probable cause determination required by the Fourth Amendment. The sole issue is whether there is probable cause for detaining the arrested person pending such further proceedings ~~as may be afforded by law~~. This issue can be determined reliably without a full adversary hearing. The standard is the same as that for arrest.<sup>22</sup>

ordinarily

<sup>22</sup> Because the standards are identical, there is no need for further investigation before the probable cause determination can be made. "Presumably, whomever the police arrest they must arrest on 'probable cause.' It is not the function of the police to arrest, as it were, at large and to use an interrogating process at police headquarters in order to determine whom they should charge before a committing magistrate on 'probable cause.'" *Mallory v. United States*, 354 U. S. 449, 456 (1957).



That standard—probable cause to believe the suspect has committed a crime—traditionally has been decided in nonadversary proceedings on hearsay and written testimony, and the Court has approved these informal modes of proof.

"Guilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined to that which long experience in the common-law tradition, to some extent embodied in the Constitution, has crystallized into rules of evidence consistent with that standard. These rules are historically grounded rights of our system, developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property.

"In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved." *Brinegar v. United States*, 338 U. S. 160, 174-175 (1949).

Cf. *McCray v. Illinois*, 386 U. S. 300 (1967).

The use of these informal procedures is justified not only by the lesser consequences of a probable cause determination but also by the nature of the determination itself. It does not require the fine resolution of conflicting evidence that a reasonable-doubt or even a preponderance standard demands, and credibility determinations are seldom crucial in deciding whether the evidence supports a reasonable belief in guilt. See F. Miller, *The Decision to Charge a Suspect with a Crime* 64-109 (1969). This is not to say that Confrontation and cross-examination might not enhance the reliability of probable cause

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determinations in some cases, <sup>however,</sup> but in most cases, their value would be too slight to justify holding, as a matter of constitutional principle, that these formalities and safeguards designed for trial must also be employed in making the Fourth Amendment determination of probable cause. <sup>24</sup> Our system of criminal justice is already overburdened, and it is subject to valid criticism when overemphasis on procedural and evidentiary formalities results in delayed justice, repetitive trials, and burdensome expense for both the State and the accused.

Because of its limited function and its nonadversary character, the probable cause determination is not a "critical stage" in the prosecution that would require appointed counsel. ~~We have~~ identified as "critical stages" those pretrial procedures that would impair defense on the merits if the accused is required to proceed without counsel. *Coleman v. Alabama*, 399 U. S. 1

The Court has

<sup>23</sup> In *Morrissey v. Brewer*, 408 U. S. 471 (1972), and *Gagnon v. Scarpelli*, 411 U. S. 778 (1973), we held that a parolee or probationer arrested prior to revocation is entitled to an informal preliminary hearing at the place of arrest, with some provision for live testimony. 408 U. S., at 487; 411 U. S., at 786. That preliminary hearing, more than the probable cause determination required by the Fourth Amendment, serves the purpose of gathering and preserving live testimony, since the final revocation hearing frequently is held at some distance from the place where the violation occurred. 408 U. S., at 485; 411 U. S., at 779 n. 5. Moreover, revocation proceedings may offer less protection from initial error than the more formal criminal process, where violations are defined by statute and the prosecutor has a professional duty not to charge a suspect with crime unless he is satisfied of probable cause. See ABA Code of Professional Responsibility, ~~DR~~ 7-103 (A) (a prosecutor has a professional responsibility not to institute or cause to be instituted criminal charges when he knows or it is obvious that the charges are not supported by probable cause"); ABA Standards Relating to the Administration of Criminal Justice, *The Prosecution Function*, §§ 1.1, 3.4, 3.9 (1974); American College of Trial Lawyers, Code of Trial Conduct, rule 4 (c), (1972).

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Footnote 24

Criminal justice is already overburdened by the volume of cases and the complexities of our system. The processing of misdemeanors and the early stages of prosecution generally are marked by delays that can seriously affect the quality of justice. A constitutional doctrine requiring full adversary hearings for all persons detained pending trial could exacerbate the problem of



preliminary

(1970); *United States v. Wade*, 388 U. S. 218, 226 (1967). In *Coleman v. Alabama*, where the Court held that a preliminary hearing was a critical stage of an Alabama prosecution, the majority and concurring opinions identified two critical factors that distinguish the Alabama preliminary hearing from the probable cause determination required by the Fourth Amendment. First, under Alabama law the function of the hearing was to determine whether the evidence justified charging the suspect with an offense. A finding of no probable cause could mean that he would not be tried at all. The Fourth Amendment probable cause determination is addressed only to pretrial custody. To be sure, pretrial custody may affect to some extent the defendant's ability to assist in preparation of his defense, but this is not the kind of substantial harm identified as controlling in *Wade* and *Coleman*. Second, Alabama allowed the suspect to confront and cross-examine prosecution witnesses at the preliminary hearing. The Court noted that the suspect's defense on the merits could be compromised if he had no legal assistance for exploring or preserving the witnesses' testimony. This consideration does not apply to the informal, nonadversary procedure required under the Fourth Amendment.

The reasons that make a nonadversary proceeding appropriate, however, do not justify denying the suspect an opportunity to be present and participate in the determination.<sup>25</sup> Our system of justice operates on the premise

<sup>25</sup> The procedures suggested in the Uniform Rules of Criminal Procedure (Proposed Final Draft 1974) and the A. L. I. Model Code of Pre-arraignment Procedure (Tent. Draft No. 5, 1972, and Tent. Draft No. 5A, 1973) are instructive. Under the Uniform Rules, a person arrested without a warrant is entitled, "without unnecessary delay," to a first appearance before a magistrate and a determination that grounds exist for issuance of an arrest warrant. The determination may be made on affidavits or testimony, in the presence of



Groppi v. Leslie,  
404 U.S. 496,  
502 (1972);

that the subject of a judicial proceeding is entitled to participate unless there is good reason to exclude him. See *Rees v. City of Watertown*, 86 U. S. (19 Wall.) 107, 122-123 (1873). ~~The Fourth Amendment is not inconsistent with that concept.~~ The procedures normally followed in applying for warrants are *ex parte* proceedings by necessity, as notifying the suspect would often frustrate the purpose of the warrant. See T. Taylor, *Two Studies in Constitutional Interpretation* 81-82 (1969). But when the suspect is already in custody, and the only issue is probable cause for detention, he should be allowed to participate in the determination. Allowing him to appear before the magistrate and giving him an opportunity

the accused. Rule 311. Persons who remain in custody for inability to qualify for pretrial release are offered another opportunity for a probable cause determination at the detention hearing, held no more than 5 days after arrest. This is an adversary hearing, and the parties may summon witnesses, but reliable hearsay ~~may be con-~~ sidered. Rule 344.

evidence

The Model Code of Pre-arraignment Procedure also provides a first appearance, at which a warrantless arrest must be supported by a reasonably detailed written statement of facts. § 310. The magistrate may make a determination of probable cause to hold the accused, but he is not required to do so and the accused may request an attorney for an "adjourned session" of the first appearance to be held within 2 "court days." At that session, the magistrate makes a determination of probable cause upon a combination of written and live testimony:

"The arrested person may present written and testimonial evidence and arguments for his discharge and the state may present additional written and testimonial evidence and arguments that there is reasonable cause to believe that he has committed the crime of which he is accused. The state's submission may be made by means of affidavits, and no witnesses shall be required to appear unless the court, in the light of the evidence and arguments submitted by the parties, determines that there is a basis for believing that the appearance of one or more witnesses for whom the arrested person seeks subpoenas might lead to a finding that there is no reasonable cause." § 310.2 (2) (Tent. Draft No. 6A, 1973).



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404 U.S. 496,  
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to speak or to submit written evidence for consideration along with the State's presentation could enhance both the reliability and the fairness of the proceeding. ~~With the burden on the State would be minimal.~~ Virtually all jurisdictions require that arrested persons be presented to a judicial officer within a short time after arrest, see A. L. I., Model Code of Pre-arraignment Procedure 230-231 (Tent. Draft No. 1, 1966), and every jurisdiction makes some provision for setting bail or determining other conditions of pretrial release. See L. Katz, Justice Is the Crime, Appendix B, at 247-365 (1972). Since the defendant is already in the courtroom, the issue of probable cause may be decided at that time with little or no inconvenience to the State. In fact, the suspect's first appearance before a magistrate traditionally has been considered the proper time for determining whether there is probable cause for detention. 1. Hale, Pleas of the Crown 589-590 (1736); 2 *id.*, at 77-95; 2. Hawkins, Pleas of the Crown 116-117 (4th ed. 1762); see McNabb v. United States, 318 U. S. 332, 342-344 (1943); Amsterdam, Perspective on the Fourth Amendment, 58 Minn. L. Rev. 349, 391 & n. 408 (1974). Although the Federal Rules of Criminal Procedure do not explicitly acknowledge this function of the first appearance, ~~this~~ Court has interpreted them to require a determination of probable cause at that stage. Jaben v. United States, 381 U. S. 214 (1965); Mallory v. United States, 354 U. S. 449, 454 (1957).<sup>26</sup>

The suspect's presence and participation would impose no significant burden on the State.

<sup>26</sup> In an amicus brief filed on behalf of the United States, the Solicitor General suggested that McNabb & Mallory had mistaken the purpose of the first appearance, and that actual practice is otherwise. Cf. Note, Probable Cause at the Initial Appearance in Warrantless Arrests, 45 So. Cal. L. Rev. 1128 (1972). McNabb, of course, was decided before the adoption of the Federal Rules of Criminal Procedure. It interpreted a statutory requirement that an arrested

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There is no single proper method for making the probable cause determination required by the Fourth Amendment. The States have many different patterns of criminal procedure, and each may adapt its own to provide a swift and reliable probable cause determination with the least burden to its system. Like many jurisdictions, Florida requires every arrested person to be brought before a magistrate within 24 hours, unless sooner released. Fla. Rule Crim. Proc. 3.310 (b). At that appearance the defendant is told of the charges against him, furnished a copy of the complaint, advised of his constitutional rights, and provided counsel if he is indigent. The magistrate then sets bail or prescribes other conditions of pretrial release. One of the factors typically relied upon in making this decision is the weight of evidence against the accused. ABA Standards Relating to the Administration of Criminal Justice, Pretrial Release § 5.1 (1974); see 18 U. S. C. § 3146 (b). Expanding that determination to a test of probable cause would be a natural way of integrating the probable cause decision with existing procedures.

(b)

encompass

determination of

In other States, existing procedures may satisfy the requirement of the Fourth Amendment. Some States already authorize a ~~hearing on~~ probable cause at or immediately following the suspect's first appearance.

with only minor adjustments.

person be brought before a magistrate without unnecessary delay. 318 U. S., at 342. *Mallory* was decided after the federal rules were adopted, and although the interpretation of the federal rules was dictum, it clearly outlined the Court's view:

"The scheme for initiating a federal prosecution is plainly defined. The police may not arrest upon mere suspicion but only on 'probable cause.' The next step in the proceeding is to arraign the arrested person before a judicial officer as quickly as possible so that he may be advised of his rights and so that the issue of probable cause may be promptly determined." 354 U. S., at 454.

The use of the word "arraign" was ~~an~~ error, as arraignment occurs later in the process. Fed. Rule Crim. Proc. 10.

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3 (1965 Supp.)

*E. g.*, Colo. Rev. Stat. § 39-2-1; Hawaii Rev. Stat. § 708-9(5) (1968); Vt. Rules  
 709. Others may choose simply to accelerate their exist-  
 ing preliminary hearings. What the Fourth Amendment 27  
 requires for pretrial restraint on liberty is a reliable  
 determination of probable cause made either before or  
 promptly after arrest, and preferably no later than the  
 first appearance before a judicial officer. If made after  
 arrest, the suspect must be allowed to be present. Each  
 State may choose the procedure that best accommodates  
 this determination to its existing practice. 28

Crim. Proc. 3(b),  
 5(c) (1974).

given an  
 opportunity

and to be heard.

## IV

We agree with the Court of Appeals that the Fourth Amendment requires a timely judicial determination of probable cause as a prerequisite to detention, and we accordingly affirm that much of the judgment. As we do not agree that the Fourth Amendment requires the adversary hearing outlined in the District Court's decree, we reverse in part and remand to the Court of Appeals for further proceedings consistent with this opinion.

Tr 4 27 Because the probable cause determination is not a constitutional prerequisite to the charging decision, it is required only for those suspects who suffer restraints on liberty other than the condition that they appear for trial. There are many kinds of pretrial release and many degrees of conditional liberty. See 18 U. S. C. § 3146; ABA Standards Relating to the Administration of Criminal Justice, Pretrial Release § 5.2 (1974); Uniform Rules of Criminal Procedure, Rule 3A1 (Proposed Final Draft 1974). We cannot define specifically those that would require a prior probable cause determination, but the key factor is significant restraint on liberty.

28 Of course, if the State incorporates the probable cause determination into a multipurpose hearing, the necessity for appointed counsel at the combined proceeding must be governed by the principles of *Coleman v. Alabama*, *supra*.

United States  
 v. Wade and



To: The Chief Justice  
Mr. Justice Douglas  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Rehnquist

1st DRAFT

SUPREME COURT OF THE UNITED STATES

By: Powell, J.

No. 73-477

Circulated: DEC 17 1974

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Richard E. Gerstein, State At-  
torney for Eleventh Judicial  
Circuit of Florida,  
Petitioner,  
v.  
Robert Pugh et al.

On Writ of Certiorari  
to the United States  
Court of Appeals for  
the Fifth Circuit.

[December —, 1974]

MR. JUSTICE POWELL delivered the opinion of the  
Court.

The issue in this case is whether a person arrested  
under a prosecutor's information is constitutionally en-  
titled to a judicial determination of probable cause for  
pretrial restraint of liberty.

I

In March 1971 respondents Pugh and Henderson were  
arrested in Dade County, Florida. Each was charged  
with several offenses under a prosecutor's information.<sup>1</sup>  
Pugh was denied bail because one of the charges against  
him carried a potential life sentence, and Henderson re-  
mained in custody because he was unable to post a \$4,500  
bond.

<sup>1</sup> Respondent Pugh was arrested on March 3, 1971. On March 16  
an information was filed charging him with robbery, carrying a con-  
cealed weapon, and possession of a firearm during commission of a  
felony. Respondent Henderson was arrested on March 2, and charged  
by information on March 19 with the offenses of breaking and  
entering and assault and battery. The record does not indicate  
whether there was an arrest warrant in either case.



In Florida, indictments are required only for prosecution of capital offenses. Prosecutors may charge all other crimes by information, without a prior preliminary hearing and without obtaining leave of court. Fla. Rule Crim. Proc. 3.140 (a); *State v. Hernandez*, 217 So. 2d 109 (Fla. 1968); *Di Bona v. State*, 121 So. 2d 192 (Fla. Ct. App. 1960). At the time respondents were arrested, a Florida rule seemed to authorize adversary preliminary hearings to test probable cause for detention in all cases. Fla. Rule Crim. Proc. 1.122 (amended 1972). But the Florida courts had held that the filing of an information foreclosed the suspect's right to a preliminary hearing. See *State ex rel. Hardy v. Blount*, 261 So. 2d 172 (Fla. 1972).<sup>2</sup> They had also held that habeas corpus could not be used, except perhaps in exceptional circumstances, to test the probable cause for detention under an information. See *Sullivan v. State ex rel. McCrory*, 29 So. 2d 794, 797 (Fla. 1951). The only possible methods for obtaining a judicial determination of probable cause were a special statute allowing a preliminary hearing after 30 days, Fla. Stat. Ann. § 907.045 (1973),<sup>3</sup> and arraignment, which the District Court found was often delayed a month or more after arrest. *Pugh v. Rainwater*, 332 F. Supp. 1107, 1110 (SD Fla. 1971).<sup>4</sup> As a result, a person charged

<sup>2</sup> Florida law also denies preliminary hearings to persons confined under indictment, see *Sangaree v. Hamlin*, 235 So. 2d 729 (Fla. 1970), Fla. Rule Crim. Proc. 3.131 (a), but that procedure is not challenged in this case.

<sup>3</sup> This statute may have been construed to make the hearing permissive instead of mandatory. See *Evans v. State*, 197 So. 2d 323 (Fla. Ct. App. 1967); Fla. Op. Att'y Gen. 067-29 (1967). But cf. *Karz v. Overton*, 249 So. 2d 763 (Fla. Ct. App. 1971). It may also have been superseded by the subsequent amendments to the rules of criminal procedure. *In re Florida Rules of Criminal Procedure*, 272 So. 2d 85 (1972).

<sup>4</sup> The Florida rules do not suggest that the issue of probable cause can be raised at arraignment, Fla. Rule Crim. Proc. 3.160, but



by information could be detained for a substantial period solely on the decision of a prosecutor.

Respondents Pugh and Henderson filed a class action against Dade County officials in the Federal District Court,<sup>5</sup> claiming a constitutional right to a judicial hearing on the issue of probable cause and requesting declaratory and injunctive relief.<sup>6</sup> Respondents Turner and Faulk, also in custody under informations, subsequently intervened.<sup>7</sup> Petitioner Gerstein, the State Attorney for Dade County, was one of several defendants.<sup>8</sup>

After an initial delay while the Florida legislature considered a bill that would have afforded preliminary hearings to persons charged by information, the District Court granted the relief sought. *Pugh v. Rainwater*, *supra*. The Court certified the case as a class action under Fed.

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counsel for Petitioner represented at oral argument that arraignment affords the suspect an opportunity to "attack the sufficiency of the evidence to hold him." Tr. of Oral Arg., Mar. 25, 1974, at 17. The Court of Appeals assumed, without deciding, that this was true. 483 F.2d 778, 781 n. 8.

<sup>5</sup> The complaint was framed under 42 U. S. C. § 1983, and jurisdiction in the District Court was based on 28 U. S. C. § 1343 (3).

<sup>6</sup> Respondents did not ask for release from state custody, even as an alternate remedy. They asked only that the state authorities be ordered to give them a probable cause determination. This was also the only relief that the District Court ordered for the named respondents. 332 F. Supp., at 1115-1116. Because release was neither asked nor ordered, the lawsuit did not come within the class of cases for which habeas corpus is the exclusive remedy. *Preiser v. Rodriguez*, 411 U. S. 475 (1973); see *Wolff v. McDonnell*, 417 U. S. —, — (1974).

<sup>7</sup> Turner was being held on a charge of auto theft, following arrest on March 11, 1971. Faulk was arrested on March 19 on charges of soliciting a ride and possession of marijuana.

<sup>8</sup> The named defendants included justices of the peace and judges of small-claims courts, who were authorized to hold preliminary hearings in criminal cases, and a group of law enforcement officers with power to make arrests in Dade County. Gerstein was the only one who petitioned for certiorari.



Rule Civ. Proc. 23 (b)(2), and held that the Fourth and Fourteenth Amendments give all arrested persons charged by information a right to a judicial hearing on the question of probable cause. The District Court ordered the Dade County defendants to give the named plaintiffs an immediate preliminary hearing to determine probable cause for further detention.<sup>6</sup> It also ordered them to submit a plan providing preliminary hearings in all cases instituted by information.

The defendants submitted a plan authored by Sheriff E. Wilson Purdy, and the District Court adopted it with modifications. The final order prescribed a detailed post-arrest procedure. 336 F. Supp. 490. Upon arrest the accused would be taken before a magistrate for a "first appearance hearing." The magistrate would explain the charges, advise the accused of his rights, appoint counsel if he was indigent, and proceed with a probable cause determination unless either the prosecutor or the accused was unprepared. If either requested more time, the magistrate would set the date for a "preliminary hearing," to be held within four days if the accused was in custody and within 10 days if he had been released pending trial. The order provided sanctions for failure to hold the hearings at prescribed times. At the "preliminary hearing" the accused would be entitled to counsel, and he would be allowed to confront and cross-examine adverse witnesses,

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<sup>6</sup> The District Court correctly held that respondents' claim for relief was not barred by the equitable restrictions on federal intervention in state prosecutions, *Younger v. Harris*, 401 U. S. 37 (1971). The injunction was not directed at the state prosecutions as such, but only at the legality of pretrial detention without a judicial hearing, an issue that could not be raised in defense of the criminal prosecution. The order to hold preliminary hearings could not prejudice the conduct of trial on the merits. See *Conover v. Montemuro*, 477 F. 2d 1073, 1082 (CA3 1973); cf. *Perez v. Ledesma*, 401 U. S. 82 (1971); *Stefanelli v. Minard*, 342 U. S. 117 (1951).



to summon favorable witnesses, and to have a transcript made on request. If the magistrate found no probable cause, the accused would be discharged. He then could not be charged with the same offense by complaint or information, but only by indictment returned within 30 days.

The Court of Appeals for the Fifth Circuit stayed the District Court's order pending appeal, but while the case was awaiting decision, the Dade County judiciary voluntarily adopted a similar procedure of its own. Upon learning of this development, the Court of Appeals remanded the case for specific findings on the constitutionality of the new Dade County system. Before the District Court issued its findings, however, the Florida Supreme Court amended the procedural rules governing preliminary hearings statewide, and the parties agreed that the District Court should direct its inquiry to the new rules rather than the Dade County procedures.

Under the amended rules every arrested person must be taken before a judicial officer within 24 hours. Fla. Rule Crim. Proc. 3.130 (b). This "first appearance" is similar to the "first appearance hearing" ordered by the District Court in all respects but the crucial one: the magistrate does not make a determination of probable cause. The rule amendments also changed the procedure for preliminary hearings, restricting them to felony charges and codifying the rule that no hearings are available to persons charged by information or indictment. Rule 3.131; see *In re Rule 3.131 (b)*, *Florida Rules of Criminal Procedure*, 289 So. 2d 3 (Fla. 1974).

In a supplemental opinion the District Court held that the amended rules had not answered the basic constitutional objection, since a defendant charged by information still could be detained pending trial without a judicial determination of probable cause. 355 F. Supp.



1286. Reaffirming its original ruling, the District Court declared that the continuation of this practice was unconstitutional.<sup>10</sup> The Court of Appeals affirmed, 483 F. 2d 778, modifying the District Court's decree in minor particulars and suggesting that the form of preliminary hearing provided by the amended Florida rules would be acceptable, as long as it was provided to all defendants in custody pending trial. *Id.*, at 788-789.<sup>11</sup>

<sup>10</sup> Although this ruling held a statewide "legislative rule" unconstitutional, it was not outside the jurisdiction of a single judge by virtue of 28 U. S. C. § 2281. The original complaint did not ask for an injunction against enforcement of any state statute or legislative rule of statewide application, since the practice of denying preliminary hearings to persons charged by information was then embodied only in judicial decisions. The District Court therefore had jurisdiction to issue the initial injunction, and the Court of Appeals had jurisdiction over the appeal. On remand, the constitutionality of a state "statute" was drawn into question for the first time when the criminal rules were amended. The District Court's supplemental opinion can fairly be read as a declaratory judgment that the amended rules were unconstitutional; the injunctive decree was never amended to incorporate that holding; and the opinion in the Court of Appeals is not inconsistent with the conclusion that the District Court did not enjoin enforcement of the statewide rule. See 483 F. 2d, at 788-790. Accordingly, a district court of three judges was not required for the issuance of this order. See *Kennedy v. Mendoza-Martinez*, 372 U. S. 144, 152-153 (1963); *Flemming v. Nestor*, 363 U. S. 603, 606-608 (1960).

<sup>11</sup> The major difference between the District Court's order and that of the Court of Appeals centered on the question whether a probable cause hearing is required for all arrested persons charged by information or only for those confined pending trial. The District Court's original decree required preliminary hearings for all arrested persons. 336 F. Supp., at 491. On remand, the District Court made an exception for persons charged with misdemeanors who neither suffered pretrial detention nor faced imprisonment upon conviction. 355 F. Supp., at 1290. The Court of Appeals explicitly limited the hearing right for misdemeanor defendants to those who are jailed pending trial. 483 F. 2d, at 789. Its opinion also suggests, without



State Attorney Gerstein petitioned for review, and we granted certiorari because of the importance of the issue.<sup>12</sup> 414 U. S. 1062. We affirm in part and reverse in part.

stating explicitly, that the hearing right is similarly limited to felony defendants who are confined pending trial. *Id.*, at 787, 789.

The Court of Appeals vacated those parts of the District Court's order that prescribed time periods different from those in the amended rules and imposed sanctions for failure to comply with the hearing requirements. Our disposition of the case makes it unnecessary to address the specific terms of the District Court's decree.

<sup>12</sup> At oral argument counsel informed us that the named respondents have been convicted. Their pretrial detention therefore has ended. This case belongs, however, to that narrow class of cases in which the termination of a class representative's claim does not moot the claims of the unnamed members of the class. See *Sosna v. Iowa*, — U. S. — (1975). Pretrial detentions is by nature temporary, and it is most unlikely that any given individual could have his constitutional claim decided on appeal before he is either released or convicted. The individual could nonetheless suffer repeated deprivations, and it is certain that other persons similarly situated will be detained under the allegedly unconstitutional procedures. The claim, in short, is one that is distinctly "capable of repetition, yet evading review."

At the time the complaint was filed, the named respondents were members of a class of persons detained without a judicial probable cause determination, but the record does not indicate whether any of them were still in custody awaiting trial when the District Court certified the class. Such a showing ordinarily would be required to avoid mootness under *Sosna*. But this case is a suitable exception to that requirement. See *Sosna*, *supra*, at — n. 11; cf. *Rivera v. Freeman*, 469 F. 2d 1159, 1162-1163 (CA9 1972). The length of pretrial custody cannot be ascertained at the outset, and it may be ended at any time by release on recognizance, dismissal of the charges, or a guilty plea, as well as by acquittal or conviction after trial. It is by no means certain that any given individual, named as plaintiff, would be in pretrial custody long enough for a district judge to certify the class. Moreover, in this case the constant existence of a class of persons suffering the deprivation is certain. The attorney representing the named respondents is a public defender, and we can safely assume that he has other clients with a continuing live interest in the case.



## II

As framed by the proceedings below, this case presents two issues: whether a person arrested and held for trial on an information is entitled to a judicial determination of probable cause for detention, and if so, whether the adversary hearing ordered by the District Court and approved by the Court of Appeals is required by the Constitution.

## A

Both the standards and procedures for arrest and detention have been derived from the Fourth Amendment and its common-law antecedents. See *Cupp v. Murphy*, 412 U. S. 291, 294-295 (1973); *Ex parte Bollman*, 8 U. S. (4 Cranch) 75 (1807); *Ex parte Burford*, 7 U. S. (3 Cranch) 448 (1806). 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." *Beck v. Ohio*, 379 U. S. 89, 91 (1964). See also *Henry v. United States*, 361 U. S. 98 (1959); *Brinegar v. United States*, 338 U. S. 160, 175-176 (1949). This standard, like those for searches and seizures, represents a necessary accommodation between the individual's right to liberty and the State's duty to control crime.

"These long-prevailing standards seek to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime. They also seek to give fair leeway for enforcing the law in the community's protection. Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to



their conclusions of probability. The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating these often opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice." *Brinegar v. United States*, *supra*, at 176.

To implement the Fourth Amendment's protection against unfounded invasions of liberty and privacy, the Court has required that the existence of probable cause be decided by a neutral and detached magistrate whenever possible. The classic statement of this principle appears in *Johnson v. United States*, 333 U. S. 10, 13-14 (1948):

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

See also *Terry v. Ohio*, 392 U. S. 1, 20-22 (1968).<sup>12</sup>

Maximum protection of individual rights could be assured by requiring a magistrate's review of the factual justification prior to any arrest, but such a requirement

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<sup>12</sup> We reiterated this principle in *United States v. United States District Court*, 407 U. S. 297 (1972). In terms that apply equally to arrests, we described the "very heart of the Fourth Amendment directive" as a requirement that "where practical, a governmental search and seizure should represent both the efforts of the officer to gather evidence of wrongful acts and the judgment of the magistrate that the collected evidence is sufficient to justify invasion of a citizen's private premises or conversation." *Id.*, at 316. See also *Terry v. Ohio*, 392 U. S. 1, 20-22 (1968).



would constitute an intolerable handicap for legitimate law enforcement. Thus, while the Court has expressed a preference for the use of arrest warrants when feasible, *Beck v. Ohio*, 379 U. S. 89, 96 (1964); *Wong Sun v. United States*, 371 U. S. 471, 479-482 (1963), it has never invalidated an arrest supported by probable cause solely because the officers failed to secure a warrant. See *Ker v. California*, 374 U. S. 23 (1963); *Draper v. United States*, 358 U. S. 307 (1959); *Trupiano v. United States*, 334 U. S. 699, 705 (1948).<sup>14</sup>

Under this practical compromise, a policeman's on-the-scene assessment of probable cause provides legal justification for arresting a person suspected of crime, and for a brief period of detention to take the administrative steps incident to arrest. Once the suspect is in custody, however, the reasons that justify dispensing with the magistrate's neutral judgment evaporate. There no longer is any danger that the suspect will escape or commit further crimes while the police submit their evidence to a magistrate. And, while the State's reasons for taking summary action subside, the suspect's need for a neutral determination of probable cause increases significantly. The consequences of prolonged detention may be more serious than the interference occasioned by arrest. Pretrial confinement may imperil the suspect's job, interrupt his source of income, and impair his family relationships. See R. Goldfarb, *Ransom* 32-91 (1965); L. Katz, *Justice*

<sup>14</sup> Another aspect of *Trupiano* was overruled in *United States v. Rabinowitz*, 339 U. S. 56 (1950), which was overruled in turn by *Chimel v. California*, 395 U. S. 752 (1969).

The issue of warrantless arrest that has generated the most controversy, and which remains unsettled, is whether and under what circumstances an officer may enter a suspect's home to make a warrantless arrest. See *Coolidge v. New Hampshire*, 403 U. S. 443, 474-481 (1971); *id.*, at 510-512 n. 1 (WHITE, J., dissenting); *Jones v. United States*, 357 U. S. 493, 499-500 (1958).



Is the Crime 51-62 (1972). Even pretrial release may be accompanied by burdensome conditions that effect a significant restraint on liberty. See, e. g., 18 U. S. C. § 3146 (a)(2), (5). When the stakes are this high, the detached judgment of a neutral magistrate is essential if the Fourth Amendment is to furnish meaningful protection from unfounded interference with liberty. Accordingly, we hold that the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint on liberty following arrest.

This result has historical support in the common law that has guided interpretation of the Fourth Amendment. See *Carroll v. United States*, 267 U. S. 132, 149 (1925). At common law it was customary, if not obligatory, for an arrested person to be brought before a justice of the peace shortly after arrest. 2 M. Hale, *Pleas of the Crown* 77, 81, 95, 121 (1736); 2 W. Hawkins, *Pleas of the Crown* 116-117 (4th ed. 1792). See also *Kurtz v. Moffitt*, 115 U. S. 487, 498-499 (1885).<sup>15</sup> The justice of the peace

<sup>15</sup> The primary motivation for the requirement seems to have been the penalty for allowing an offender to escape, if he had in fact committed the crime, and the fear of liability for false imprisonment, if he had not. But Hale also recognized that a judicial warrant of commitment, called a *mittimus*, was required for more than brief detention.

"When a private person hath arrested a felon, or one suspected of felony, he may detain him in custody till he can reasonably dismiss himself of him; but with as much speed as conveniently he can, he may do either of these things.

"1. He may carry him to the common gaol, . . . but that is now rarely done.

"2. He may deliver him to the constable of the vill, who may either carry him to the common gaol, . . . or to a justice of peace to be examined, and farther proceed against as case shall require. . . .

"3. Or he may carry him immediately to any justice of peace of the county where he is taken, who upon examination may discharge, bail, or commit him, as the case shall require.

"And the bringing the offender either by the constable or private



would "examine" the prisoner and the witnesses to determine whether there was reason to believe the prisoner had committed a crime. If there was, the suspect would be committed to jail or bailed pending trial. If not, he would be discharged from custody. 1 M. Hale, *supra*, at 583-586; 2 W. Hawkins, *supra*, at 116-119; 1 J. Stephen, *History of the Criminal Law of England* 233 (1883).<sup>16</sup> The initial determination of probable cause also could be reviewed by higher courts on a writ of habeas corpus. 2 W. Hawkins, *supra*, at 112-115; 1 J. Stephen, *supra*, at 243; see *Ex parte Bollman*, 8 U. S. (4 Cranch) 75, 97-101 (1807). This practice furnished the model for criminal procedure in America immediately following the adoption of the Fourth Amendment, see *Ex parte Bollman*, 8 U. S. (4 Cranch) 75 (1807);<sup>17</sup> *Ex parte Burford*, 7 U. S. (3 Cranch) 448 (1806); *United States v. Hamilton*, 3 U. S. (3 Dall.) 17 (1795), and there are indications that the Framers of the Bill of Rights regarded it as a model

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person to a justice of peace is most usual and safe, because a gaoler will expect a *Mittimus* for his warrant of detaining."

1 M. Hale, *supra*, at 589-590.

<sup>16</sup> The examination of the prisoner was inquisitorial, and the witnesses were questioned outside the prisoner's presence. Although this method of proceeding was considered quite harsh, 1 J. Stephen, at 219-225, it was well established that the prisoner was entitled to be discharged if the investigation turned up insufficient evidence of his guilt. *Id.*, at 233.

<sup>17</sup> In *Ex parte Bollman*, two men charged in the Aaron Burr case were committed following an examination in the circuit court of the District of Columbia. They filed a petition for writ of habeas corpus in the Supreme Court. The Court, in an opinion by Chief Justice Marshall, affirmed its jurisdiction to issue habeas corpus to persons in custody by order of federal trial courts. Then, following arguments on the Fourth Amendment requirement of probable cause, the Court surveyed the evidence against the prisoners and held that it did not establish probable cause that they were guilty of treason. The prisoners were discharged.



for a "reasonable" seizure. See *Draper v. United States*, 358 U. S. 307, 317-320 (1959) (DOUGLAS, J., dissenting).<sup>18</sup>

## B

Under the Florida procedures challenged here, a person arrested without a warrant and charged by information may be jailed or subjected to other restraints pending trial without any opportunity for a probable cause determination.<sup>19</sup> Petitioner defends this practice on the ground that the prosecutor's decision to file an information is itself a determination of probable cause that furnishes sufficient reason to detain a defendant pending trial. Although a conscientious decision that the evidence warrants prosecution affords a measure of protection against unfounded detention, we do not think prosecutorial judgment standing alone meets the requirements of the Fourth Amendment. Indeed, we think the Court's previous decisions compel disapproval of the Florida procedure. In *Albrecht v. United States*, 273

<sup>18</sup> See also N. Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* 15-16 (1937). A similar procedure at common law, the warrant for recovery of stolen goods, is said to have furnished the model for a "reasonable" search under the Fourth Amendment. The victim was required to appear before a justice of the peace and make an oath of probable cause that his goods could be found in a particular place. After the warrant was executed, and the goods seized, the victim and the alleged thief would appear before the justice of the peace for a prompt determination of the cause for seizure of the goods and detention of the thief. 2 M. Hale, *supra*, at 149-152; T. Taylor, *Two Studies in Constitutional Interpretation* 24-25, 39-40 (1969); see *Boyd v. United States*, 116 U. S. 615, 626-629 (1886).

<sup>19</sup> A person arrested under a warrant would have received a prior judicial determination of probable cause. Under Fla. Rule Crim. Proc. 3.120, a warrant may be issued upon a sworn complaint that states facts showing that the suspect has committed a crime. The magistrate may also take testimony under oath to determine if there is reasonable ground to believe the complaint is true.



U. S. 1, 5 (1927), the Court held that an arrest warrant issued solely upon a United States Attorney's information was invalid because the accompanying affidavits were defective. Although the Court's opinion did not explicitly state that the prosecutor's official oath could not furnish probable cause, that conclusion was implicit in the judgment that the arrest was illegal under the Fourth Amendment.<sup>20</sup> More recently, in *Coolidge v. New Hampshire*, 403 U. S. 443, 449-453 (1971), the Court held that a prosecutor's responsibility to law enforcement is inconsistent with the constitutional role of a neutral and detached magistrate. We reaffirmed that principle in *Shadwick v. City of Tampa*, 407 U. S. 345 (1972), and held that probable cause for the issuance of an arrest warrant must be determined by someone independent of police and prosecution. See also *United States v. United States District Court*, 407 U. S. 297, 317 (1972).<sup>21</sup> The reason

<sup>20</sup> By contrast, the Court has held that an indictment, "fair upon its face," and returned by a "properly constituted grand jury" conclusively determines the existence of probable cause and requires issuance of an arrest warrant without further inquiry. *Ex parte United States*, 287 U. S. 241, 250 (1932). See also *Giordenello v. United States*, 357 U. S. 480, 487 (1958). The willingness to let a grand jury's judgment substitute for that of a neutral and detached magistrate is attributable to the grand jury's relationship to the courts and its historical role of protecting individuals from unjust prosecution. See *United States v. Calandra*, 414 U. S. 338, 342-346 (1974).

<sup>21</sup> The Court had earlier reached a different result in *Ocampo v. United States*, 234 U. S. 91 (1914), a criminal appeal from the Philippine Islands. Interpreting a statutory guarantee substantially identical to the Fourth Amendment, Act of July 1, 1902, c. 1369, § 5, 32 Stat. 693, the Court held that an arrest warrant could issue solely upon a prosecutor's information. The Court has since held that interpretation of a statutory guarantee applicable to the Philippines is not conclusive for interpretation of a cognate provision in the Federal Constitution, *Green v. United States*, 355 U. S. 184, 194-198 (1957). Even if it were, the result reached in *Ocampo*



for this separation of functions was expressed by Justice Frankfurter in a similar context:

"A democratic society, in which respect for the dignity of all men is central, naturally guards against the misuse of the law enforcement process. Zeal in tracking down crime is not in itself an assurance of soberness of judgment. Disinterestedness in law enforcement does not alone prevent disregard of cherished liberties. Experience has therefore counseled that safeguards must be provided against the dangers of the overzealous as well as the despotic. The awful instruments of the criminal law cannot be entrusted to a single functionary. The complicated process of criminal justice is therefore divided into different parts, responsibility for which is separately vested in the various participants upon whom the criminal law relies for its vindication." *McNabb v. United States*, 318 U. S. 332, 343 (1943).

In holding that the prosecutor's assessment of probable cause is not sufficient alone to justify restraint on liberty pending trial, we do not imply that the accused is entitled to judicial oversight or review of a prosecutor's decision to prosecute. Instead, we adhere to the Court's prior holding that a judicial hearing is not prerequisite to prosecution by information. *Beck v. Washington*, 369 U. S. 541, 545 (1962). *Lem Woon v. Oregon*, 229 U. S. 586 (1913). Nor do we retreat from the established rule that illegal arrest or detention does not void a subsequent conviction. *Frisbie v. Collins*, 342 U. S. 519 (1952); *Ker v. Illinois*, 119 U. S. 436 (1886). Thus, as the Court of Appeals noted below, although a suspect who is presently detained may challenge the probable cause for

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is incompatible with the later holdings of *Albrecht*, *Cookidge*, and *Shadwick*.



that confinement, a conviction will not be vacated on the ground that the defendant was detained pending trial without a determination of probable cause. 483 F. 2d, at 786-787. Compare *Scarborough v. Dutton*, 393 F. 2d 6 (CA5 1968), with *Brown v. Fauntleroy*, — U. S. App. D. C. —, 442 F. 2d 838 (1971), and *Cooley v. Stone*, — U. S. App. D. C. —, 414 F. 2d 1213 (1969).

### III

Both the District Court and the Court of Appeals held that the determination of probable cause must be accompanied by the full panoply of adversary safeguards—counsel, confrontation, cross-examination, and compulsory process for witnesses. A full preliminary hearing of this sort is modeled after the procedure used in many States to determine whether the evidence justifies going to trial under an information or presenting the case to a grand jury. See *Coleman v. Alabama*, 399 U. S. 1 (1970); Y. Kamisar, W. LaFare & J. Israel, *Modern Criminal Procedure* 957-967, 996-1000 (4th ed. 1974). The standard of proof required of the prosecution is usually referred to as "probable cause," but in some jurisdictions it may approach a *prima facie* case of guilt. A. L. I. Model Code of Pre-arraignment Procedure, Commentary on Article 330, at 90-91 (Tent. Draft No. 5, 1972). When the hearing takes this form, adversary procedures are customarily employed. The importance of the issue to both the State and the accused justifies the presentation of witnesses and full exploration of their testimony on cross-examination. This kind of hearing also requires appointment of counsel for indigent defendants. *Coleman v. Alabama*, *supra*. And, as the hearing assumes increased importance and the procedures become more complex, the likelihood that it can be held promptly



after arrest diminishes. See A. L. I. Model Code of Pre-arraignment Procedure, *supra*, at 33-34.

These adversary safeguards are not essential for the probable cause determination required by the Fourth Amendment. The sole issue is whether there is probable cause for detaining the arrested person pending further proceedings. This issue can be determined reliably without a full adversary hearing. The standard is the same as that for arrest.<sup>22</sup> That standard—probable cause to believe the suspect has committed a crime—traditionally has been decided in nonadversary proceedings on hearsay and written testimony, and the Court has approved these informal modes of proof.

"Guilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined to that which long experience in the common-law tradition, to some extent embodied in the Constitution, has crystallized into rules of evidence consistent with that standard. These rules are historically grounded rights of our system, developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property.

"In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and

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<sup>22</sup> Because the standards are identical, ordinarily there is no need for further investigation before the probable cause determination can be made.

"Presumably, whomever the police arrest they must arrest on 'probable cause.' It is not the function of the police to arrest, as it were, at large and to use an interrogating process at police headquarters in order to determine whom they should charge before a committing magistrate on 'probable cause.'" *Mallory v. United States*, 354 U. S. 449, 456 (1957).



practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved." *Brinegar v. United States*, 338 U. S. 160, 174-175 (1949).

Cf. *McCray v. Illinois*, 386 U. S. 300 (1967).

The use of these informal procedures is justified not only by the lesser consequences of a probable cause determination but also by the nature of the determination itself. It does not require the fine resolution of conflicting evidence that a reasonable-doubt or even a preponderance standard demands, and credibility determinations are seldom crucial in deciding whether the evidence supports a reasonable belief in guilt. See F. Miller, *Prosecution: The Decision to Charge a Suspect with a Crime* 64-109 (1969).<sup>22</sup> This is not to say that confrontation and cross-examination might not enhance the reliability of

<sup>22</sup> In *Morrissey v. Brewer*, 408 U. S. 471 (1972), and *Gagnon v. Scarpelli*, 411 U. S. 778 (1973), we held that a parolee or probationer arrested prior to revocation is entitled to an informal preliminary hearing at the place of arrest, with some provision for live testimony. 408 U. S., at 487; 411 U. S., at 786. That preliminary hearing, more than the probable cause determination required by the Fourth Amendment, serves the purpose of gathering and preserving live testimony, since the final revocation hearing frequently is held at some distance from the place where the violation occurred. 408 U. S., at 485; 411 U. S., at 782-783 n. 5. Moreover, revocation proceedings may offer less protection from initial error than the more formal criminal process, where violations are defined by statute and the prosecutor has a professional duty not to charge a suspect with crime unless he is satisfied of probable cause. See ABA Code of Professional Responsibility, DR 7-103 (A) (a prosecutor "shall not institute or cause to be instituted criminal charges when he knows or it is obvious that the charges are not supported by probable cause"); ABA Standards Relating to the Administration of Criminal Justice, *The Prosecution Function*, §§ 1.1, 3.4, 3.9 (1974); American College of Trial Lawyers, *Code of Trial Conduct*, rule 4 (c) (1972).



probable cause determinations in some cases. In most cases, however, their value would be too slight to justify holding, as a matter of constitutional principle, that these formalities and safeguards designed for trial must also be employed in making the Fourth Amendment determination of probable cause.<sup>24</sup>

Because of its limited function and its nonadversary character, the probable cause determination is not a "critical stage" in the prosecution that would require appointed counsel. The Court has identified as "critical stages" those pretrial procedures that would impair defense on the merits if the accused is required to proceed without counsel. *Coleman v. Alabama*, 399 U. S. 1 (1970); *United States v. Wade*, 388 U. S. 218, 226-227 (1967). In *Coleman v. Alabama*, where the Court held that a preliminary hearing was a critical stage of an Alabama prosecution, the majority and concurring opinions identified two critical factors that distinguish the Alabama preliminary hearing from the probable cause determination required by the Fourth Amendment. First under Alabama law the function of the preliminary hearing was to determine whether the evidence justified charging the suspect with an offense. A finding of no probable cause could mean that he would not be tried at all. The Fourth Amendment probable cause determination is addressed only to pretrial custody. To be sure, pretrial custody may affect to some extent the defendant's ability to assist in preparation of his defense, but this is not the kind of substantial harm identified as controlling in *Wade* and *Coleman*. Second, Alabama allowed the suspect to

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<sup>24</sup> Criminal justice is already overburdened by the volume of cases and the complexities of our system. The processing of misdemeanors and the early stages of prosecution generally are marked by delays that can seriously affect the quality of justice. A constitutional doctrine requiring full adversary hearings for all persons detained pending trial could exacerbate the problem of pretrial delay.



confront and cross-examine prosecution witnesses at the preliminary hearing. The Court noted that the suspect's defense on the merits could be compromised if he had no legal assistance for exploring or preserving the witnesses' testimony. This consideration does not apply to the informal, nonadversary procedure required under the Fourth Amendment.

The reasons that make a nonadversary proceeding appropriate, however, do not justify denying the suspect an opportunity to be present and participate in the determination.<sup>25</sup> Our system of justice operates on the premise

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<sup>25</sup> The procedures suggested in the Uniform Rules of Criminal Procedure (Proposed Final Draft 1974) and the A. L. I. Model Code of Pre-arraignment Procedure (Tent. Draft No. 5, 1972, and Tent. Draft No. 5A, 1973) are instructive. Under the Uniform Rules, a person arrested without a warrant is entitled, "without unnecessary delay," to a first appearance before a magistrate and a determination that grounds exist for issuance of an arrest warrant. The determination may be made on affidavits or testimony, in the presence of the accused. Rule 311. Persons who remain in custody for inability to qualify for pretrial release are offered another opportunity for a probable cause determination at the detention hearing, held no more than 5 days after arrest. This is an adversary hearing, and the parties may summon witnesses, but reliable hearsay evidence may be considered. Rule 344.

The Model Code of Pre-arraignment Procedure also provides a first appearance, at which a warrantless arrest must be supported by a reasonably detailed written statement of facts. § 310. The magistrate may make a determination of probable cause to hold the accused, but he is not required to do so and the accused may request an attorney for an "adjourned session" of the first appearance to be held within 2 "court days." At that session, the magistrate makes a determination of probable cause upon a combination of written and live testimony:

"The arrested person may present written and testimonial evidence and arguments for his discharge and the state may present additional written and testimonial evidence and arguments that there is reasonable cause to believe that he has committed the crime of which he is accused. The state's submission may be made by means



that the subject of a judicial proceeding is entitled to participate unless there is good reason to exclude him. See *Groppi v. Leslie*, 404 U. S. 496, 502 (1972); *Rees v. City of Watertown*, 86 U. S. (19 Wall.) 107, 122-123 (1873). The procedures normally followed in applying for warrants are *ex parte* proceedings by necessity, as notifying the suspect would often frustrate the purpose of the warrant. See T. Taylor, *Two Studies in Constitutional Interpretation* 81-82 (1969). But when the suspect is already in custody, and the only issue is probable cause for detention, he should be allowed to participate in the determination. Allowing him to appear before the magistrate and giving him an opportunity to speak or to submit written evidence for consideration along with the State's presentation could enhance both the reliability and the fairness of the proceeding.

The suspect's presence and participation would impose no significant burden on the State. Virtually all jurisdictions require that arrested persons be presented to a judicial officer within a short time after arrest, see A. L. I., *Model Code of Pre-arraignment Procedure* 230-231 (Tent. Draft No. 1, 1966), and every jurisdiction makes some provision for setting bail or determining other conditions of pretrial release. See L. Katz, *Justice Is the Crime*, Appendix B, at 247-365 (1972). Since the defendant is already in the courtroom, the issue of probable cause may be decided at that time with little or no inconvenience to the State. In fact, the suspect's first appearance before a magistrate traditionally has been considered the proper time for determining whether there

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of affidavits, and no witnesses shall be required to appear unless the court, in the light of the evidence and arguments submitted by the parties, determines that there is a basis for believing that the appearance of one or more witnesses for whom the arrested person seeks subpoenas might lead to a finding that there is no reasonable cause." § 310.2 (2) (Tent. Draft No. 5A, 1973).



is probable cause for detention. 1 M. Hale, *Pleas of the Crown* 585-586, 589-590 (1736); 2 *id.*, at 77-95; 2 W. Hawkins, *Pleas of the Crown* 116-119 (4th ed. 1762); see *McNabb v. United States*, 318 U. S. 332, 342-344 (1943); Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349, 391 & n. 408 (1974). Although the Federal Rules of Criminal Procedure do not explicitly acknowledge this function of the first appearance, the Court has interpreted them to require a determination of probable cause at that stage. *Jaben v. United States*, 381 U. S. 214, 218 (1965); *Mallory v. United States*, 354 U. S. 449, 454 (1957).<sup>20</sup>

There is no single proper method for making the probable cause determination required by the Fourth Amendment. The States have many different patterns of criminal procedure, and each may adapt its own to provide a swift and reliable probable cause determination with the least burden to its system. Like many jurisdictions,

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<sup>20</sup> In an *amicus* brief filed on behalf of the United States, the Solicitor General suggested that *McNabb* and *Mallory* had mistaken the purpose of the first appearance, and that actual practice is otherwise. Cf. Note, *Probable Cause at the Initial Appearance in Warrantless Arrests*, 45 So. Cal. L. Rev. 1128 (1972). *McNabb*, of course, was decided before the adoption of the Federal Rules of Criminal Procedure. It interpreted a statutory requirement that an arrested person be brought before a magistrate without unnecessary delay, 318 U. S., at 342. *Mallory* was decided after the federal rules were adopted, and although the interpretation of the federal rules was dictum, it clearly outlined the Court's view:

"The scheme for initiating a federal prosecution is plainly defined. The police may not arrest upon mere suspicion but only on 'probable cause.' The next step in the proceeding is to arraign the arrested person before a judicial officer as quickly as possible so that he may be advised of his rights and so that the issue of probable cause may be promptly determined." 354 U. S., at 454.

The use of the word "arraign" was an error, as arraignment occurs later in the process. Fed. Rule Crim. Proc. 10.



Florida requires every arrested person to be brought before a magistrate within 24 hours, unless sooner released. Fla. Rule Crim. Proc. 3.310 (b). At that appearance the defendant is told of the charges against him, furnished a copy of the complaint, advised of his constitutional rights, and provided counsel if he is indigent. The magistrate then sets bail or prescribes other conditions of pretrial release. One of the factors typically relied upon in making this decision is the weight of evidence against the accused. ABA Standards Relating to the Administration of Criminal Justice, Pretrial Release § 5.1 (b) (1974); see 18 U. S. C. § 3146 (b). Expanding that determination to encompass a test of probable cause would be a natural way of integrating the probable cause decision with existing procedures.

In other States, existing procedures may satisfy the requirement of the Fourth Amendment with only minor adjustments. Some States already authorize a determination of probable cause at or immediately following the suspect's first appearance. *E. g.*, Colo. Rev. Stat. § 39-2-3 (1965 Supp.); Hawaii Rev. Stat. § 708-9 (5) (1968); Vt. Rules Crim. Proc. 3 (b), 5 (c) (1974). Others may choose simply to accelerate their existing preliminary hearings. What the Fourth Amendment requires for pretrial restraint on liberty<sup>27</sup> is a reliable determination of probable cause made either before or promptly after arrest, and preferably no later than the first appearance before a ju-

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<sup>27</sup> Because the probable cause determination is not a constitutional prerequisite to the charging decision, it is required only for those suspects who suffer restraints on liberty other than the condition that they appear for trial. There are many kinds of pretrial release and many degrees of conditional liberty. See 18 U. S. C. § 3146; ABA Standards Relating to the Administration of Criminal Justice, Pretrial Release § 5.2 (1974); Uniform Rules of Criminal Procedure, Rule 341 (Proposed Final Draft 1974). We cannot define specifically those that would require a prior probable cause determination, but the key factor is significant restraint on liberty.



dicial officer. If made after arrest, the suspect must be given an opportunity to be present and to be heard. Each State may choose the procedure that best accommodates this determination to its existing practice.<sup>28</sup>

#### IV

We agree with the Court of Appeals that the Fourth Amendment requires a timely judicial determination of probable cause as a prerequisite to detention, and we accordingly affirm that much of the judgment. As we do not agree that the Fourth Amendment requires the adversary hearing outlined in the District Court's decree, we reverse in part and remand to the Court of Appeals for further proceedings consistent with this opinion.

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<sup>28</sup> Of Course, if the State incorporates the probable cause determination into a multipurpose hearing, the necessity for appointed counsel at the combined proceeding must be governed by the principles of *United States v. Wade* and *Coleman v. Alabama*, *supra*.



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SUPREME COURT OF THE UNITED STATES

No. 73-477

Richard E. Gerstein, State At- torney for Eleventh Judicial Circuit of Florida, Petitioner, v. Robert Pugh et al.	}	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.
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[December —, 1974]

MR. JUSTICE POWELL delivered the opinion of the Court.

The issue in this case is whether a person arrested under a prosecutor's information is constitutionally entitled to a judicial determination of probable cause for pretrial restraint of liberty.

I

In March 1971 respondents Pugh and Henderson were arrested in Dade County, Florida. Each was charged with several offenses under a prosecutor's information.<sup>1</sup> Pugh was denied bail because one of the charges against him carried a potential life sentence, and Henderson remained in custody because he was unable to post a \$4,500 bond.

<sup>1</sup> Respondent Pugh was arrested on March 3, 1971. On March 16 an information was filed charging him with robbery, carrying a concealed weapon, and possession of a firearm during commission of a felony. Respondent Henderson was arrested on March 2, and charged by information on March 19 with the offenses of breaking and entering and assault and battery. The record does not indicate whether there was an arrest warrant in either case.



In Florida, indictments are required only for prosecution of capital offenses. Prosecutors may charge all other crimes by information, without a prior preliminary hearing and without obtaining leave of court. Fla. Rule Crim. Proc. 3.140 (a); *State v. Hernandez*, 217 So. 2d 109 (Fla. 1968); *Di Bona v. State*, 121 So. 2d 192 (Fla. Ct. App. 1960). At the time respondents were arrested, a Florida rule seemed to authorize adversary preliminary hearings to test probable cause for detention in all cases. Fla. Rule Crim. Proc. 1.122 (amended 1972). But the Florida courts had held that the filing of an information foreclosed the suspect's right to a preliminary hearing. See *State ex rel. Hardy v. Blount*, 261 So. 2d 172 (Fla. 1972).<sup>2</sup> They had also held that habeas corpus could not be used, except perhaps in exceptional circumstances, to test the probable cause for detention under an information. See *Sullivan v. State ex rel. McCrory*, 29 So. 2d 794, 797 (Fla. 1951). The only possible methods for obtaining a judicial determination of probable cause were a special statute allowing a preliminary hearing after 30 days, Fla. Stat. Ann. § 907.045 (1973),<sup>3</sup> and arraignment, which the District Court found was often delayed a month or more after arrest. *Pugh v. Rainwater*, 332 F. Supp. 1107, 1110 (SD Fla. 1971).<sup>4</sup> As a result, a person charged

<sup>2</sup> Florida law also denies preliminary hearings to persons confined under indictment, see *Sangaree v. Hamlin*, 235 So. 2d 729 (Fla. 1970), Fla. Rule Crim. Proc. 3.131 (a), but that procedure is not challenged in this case.

<sup>3</sup> This statute may have been construed to make the hearing permissive instead of mandatory. See *Evans v. State*, 197 So. 2d 323 (Fla. Ct. App. 1967); Fla. Op. Att'y Gen. 067-29 (1967). But cf. *Karz v. Overton*, 249 So. 2d 783 (Fla. Ct. App. 1971). It may also have been superseded by the subsequent amendments to the rules of criminal procedure. *In re Florida Rules of Criminal Procedure*, 272 So. 2d 65 (1972).

<sup>4</sup> The Florida rules do not suggest that the issue of probable cause can be raised at arraignment, Fla. Rule Crim. Proc. 3.160, but



by information could be detained for a substantial period solely on the decision of a prosecutor.

Respondents Pugh and Henderson filed a class action against Dade County officials in the Federal District Court,<sup>5</sup> claiming a constitutional right to a judicial hearing on the issue of probable cause and requesting declaratory and injunctive relief.<sup>6</sup> Respondents Turner and Faulk, also in custody under informations, subsequently intervened.<sup>7</sup> Petitioner Gerstein, the State Attorney for Dade County, was one of several defendants.<sup>8</sup>

After an initial delay while the Florida legislature considered a bill that would have afforded preliminary hearings to persons charged by information, the District Court granted the relief sought. *Pugh v. Rainwater, supra*.  
 le The Court certified the case as a class action under Fed.

h— counsel for Petitioner represented at oral argument that arraignment affords the suspect an opportunity to "attack the sufficiency of the evidence to hold him." Tr. of Oral Arg., Mar. 25, 1974, at 17. The Court of Appeals assumed, without deciding, that this was true. 483 F. 2d 778, 781 n. 8.

<sup>5</sup> The complaint was framed under 42 U. S. C. § 1983, and jurisdiction in the District Court was based on 28 U. S. C. § 1343 (3).

<sup>6</sup> Respondents did not ask for release from state custody, even as an alternate remedy. They asked only that the state authorities be ordered to give them a probable cause determination. This was also the only relief that the District Court ordered for the named respondents. 332 F. Supp., at 1115-1116. Because release was neither asked nor ordered, the lawsuit did not come within the class of cases for which habeas corpus is the exclusive remedy. *Preiser v. Rodriguez*, 411 U. S. 475 (1973); see *Wolff v. McDonnell*, 417 U. S. —, — (1974).

<sup>7</sup> Turner was being held on a charge of auto theft, following arrest on March 11, 1971. Faulk was arrested on March 19 on charges of soliciting a ride and possession of marijuana.

<sup>8</sup> The named defendants included justices of the peace and judges of small-claims courts, who were authorized to hold preliminary hearings in criminal cases, and a group of law enforcement officers with power to make arrests in Dade County. Gerstein was the only one who petitioned for certiorari.



Rule Civ. Proc. 23 (b)(2), and held that the Fourth and Fourteenth Amendments give all arrested persons charged by information a right to a judicial hearing on the question of probable cause. The District Court ordered the Dade County defendants to give the named plaintiffs an immediate preliminary hearing to determine probable cause for further detention.<sup>8</sup> It also ordered them to submit a plan providing preliminary hearings in all cases instituted by information.

The defendants submitted a plan authored by Sheriff E. Wilson Purdy, and the District Court adopted it with modifications. The final order prescribed a detailed post-arrest procedure. 336 F. Supp. 490. Upon arrest the accused would be taken before a magistrate for a "first appearance hearing." The magistrate would explain the charges, advise the accused of his rights, appoint counsel if he was indigent, and proceed with a probable cause determination unless either the prosecutor or the accused was unprepared. If either requested more time, the magistrate would set the date for a "preliminary hearing," to be held within four days if the accused was in custody and within 10 days if he had been released pending trial. The order provided sanctions for failure to hold the hearings at prescribed times. At the "preliminary hearing" the accused would be entitled to counsel, and he would be allowed to confront and cross-examine adverse witnesses,

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<sup>8</sup> The District Court correctly held that respondents' claim for relief was not barred by the equitable restrictions on federal intervention in state prosecutions, *Younger v. Harris*, 401 U. S. 37 (1971). The injunction was not directed at the state prosecutions as such, but only at the legality of pretrial detention without a judicial hearing, an issue that could not be raised in defense of the criminal prosecution. The order to hold preliminary hearings could not prejudice the conduct of trial on the merits. See *Conover v. Montemuro*, 477 F. 2d 1073, 1082 (CA3 1973); cf. *Perez v. Ledesma*, 401 U. S. 82 (1971); *Stefanelli v. Minard*, 342 U. S. 117 (1951).



to summon favorable witnesses, and to have a transcript made on request. If the magistrate found no probable cause, the accused would be discharged. He then could not be charged with the same offense by complaint or information, but only by indictment returned within 30 days.

The Court of Appeals for the Fifth Circuit stayed the District Court's order pending appeal, but while the case was awaiting decision, the Dade County judiciary voluntarily adopted a similar procedure of its own. Upon learning of this development, the Court of Appeals remanded the case for specific findings on the constitutionality of the new Dade County system. Before the District Court issued its findings, however, the Florida Supreme Court amended the procedural rules governing preliminary hearings statewide, and the parties agreed that the District Court should direct its inquiry to the new rules rather than the Dade County procedures.

Under the amended rules every arrested person must be taken before a judicial officer within 24 hours. Fla. Rule Crim. Proc. 3.130 (b). This "first appearance" is similar to the "first appearance hearing" ordered by the District Court in all respects but the crucial one: the magistrate does not make a determination of probable cause. The rule amendments also changed the procedure for preliminary hearings, restricting them to felony charges and codifying the rule that no hearings are available to persons charged by information or indictment. Rule 3.131; see *In re Rule 3.131 (b)*, *Florida Rules of Criminal Procedure*, 289 So. 2d 3 (Fla. 1974).

In a supplemental opinion the District Court held that the amended rules had not answered the basic constitutional objection, since a defendant charged by information still could be detained pending trial without a judicial determination of probable cause. 355 F. Supp.



1286. Reaffirming its original ruling, the District Court declared that the continuation of this practice was unconstitutional.<sup>10</sup> The Court of Appeals affirmed, 483 F. 2d 778, modifying the District Court's decree in minor particulars and suggesting that the form of preliminary hearing provided by the amended Florida rules would be acceptable, as long as it was provided to all defendants in custody pending trial. *Id.*, at 788-789.<sup>11</sup>

<sup>10</sup> Although this ruling held a statewide "legislative rule" unconstitutional, it was not outside the jurisdiction of a single judge by virtue of 28 U. S. C. § 2281. The original complaint did not ask for an injunction against enforcement of any state statute or legislative rule of statewide application, since the practice of denying preliminary hearings to persons charged by information was then embodied only in judicial decisions. The District Court therefore had jurisdiction to issue the initial injunction, and the Court of Appeals had jurisdiction over the appeal. On remand, the constitutionality of a state "statute" was drawn into question for the first time when the criminal rules were amended. The District Court's supplemental opinion can fairly be read as a declaratory judgment that the amended rules were unconstitutional; the injunctive decree was never amended to incorporate that holding; and the opinion in the Court of Appeals is not inconsistent with the conclusion that the District Court did not enjoin enforcement of the statewide rule. See 483 F. 2d, at 788-790. Accordingly, a district court of three judges was not required for the issuance of this order. See *Kennedy v. Mendoza-Martinez*, 372 U. S. 144, 152-155 (1963); *Flemming v. Nestor*, 363 U. S. 603, 606-608 (1960).

<sup>11</sup> The major difference between the District Court's order and that of the Court of Appeals centered on the question whether a probable cause hearing is required for all arrested persons charged by information or only for those confined pending trial. The District Court's original decree required preliminary hearings for all arrested persons. 336 F. Supp., at 491. On remand, the District Court made an exception for persons charged with misdemeanors who neither suffered pretrial detention nor faced imprisonment upon conviction. 355 F. Supp., at 1290. The Court of Appeals explicitly limited the hearing right for misdemeanor defendants to those who are jailed pending trial. 483 F. 2d, at 789. Its opinion also suggests, without



State Attorney Gerstein petitioned for review, and we granted certiorari because of the importance of the issue.<sup>12</sup> 414 U. S. 1062. We affirm in part and reverse in part.

stating explicitly, that the hearing right is similarly limited to felony defendants who are confined pending trial. *Id.*, at 787, 789.

The Court of Appeals vacated those parts of the District Court's order that prescribed time periods different from those in the amended rules and imposed sanctions for failure to comply with the hearing requirements. Our disposition of the case makes it unnecessary to address the specific terms of the District Court's decree.

<sup>12</sup> At oral argument counsel informed us that the named respondents have been convicted. Their pretrial detention therefore has ended. This case belongs, however, to that narrow class of cases in which the termination of a class representative's claim does not moot the claims of the unnamed members of the class. See *Sosna v. Iowa*, — U. S. — (1975). Pretrial detention is by nature temporary, and it is most unlikely that any given individual could have his constitutional claim decided on appeal before he is either released or convicted. The individual could nonetheless suffer repeated deprivations, and it is certain that other persons similarly situated will be detained under the allegedly unconstitutional procedures. The claim, in short, is one that is distinctly "capable of repetition, yet evading review."

At the time the complaint was filed, the named respondents were members of a class of persons detained without a judicial probable cause determination, but the record does not indicate whether any of them were still in custody awaiting trial when the District Court certified the class. Such a showing ordinarily would be required to avoid mootness under *Sosna*. But this case is a suitable exception to that requirement. See *Sosna*, *supra*, at — n. 11; cf. *Rivera v. Freeman*, 469 F.2d 1159, 1162-1163 (CA9 1972). The length of pretrial custody cannot be ascertained at the outset, and it may be ended at any time by release on recognizance, dismissal of the charges, or a guilty plea, as well as by acquittal or conviction after trial. It is by no means certain that any given individual, named as plaintiff, would be in pretrial custody long enough for a district judge to certify the class. Moreover, in this case the constant existence of a class of persons suffering the deprivation is certain. The attorney representing the named respondents is a public defender, and we can safely assume that he has other clients with a continuing live interest in the case.



## II

As framed by the proceedings below, this case presents two issues: whether a person arrested and held for trial on an information is entitled to a judicial determination of probable cause for detention, and if so, whether the adversary hearing ordered by the District Court and approved by the Court of Appeals is required by the Constitution.

## A

Both the standards and procedures for arrest and detention have been derived from the Fourth Amendment and its common-law antecedents. See *Cupp v. Murphy*, 412 U. S. 291, 294-295 (1973); *Ex parte Bollman*, 8 U. S. (4 Cranch) 75 (1807); *Ex parte Burford*, 7 U. S. (3 Cranch) 448 (1806). 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," *Beck v. Ohio*, 379 U. S. 89, 91 (1964). See also *Henry v. United States*, 361 U. S. 98 (1959); *Brinegar v. United States*, 338 U. S. 160, 175-176 (1949). This standard, like those for searches and seizures, represents a necessary accommodation between the individual's right to liberty and the State's duty to control crime.

"These long-prevailing standards seek to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime. They also seek to give fair leeway for enforcing the law in the community's protection. Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to



their conclusions of probability. The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating these often opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice." *Brinegar v. United States*, *supra*, at 176.

To implement the Fourth Amendment's protection against unfounded invasions of liberty and privacy, the Court has required that the existence of probable cause be decided by a neutral and detached magistrate whenever possible. The classic statement of this principle appears in *Johnson v. United States*, 333 U. S. 10, 13-14 (1948):

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

See also *Terry v. Ohio*, 392 U. S. 1, 20-22 (1968).<sup>13</sup>

Maximum protection of individual rights could be assured by requiring a magistrate's review of the factual justification prior to any arrest, but such a requirement

<sup>13</sup> We reiterated this principle in *United States v. United States District Court*, 407 U. S. 297 (1972). In terms that apply equally to arrests, we described the "very heart of the Fourth Amendment directive" as a requirement that "where practical, a governmental search and seizure should represent both the efforts of the officer to gather evidence of wrongful acts and the judgment of the magistrate that the collected evidence is sufficient to justify invasion of a citizen's private premises or conversation." *Id.*, at 316. See also *Terry v. Ohio*, 392 U. S. 1, 20-22 (1968).



would constitute an intolerable handicap for legitimate law enforcement. Thus, while the Court has expressed a preference for the use of arrest warrants when feasible, *supra*, at 96; *Beck v. Ohio*, 379 U. S. 89, 90 (1964); *Wong Sun v. United States*, 371 U. S. 471, 479-482 (1963), it has never invalidated an arrest supported by probable cause solely because the officers failed to secure a warrant. See *Ker v. California*, 374 U. S. 23 (1963); *Draper v. United States*, 358 U. S. 307 (1959); *Trupiano v. United States*, 334 U. S. 699, 705 (1948).<sup>14</sup>

Under this practical compromise, a policeman's on-the-scene assessment of probable cause provides legal justification for arresting a person suspected of crime, and for a brief period of detention to take the administrative steps incident to arrest. Once the suspect is in custody, however, the reasons that justify dispensing with the magistrate's neutral judgment evaporate. There no longer is any danger that the suspect will escape or commit further crimes while the police submit their evidence to a magistrate. And, while the State's reasons for taking summary action subside, the suspect's need for a neutral determination of probable cause increases significantly. The consequences of prolonged detention may be more serious than the interference occasioned by arrest. Pretrial confinement may imperil the suspect's job, interrupt his source of income, and impair his family relationships. See R. Goldfarb, *Ransom* 32-91 (1965); L. Katz, *Justice*

<sup>14</sup> Another aspect of *Trupiano* was overruled in *United States v. Rabinowitz*, 339 U. S. 56 (1950), which was overruled in turn by *Chimel v. California*, 395 U. S. 752 (1969).

The issue of warrantless arrest that has generated the most controversy, and which remains unsettled, is whether and under what circumstances an officer may enter a suspect's home to make a warrantless arrest. See *Coolidge v. New Hampshire*, 403 U. S. 443, 474-481 (1971); *id.*, at 510-512 n. 1 (WHITE, J., dissenting); *Jones v. United States*, 357 U. S. 493, 499-500 (1958).



Is the Crime 51-62 (1972). Even pretrial release may be accompanied by burdensome conditions that effect a significant restraint on liberty. See, *e. g.*, 18 U. S. C. § 3146 (a)(2), (5). When the stakes are this high, the detached judgment of a neutral magistrate is essential if the Fourth Amendment is to furnish meaningful protection from unfounded interference with liberty. Accordingly, we hold that the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint on liberty following arrest.

This result has historical support in the common law that has guided interpretation of the Fourth Amendment. See *Carroll v. United States*, 267 U. S. 132, 149 (1925). At common law it was customary, if not obligatory, for an arrested person to be brought before a justice of the peace shortly after arrest. 2 M. Hale, *Pleas of the Crown* 77, 81, 95, 121 (1736); 2 W. Hawkins, *Pleas of the Crown* 116-117 (4th ed. 1792). See also *Kurtz v. Moffitt*, 115 U. S. 487, 498-499 (1885).<sup>15</sup> The justice of the peace

<sup>15</sup> The primary motivation for the requirement seems to have been the penalty for allowing an offender to escape, if he had in fact committed the crime, and the fear of liability for false imprisonment, if he had not. But Hale also recognized that a judicial warrant of commitment, called a *mittimus*, was required for more than brief detention.

"When a private person hath arrested a felon, or one suspected of felony, he may detain him in custody till he can reasonably dismiss himself of him; but with as much speed as conveniently he can, he may do either of these things.

"1. He may carry him to the common gaol, . . . but that is now rarely done.

"2. He may deliver him to the constable of the vill, who may either carry him to the common gaol, . . . or to a justice of peace to be examined, and farther ~~proceed~~ against as case shall require. . . .

"3. Or he may carry him immediately to any justice of peace of the county where he is taken, who upon examination may discharge, bail, or commit him, as the case shall require.

"And the bringing the offender either by the constable or private

proceeded



would "examine" the prisoner and the witnesses to determine whether there was reason to believe the prisoner had committed a crime. If there was, the suspect would be committed to jail or bailed pending trial. If not, he would be discharged from custody. 1 M. Hale, *supra*, at 583-586; 2 W. Hawkins, *supra*, at 116-119; 1 J. Stephen, *History of the Criminal Law of England* 233 (1883).<sup>16</sup> The initial determination of probable cause also could be reviewed by higher courts on a writ of habeas corpus. 2 W. Hawkins, *supra*, at 112-115; 1 J. Stephen, *supra*, at 243; see *Ex parte Bollman*, 8 U. S. (4 Cranch) 75, 97-101 (1807). This practice furnished the model for criminal procedure in America immediately following the adoption of the Fourth Amendment, see *Ex parte Bollman*, 8 U. S. (4 Cranch) 75 (1807); <sup>17</sup> *Ex parte Burford*, 7 U. S. (3 Cranch) 448 (1806); *United States v. Hamilton*, 3 U. S. (3 Dall.) 17 (1795), and there are indications that the Framers of the Bill of Rights regarded it as a model

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person to a justice of peace is most usual and safe, because a gaoler will expect a *Mittimus* for his warrant of detaining."

1 M. Hale, *supra*, at 589-590.

<sup>16</sup> The examination of the prisoner was inquisitorial, and the witnesses were questioned outside the prisoner's presence. Although this method of proceeding was considered quite harsh, 1 J. Stephen, at 219-225, it was well established that the prisoner was entitled to be discharged if the investigation turned up insufficient evidence of his guilt. *Id.*, at 233.

<sup>17</sup> In *Ex parte Bollman*, two men charged in the Aaron Burr case were committed following an examination in the circuit court of the District of Columbia. They filed a petition for writ of habeas corpus in the Supreme Court. The Court, in an opinion by Chief Justice Marshall, affirmed its jurisdiction to issue habeas corpus to persons in custody by order of federal trial courts. Then, following arguments on the Fourth Amendment requirement of probable cause, the Court surveyed the evidence against the prisoners and held that it did not establish probable cause that they were guilty of treason. The prisoners were discharged.



for a "reasonable" seizure. See *Draper v. United States*, 358 U. S. 307, 317-320 (1959) (DOUGLAS, J., dissenting).<sup>18</sup>

## B

Under the Florida procedures challenged here, a person arrested without a warrant and charged by information may be jailed or subjected to other restraints pending trial without any opportunity for a probable cause determination.<sup>19</sup> Petitioner defends this practice on the ground that the prosecutor's decision to file an information is itself a determination of probable cause that furnishes sufficient reason to detain a defendant pending trial. Although a conscientious decision that the evidence warrants prosecution affords a measure of protection against unfounded detention, we do not think prosecutorial judgment standing alone meets the requirements of the Fourth Amendment. Indeed, we think the Court's previous decisions compel disapproval of the Florida procedure. In *Albrecht v. United States*, 273

<sup>18</sup> See also N. Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* 15-16 (1937). A similar procedure at common law, the warrant for recovery of stolen goods, is said to have furnished the model for a "reasonable" search under the Fourth Amendment. The victim was required to appear before a justice of the peace and make an oath of probable cause that his goods could be found in a particular place. After the warrant was executed, and the goods seized, the victim and the alleged thief would appear before the justice of the peace for a prompt determination of the cause for seizure of the goods and detention of the thief. 2 M. Hale, *supra*, at 149-152; T. Taylor, *Two Studies in Constitutional Interpretation* 24-25, 39-40 (1969); see *Boyd v. United States*, 116 U. S. 616, 626-629 (1886).

<sup>19</sup> A person arrested under a warrant would have received a prior judicial determination of probable cause. Under Fla. Rule Crim. Proc. 3.120, a warrant may be issued upon a sworn complaint that states facts showing that the suspect has committed a crime. The magistrate may also take testimony under oath to determine if there is reasonable ground to believe the complaint is true.



U. S. 1, 5 (1927), the Court held that an arrest warrant issued solely upon a United States Attorney's information was invalid because the accompanying affidavits were defective. Although the Court's opinion did not explicitly state that the prosecutor's official oath could not furnish probable cause, that conclusion was implicit in the judgment that the arrest was illegal under the Fourth Amendment.<sup>20</sup> More recently, in *Coolidge v. New Hampshire*, 403 U. S. 443, 449-453 (1971), the Court held that a prosecutor's responsibility to law enforcement is inconsistent with the constitutional role of a neutral and detached magistrate. We reaffirmed that principle in *Shadwick v. City of Tampa*, 407 U. S. 345 (1972), and held that probable cause for the issuance of an arrest warrant must be determined by someone independent of police and prosecution. See also *United States v. United States District Court*, 407 U. S. 297, 317 (1972).<sup>21</sup> The reason

<sup>20</sup> By contrast, the Court has held that an indictment, "fair upon its face," and returned by a "properly constituted grand jury" conclusively determines the existence of probable cause and requires issuance of an arrest warrant without further inquiry. *Ex parte United States*, 287 U. S. 241, 250 (1932). See also *Giordenello v. United States*, 357 U. S. 480, 487 (1958). The willingness to let a grand jury's judgment substitute for that of a neutral and detached magistrate is attributable to the grand jury's relationship to the courts and its historical role of protecting individuals from unjust prosecution. See *United States v. Calandra*, 414 U. S. 338, 342-346 (1974).

<sup>21</sup> The Court had earlier reached a different result in *Ocampo v. United States*, 234 U. S. 91 (1914), a criminal appeal from the Philippine Islands. Interpreting a statutory guarantee substantially identical to the Fourth Amendment, Act of July 1, 1902, c. 1369, § 5, 32 Stat. 693, the Court held that an arrest warrant could issue solely upon a prosecutor's information. The Court has since held that interpretation of a statutory guarantee applicable to the Philippines is not conclusive for interpretation of a cognate provision in the Federal Constitution, *Green v. United States*, 355 U. S. 184, 194-198 (1957). Even if it were, the result reached in *Ocampo*



for this separation of functions was expressed by Justice Frankfurter in a similar context:

"A democratic society, in which respect for the dignity of all men is central, naturally guards against the misuse of the law enforcement process. Zeal in tracking down crime is not in itself an assurance of soberness of judgment. Disinterestedness in law enforcement does not alone prevent disregard of cherished liberties. Experience has therefore counseled that safeguards must be provided against the dangers of the overzealous as well as the despotic. The awful instruments of the criminal law cannot be entrusted to a single functionary. The complicated process of criminal justice is therefore divided into different parts, responsibility for which is separately vested in the various participants upon whom the criminal law relies for its vindication." *McNabb v. United States*, 318 U. S. 332, 343 (1943).

In holding that the prosecutor's assessment of probable cause is not sufficient alone to justify restraint on liberty pending trial, we do not imply that the accused is entitled to judicial oversight or review of ~~a prosecutor's~~ <sup>the</sup> decision to prosecute. Instead, we adhere to the Court's prior holding that a judicial hearing is not prerequisite to prosecution by information. *Beck v. Washington*, 369 U. S. 541, 545 (1962); *Lem Woon v. Oregon*, 229 U. S. 586 (1913). Nor do we retreat from the established rule that illegal arrest or detention does not void a subsequent conviction. *Frisbie v. Collins*, 342 U. S. 519 (1952); *Ker v. Illinois*, 119 U. S. 436 (1886). Thus, as the Court of Appeals noted below, although a suspect who is presently detained may challenge the probable cause for

is incompatible with the later holdings of *Albrecht*, *Coolidge*, and *Shadwick*.



that confinement, a conviction will not be vacated on the ground that the defendant was detained pending trial without a determination of probable cause. 483 F. 2d, at 786-787. Compare *Scarborough v. Dutton*, 393 F. 2d 6 (CA5 1968), with *Brown v. Fauntleroy*, — U. S. App. D. C. —, 442 F. 2d 838 (1971), and *Cooley v. Stone*, — U. S. App. D. C. —, 414 F. 2d 1213 (1969).

### III

Both the District Court and the Court of Appeals held that the determination of probable cause must be accompanied by the full panoply of adversary safeguards—counsel, confrontation, cross-examination, and compulsory process for witnesses. A full preliminary hearing of this sort is modeled after the procedure used in many States to determine whether the evidence justifies going to trial under an information or presenting the case to a grand jury. See *Coleman v. Alabama*, 399 U. S. 1 (1970); Y. Kamisar, W. LaFare & J. Israel, *Modern Criminal Procedure* 957-967, 996-1000 (4th ed. 1974). The standard of proof required of the prosecution is usually referred to as "probable cause," but in some jurisdictions it may approach a *prima facie* case of guilt. A. L. I. Model Code of Pre-arraignment Procedure, Commentary on Article 330, at 90-91 (Tent. Draft No. 5, 1972). When the hearing takes this form, adversary procedures are customarily employed. The importance of the issue to both the State and the accused justifies the presentation of witnesses and full exploration of their testimony on cross-examination. This kind of hearing also requires appointment of counsel for indigent defendants. *Coleman v. Alabama*, *supra*. And, as the hearing assumes increased importance and the procedures become more complex, the likelihood that it can be held promptly



after arrest diminishes. See A. L. I. Model Code of Pre-arraignment Procedure, *supra*, at 33-34.

These adversary safeguards are not essential for the probable cause determination required by the Fourth Amendment. The sole issue is whether there is probable cause for detaining the arrested person pending further proceedings. This issue can be determined reliably without ~~a full~~ adversary hearing. The standard is the same as that for arrest.<sup>22</sup> That standard—probable cause to believe the suspect has committed a crime—traditionally has been decided ~~in~~ nonadversary proceedings on hearsay and written testimony, and the Court has approved these informal modes of proof.

by a magistrate  
in a

"Guilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined to that which long experience in the common-law tradition, to some extent embodied in the Constitution, has crystallized into rules of evidence consistent with that standard. These rules are historically grounded rights of our system, developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property.

"In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and

<sup>22</sup> Because the standards are identical, ordinarily there is no need for further investigation before the probable cause determination can be made.

"Presumably, whomever the police arrest they must arrest on 'probable cause.' It is not the function of the police to arrest, as it were, at large and to use an interrogating process at police headquarters in order to determine whom they should charge before a committing magistrate on 'probable cause.'" *Mallory v. United States*, 354 U. S. 449, 456 (1957).



practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved." *Brinegar v. United States*, 338 U. S. 160, 174-175 (1949).

Cf. *McCray v. Illinois*, 386 U. S. 300 (1967).

The use of ~~these~~ informal procedures is justified not only by the lesser consequences of a probable cause determination but also by the nature of the determination itself. It does not require the fine resolution of conflicting evidence that a reasonable-doubt or even a preponderance standard demands, and credibility determinations are seldom crucial in deciding whether the evidence supports a reasonable belief in guilt. See F. Miller, *Prosecution: The Decision to Charge a Suspect with a Crime* 64-109 (1969).<sup>28</sup> This is not to say that confrontation and cross-examination might not enhance the reliability of

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<sup>28</sup> In *Morrissey v. Brewer*, 408 U. S. 471 (1972), and *Gagnon v. Scarpelli*, 411 U. S. 778 (1973), we held that a parolee or probationer arrested prior to revocation is entitled to an informal preliminary hearing at the place of arrest, with some provision for live testimony. 408 U. S., at 487; 411 U. S., at 786. That preliminary hearing, more than the probable cause determination required by the Fourth Amendment, serves the purpose of gathering and preserving live testimony, since the final revocation hearing frequently is held at some distance from the place where the violation occurred. 408 U. S., at 485; 411 U. S., at 782-783 n. 5. Moreover, revocation proceedings may offer less protection from initial error than the more formal criminal process, where violations are defined by statute and the prosecutor has a professional duty not to charge a suspect with crime unless he is satisfied of probable cause. See ABA Code of Professional Responsibility, DR 7-103 (A) (a prosecutor "shall not institute or cause to be instituted criminal charges when he knows or it is obvious that the charges are not supported by probable cause"); ABA Standards Relating to the Administration of Criminal Justice, The Prosecution Function, §§ 1.1, 3.4, 3.9 (1974); American College of Trial Lawyers, Code of Trial Conduct, rule 4 (c) (1972).



probable cause determinations in some cases. In most cases, however, their value would be too slight to justify holding, as a matter of constitutional principle, that these formalities and safeguards designed for trial must also be employed in making the Fourth Amendment determination of probable cause.<sup>24</sup>

Because of its limited function and its nonadversary character, the probable cause determination is not a "critical stage" in the prosecution that would require appointed counsel. The Court has identified as "critical stages" those pretrial procedures that would impair defense on the merits if the accused is required to proceed without counsel. *Coleman v. Alabama*, 399 U. S. 1 (1970); *United States v. Wade*, 388 U. S. 218, 226-227 (1967). In *Coleman v. Alabama*, where the Court held that a preliminary hearing was a critical stage of an Alabama prosecution, the majority and concurring opinions identified two critical factors that distinguish the Alabama preliminary hearing from the probable cause determination required by the Fourth Amendment. First, under Alabama law the function of the preliminary hearing was to determine whether the evidence justified charging the suspect with an offense. A finding of no probable cause could mean that he would not be tried at all. The Fourth Amendment probable cause determination is addressed only to pretrial custody. To be sure, pretrial custody may affect to some extent the defendant's ability to assist in preparation of his defense, but this is not the kind of substantial harm identified as controlling in *Wade* and *Coleman*. Second, Alabama allowed the suspect to

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does not present  
the high probability

<sup>24</sup> Criminal justice is already overburdened by the volume of cases and the complexities of our system. The processing of misdemeanors and the early stages of prosecution generally are marked by delays that can seriously affect the quality of justice. A constitutional doctrine requiring full adversary hearings for all persons detained pending trial could exacerbate the problem of pretrial delay.

in particular,



confront and cross-examine prosecution witnesses at the preliminary hearing. The Court noted that the suspect's defense on the merits could be compromised if he had no legal assistance for exploring or preserving the witnesses' testimony. This consideration does not apply to the informal, nonadversary procedure required under the Fourth Amendment.

when the prosecution is not required to produce witnesses for cross-examination.

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The reasons that make a nonadversary proceeding appropriate, however, do not justify denying the suspect an opportunity to be present and participate in the determination.<sup>27</sup> Our system of justice operates on the premise

<sup>27</sup> Under the procedures suggested in the Uniform Rules of Criminal Procedure (Proposed Final Draft 1974) and the A. L. I. Model Code of Pre-arraignment Procedure (Tent. Draft No. 5, 1972, and Tent. Draft No. 5A, 1973) are instructive. Under the Uniform Rules, a person arrested without a warrant is entitled, "without unnecessary delay," to a first appearance before a magistrate and a determination that grounds exist for issuance of an arrest warrant. The determination may be made on affidavits or testimony, in the presence of the accused. Rule 311. Persons who remain in custody for inability to qualify for pretrial release are offered another opportunity for a probable cause determination at the detention hearing, held no more than 5 days after arrest. This is an adversary hearing, and the parties may summon witnesses, but reliable hearsay evidence may be considered. Rule 344.

A.L.I.

The Model Code of Pre-arraignment Procedure also provides a first appearance, at which a warrantless arrest must be supported by a reasonably detailed written statement of facts. § 310. The magistrate may make a determination of probable cause to hold the accused, but he is not required to do so and the accused may request an attorney for an "adjourned session" of the first appearance to be held within 2 "court days." At that session, the magistrate makes a determination of probable cause upon a combination of written and live testimony:

"The arrested person may present written and testimonial evidence and arguments for his discharge and the state may present additional written and testimonial evidence and arguments that there is reasonable cause to believe that he has committed the crime of which he is accused. The state's submission may be made by means

(Tent. Draft No. 5,  
1972, and Tent.  
Draft No. 5A, 1973)



that the subject of a judicial proceeding is entitled to participate unless there is good reason to exclude him. See *Groppi v. Leslie*, 404 U. S. 496, 502 (1972); *Rees v. City of Watertown*, 86 U. S. (19 Wall.) 107, 122-123 (1873). The procedures normally followed in applying for warrants are *ex parte* proceedings by necessity, as notifying the suspect would often frustrate the purpose of the warrant. See T. Taylor, *Two Studies in Constitutional Interpretation* 81-82 (1969). But when the suspect is already in custody, and the only issue is probable cause for detention, he should be allowed to participate in the determination. Allowing him to appear before the magistrate and giving him an opportunity to speak or to submit written evidence for consideration along with the State's presentation could enhance both the reliability and the fairness of the proceeding.

The suspect's presence and participation would impose no significant burden on the State. Virtually all jurisdictions require that arrested persons be presented to a judicial officer within a short time after arrest, see A. L. I., *Model Code of Pre-arraignment Procedure* 230-231 (Tent. Draft No. 1, 1966), and every jurisdiction makes some provision for setting bail or determining other conditions of pretrial release. See L. Katz, *Justice Is the Crime*, Appendix B, at 247-365 (1972). Since the defendant is already in the courtroom, the issue of probable cause may be decided at that time with little or no inconvenience to the State. In fact, the suspect's first appearance before a magistrate traditionally has been considered the proper time for determining whether there

of affidavits, and no witnesses shall be required to appear unless the court, in the light of the evidence and arguments submitted by the parties, determines that there is a basis for believing that the appearance of one or more witnesses for whom the arrested person seeks subpoenas might lead to a finding that there is no reasonable cause." § 3102 (2) (Tent. Draft No. 5A, 1973).



Although we conclude that the Constitution does not require an adversary determination of probable cause, we recognize that state systems of criminal procedure vary widely. There is no single preferred pre-trial procedure, and the nature of the probable cause determination usually will be shaped to accord with a state's pre-trial procedure viewed as a whole. While we limit our holding to the precise requirement of the Fourth Amendment, we recognize the desirability of flexibility and experimentation by the states. It may be found desirable, for example, to make the probable cause determination at the suspect's first appearance before a judicial officer, <sup>25</sup> see McNabb v. United States, 318 U.S. 332, 342-344 (1943), or the determination may be

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25. Several states already authorize a determination of probable cause at this stage or immediately thereafter. See Colo. Rev. Stat. § 39-2-3 (1965 Supp.); Hawaii Rev. Stat. § 708-9(5) (1968); Vt. Rules Crim. Proc. 3(b), 5(c) (1974). This Court has interpreted the Federal Rules of Criminal Procedure to require a determination of probable



incorporated into the procedure for setting bail or fixing other conditions of pretrial release. In some states, existing procedures may satisfy the requirement of the Fourth Amendment ~~with only minor adjustments~~.

*Added to note 2/5*

Several states already authorize a determination of probable cause at or immediately following the suspect's first appearance. See Colo. Rev. Stat. § 39-2-3 (1965 Supp.); Hawaii Rev. Stat. § 708-9(5) (1968); Vt. Rules Grim. Proc. 3(b), 5(e) (1974). Others may ~~simply~~ *require only*

*minor adjustment, such as acceleration of*  
~~accelerate~~ their existing preliminary hearings. Current

proposals for criminal procedure reform suggest other ways of testing probable cause for detention.<sup>26</sup> Whatever procedure a state may adopt, it must provide a fair and reliable determination of probable cause as a condition for any significant pretrial restraint on liberty,<sup>27</sup> and this determination must be made by a judicial officer either before or promptly after arrest.



is probable cause for detention. 1 M. Hale, Pleas of the Crown 585-586, 589-590 (1736); 2 *id.*, at 77-95; 2 W. Hawkins, Pleas of the Crown 116-119 (4th ed. 1762); see *McNabb v. United States*, 318 U. S. 332, 342-344 (1943); Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L. Rev. 349, 391 & n. 408 (1974). Although the Federal Rules of Criminal Procedure do not explicitly acknowledge this function of the first appearance, the Court has interpreted them to require a determination of probable cause at that stage. *Jaben v. United States*, 381 U. S. 214, 218 (1965); *Mallory v. United States*, 354 U. S. 449, 454 (1957).<sup>28</sup>

There is no single proper method for making the probable cause determination required by the Fourth Amendment. The States have many different patterns of criminal procedure, and each may adapt its own to provide a swift and reliable probable cause determination with the least burden to its system. Like many jurisdictions,

<sup>28</sup>In an *amicus* brief filed on behalf of the United States, the Solicitor General suggested that *McNabb* and *Mallory* had mistaken the purpose of the first appearance, and that actual practice is otherwise. Cf. Note, Probable Cause at the Initial Appearance in Warrantless Arrests, 45 So. Cal. L. Rev. 1128 (1972). *McNabb*, of course, was decided before the adoption of the Federal Rules of Criminal Procedure. It interpreted a statutory requirement that an arrested person be brought before a magistrate without unnecessary delay. 318 U. S., at 342. *Mallory* was decided after the federal rules were adopted, and although the interpretation of the federal rules was dictum, it clearly outlined the Court's view:

"The scheme for initiating a federal prosecution is plainly defined. The police may not arrest upon mere suspicion but only on 'probable cause.' The next step in the proceeding is to arraign the arrested person before a judicial officer as quickly as possible so that he may be advised of his rights and so that the issue of probable cause may be promptly determined." 354 U. S., at 454.

The use of the word "arraign" was an error, as arraignment occurs later in the process. Fed. Rule Crim. Proc. 10.



Florida requires every arrested person to be brought before a magistrate within 24 hours, unless sooner released. Fla. Rule Crim. Proc. 3.310 (b). At that appearance the defendant is told of the charges against him, furnished a copy of the complaint, advised of his constitutional rights, and provided counsel if he is indigent. The magistrate then sets bail or prescribes other conditions of pretrial release. One of the factors typically relied upon in making this decision is the weight of evidence against the accused. ABA Standards Relating to the Administration of Criminal Justice, Pretrial Release § 5.1 (b) (1974); see 18 U. S. C. § 3146 (b). Expanding that determination to encompass a test of probable cause would be a natural way of integrating the probable cause decision with existing procedures.

In other States, existing procedures may satisfy the requirement of the Fourth Amendment with only minor adjustments. Some States already authorize a determination of probable cause at or immediately following the suspect's first appearance. *E. g.*, Colo. Rev. Stat. § 39-2-3 (1965 Supp.); Hawaii Rev. Stat. § 708-9 (5) (1968); Vt. Rules Crim. Proc. 3 (b), 5 (c) (1974). Others may choose simply to accelerate their existing preliminary hearings. What the Fourth Amendment requires for pretrial restraint on liberty<sup>27</sup> is a reliable determination of probable cause made either before or promptly after arrest, and preferably no later than the first appearance before a ju-

<sup>27</sup> Because the probable cause determination is not a constitutional prerequisite to the charging decision, it is required only for those suspects who suffer restraints on liberty other than the condition that they appear for trial. There are many kinds of pretrial release and many degrees of conditional liberty. See 18 U. S. C. § 3146; ABA Standards Relating to the Administration of Criminal Justice, Pretrial Release § 5.2 (1974); Uniform Rules of Criminal Procedure, Rule 341 (Proposed Final Draft 1974). We cannot define specifically those that would require a prior probable cause determination, but the key factor is significant restraint on liberty.



judicial officer. If made after arrest, the suspect must be given an opportunity to be present and to be heard. Each State may choose the procedure that best accommodates this determination to its existing practice."<sup>28</sup>

## IV

We agree with the Court of Appeals that the Fourth Amendment requires a timely judicial determination of probable cause as a prerequisite to detention, and we accordingly affirm that much of the judgment. As we do not agree that the Fourth Amendment requires the adversary hearing outlined in the District Court's decree, we reverse in part and remand to the Court of Appeals for further proceedings consistent with this opinion.

<sup>28</sup> Of course, if the State incorporates the probable cause determination into a multipurpose hearing, the necessity for appointed counsel at the combined proceeding must be governed by the principles of *United States v. Wade* and *Coleman v. Alabama*, *supra*.



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**SUPREME COURT OF THE UNITED STATES**

No. 73-477

Richard E. Gerstein, State At- torney for Eleventh Judicial Circuit of Florida, Petitioner, v. Robert Pugh et al.	}	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.
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[December —, 1974]

MR. JUSTICE POWELL delivered the opinion of the Court.

The issue in this case is whether a person arrested under a prosecutor's information is constitutionally entitled to a judicial determination of probable cause for pretrial restraint of liberty.

I

In March 1971 respondents Pugh and Henderson were arrested in Dade County, Florida. Each was charged with several offenses under a prosecutor's information.<sup>1</sup> Pugh was denied bail because one of the charges against him carried a potential life sentence, and Henderson remained in custody because he was unable to post a \$4,500 bond.

<sup>1</sup> Respondent Pugh was arrested on March 3, 1971. On March 16 an information was filed charging him with robbery, carrying a concealed weapon, and possession of a firearm during commission of a felony. Respondent Henderson was arrested on March 2, and charged by information on March 19 with the offenses of breaking and entering and assault and battery. The record does not indicate whether there was an arrest warrant in either case.



In Florida, indictments are required only for prosecution of capital offenses. Prosecutors may charge all other crimes by information, without a prior preliminary hearing and without obtaining leave of court. Fla. Rule Crim. Proc. 3.140 (a); *State v. Hernandez*, 217 So. 2d 109 (Fla. 1968); *Di Bona v. State*, 121 So. 2d 192 (Fla. Ct. App. 1960). At the time respondents were arrested, a Florida rule seemed to authorize adversary preliminary hearings to test probable cause for detention in all cases. Fla. Rule Crim. Proc. 1.122 (amended 1972). But the Florida courts had held that the filing of an information foreclosed the suspect's right to a preliminary hearing. See *State ex rel. Hardy v. Blount*, 261 So. 2d 172 (Fla. 1972).<sup>2</sup> They had also held that habeas corpus could not be used, except perhaps in exceptional circumstances, to test the probable cause for detention under an information. See *Sullivan v. State ex rel. McCrory*, 29 So. 2d 794, 797 (Fla. 1951). The only possible methods for obtaining a judicial determination of probable cause were a special statute allowing a preliminary hearing after 30 days, Fla. Stat. Ann. § 907.045 (1973),<sup>3</sup> and arraignment, which the District Court found was often delayed a month or more after arrest. *Pugh v. Rainwater*, 332 F. Supp. 1107, 1110 (SD Fla. 1971).<sup>4</sup> As a result, a person charged

<sup>2</sup> Florida law also denies preliminary hearings to persons confined under indictment, see *Sangaree v. Hamlin*, 235 So. 2d 729 (Fla. 1970), Fla. Rule Crim. Proc. 3.131 (a), but that procedure is not challenged in this case.

<sup>3</sup> This statute may have been construed to make the hearing permissive instead of mandatory. See *Evans v. State*, 197 So. 2d 323 (Fla. Ct. App. 1967); Fla. Op. Att'y Gen. 067-29 (1967). But cf. *Karz v. Overton*, 249 So. 2d 763 (Fla. Ct. App. 1971). It may also have been superseded by the subsequent amendments to the rules of criminal procedure. *In re Florida Rules of Criminal Procedure*, 272 So. 2d 65 (1972).

<sup>4</sup> The Florida rules do not suggest that the issue of probable cause can be raised at arraignment, Fla. Rule Crim. Proc. 3.160, but



by information could be detained for a substantial period solely on the decision of a prosecutor.

Respondents Pugh and Henderson filed a class action against Dade County officials in the Federal District Court,<sup>5</sup> claiming a constitutional right to a judicial hearing on the issue of probable cause and requesting declaratory and injunctive relief.<sup>6</sup> Respondents Turner and Faulk, also in custody under informations, subsequently intervened.<sup>7</sup> Petitioner Gerstein, the State Attorney for Dade County, was one of several defendants.<sup>8</sup>

After an initial delay while the Florida legislature considered a bill that would have afforded preliminary hearings to persons charged by information, the District Court granted the relief sought. *Pugh v. Rainwater*, *supra*. The court certified the case as a class action under Fed.

counsel for Petitioner represented at oral argument that arraignment affords the suspect an opportunity to "attack the sufficiency of the evidence to hold him." Tr. of Oral Arg., Mar. 25, 1974, at 17. The Court of Appeals assumed, without deciding, that this was true. 483 F. 2d 778, 781 n. 8.

<sup>5</sup> The complaint was framed under 42 U. S. C. § 1983, and jurisdiction in the District Court was based on 28 U. S. C. § 1343 (3).

<sup>6</sup> Respondents did not ask for release from state custody, even as an alternate remedy. They asked only that the state authorities be ordered to give them a probable cause determination. This was also the only relief that the District Court ordered for the named respondents. 332 F. Supp., at 1115-1116. Because release was neither asked nor ordered, the lawsuit did not come within the class of cases for which habeas corpus is the exclusive remedy. *Preiser v. Rodriguez*, 411 U. S. 475 (1973); see *Wolff v. McDonnell*, 417 U. S. —, — (1974).

<sup>7</sup> Turner was being held on a charge of auto theft, following arrest on March 11, 1971. Faulk was arrested on March 19 on charges of soliciting a ride and possession of marijuana.

<sup>8</sup> The named defendants included justices of the peace and judges of small-claims courts, who were authorized to hold preliminary hearings in criminal cases, and a group of law enforcement officers with power to make arrests in Dade County. Gerstein was the only one who petitioned for certiorari.



Rule Civ. Proc. 23 (b)(2), and held that the Fourth and Fourteenth Amendments give all arrested persons charged by information a right to a judicial hearing on the question of probable cause. The District Court ordered the Dade County defendants to give the named plaintiffs an immediate preliminary hearing to determine probable cause for further detention.<sup>9</sup> It also ordered them to submit a plan providing preliminary hearings in all cases instituted by information.

The defendants submitted a plan authored by Sheriff E. Wilson Purdy, and the District Court adopted it with modifications. The final order prescribed a detailed post-arrest procedure. 336 F. Supp. 490. Upon arrest the accused would be taken before a magistrate for a "first appearance hearing." The magistrate would explain the charges, advise the accused of his rights, appoint counsel if he was indigent, and proceed with a probable cause determination unless either the prosecutor or the accused was unprepared. If either requested more time, the magistrate would set the date for a "preliminary hearing," to be held within four days if the accused was in custody and within 10 days if he had been released pending trial. The order provided sanctions for failure to hold the hearings at prescribed times. At the "preliminary hearing" the accused would be entitled to counsel, and he would be allowed to confront and cross-examine adverse witnesses,

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<sup>9</sup> The District Court correctly held that respondents' claim for relief was not barred by the equitable restrictions on federal intervention in state prosecutions, *Younger v. Harris*, 401 U. S. 37 (1971). The injunction was not directed at the state prosecutions as such, but only at the legality of pretrial detention without a judicial hearing, an issue that could not be raised in defense of the criminal prosecution. The order to hold preliminary hearings could not prejudice the conduct of trial on the merits. See *Conover v. Montemuro*, 477 F. 2d 1073, 1082 (CA3 1973); cf. *Perez v. Ledesma*, 401 U. S. 82 (1971); *Stefanelli v. Minard*, 342 U. S. 117 (1951).



to summon favorable witnesses, and to have a transcript made on request. If the magistrate found no probable cause, the accused would be discharged. He then could not be charged with the same offense by complaint or information, but only by indictment returned within 30 days.

The Court of Appeals for the Fifth Circuit stayed the District Court's order pending appeal, but while the case was awaiting decision, the Dade County judiciary voluntarily adopted a similar procedure of its own. Upon learning of this development, the Court of Appeals remanded the case for specific findings on the constitutionality of the new Dade County system. Before the District Court issued its findings, however, the Florida Supreme Court amended the procedural rules governing preliminary hearings statewide, and the parties agreed that the District Court should direct its inquiry to the new rules rather than the Dade County procedures.

Under the amended rules every arrested person must be taken before a judicial officer within 24 hours. Fla. Rule Crim. Proc. 3.130 (b). This "first appearance" is similar to the "first appearance hearing" ordered by the District Court in all respects but the crucial one: the magistrate does not make a determination of probable cause. The rule amendments also changed the procedure for preliminary hearings, restricting them to felony charges and codifying the rule that no hearings are available to persons charged by information or indictment. Rule 3.131; see *In re Rule 3.131 (b)*, *Florida Rules of Criminal Procedure*, 289 So. 2d 3 (Fla. 1974).

In a supplemental opinion the District Court held that the amended rules had not answered the basic constitutional objection, since a defendant charged by information still could be detained pending trial without a judicial determination of probable cause. 355 F. Supp.



1286. Reaffirming its original ruling, the District Court declared that the continuation of this practice was unconstitutional.<sup>10</sup> The Court of Appeals affirmed, 483 F. 2d 778, modifying the District Court's decree in minor particulars and suggesting that the form of preliminary hearing provided by the amended Florida rules would be acceptable, as long as it was provided to all defendants in custody pending trial. *Id.*, at 788-789.<sup>11</sup>

<sup>10</sup> Although this ruling held a statewide "legislative rule" unconstitutional, it was not outside the jurisdiction of a single judge by virtue of 28 U. S. C. § 2281. The original complaint did not ask for an injunction against enforcement of any state statute or legislative rule of statewide application, since the practice of denying preliminary hearings to persons charged by information was then embodied only in judicial decisions. The District Court therefore had jurisdiction to issue the initial injunction, and the Court of Appeals had jurisdiction over the appeal. On remand, the constitutionality of a state "statute" was drawn into question for the first time when the criminal rules were amended. The District Court's supplemental opinion can fairly be read as a declaratory judgment that the amended rules were unconstitutional; the injunctive decree was never amended to incorporate that holding; and the opinion in the Court of Appeals is not inconsistent with the conclusion that the District Court did not enjoin enforcement of the statewide rule. See 483 F. 2d, at 788-790. Accordingly, a district court of three judges was not required for the issuance of this order. See *Kennedy v. Mendoza-Martinez*, 372 U. S. 144, 152-155 (1963); *Flemming v. Nestor*, 363 U. S. 603, 606-608 (1960).

<sup>11</sup> The major difference between the District Court's order and that of the Court of Appeals centered on the question whether a probable cause hearing is required for all arrested persons charged by information or only for those confined pending trial. The District Court's original decree required preliminary hearings for all arrested persons. 336 F. Supp., at 491. On remand, the District Court made an exception for persons charged with misdemeanors who neither suffered pretrial detention nor faced imprisonment upon conviction. 355 F. Supp., at 1290. The Court of Appeals explicitly limited the hearing right for misdemeanor defendants to those who are jailed pending trial. 483 F. 2d, at 789. Its opinion also suggests, without



State Attorney Gerstein petitioned for review, and we granted certiorari because of the importance of the issue.<sup>12</sup> 414 U. S. 1062. We affirm in part and reverse in part.

stating explicitly, that the hearing right is similarly limited to felony defendants who are confined pending trial. *Id.*, at 787, 789.

The Court of Appeals vacated those parts of the District Court's order that prescribed time periods different from those in the amended rules and imposed sanctions for failure to comply with the hearing requirements. Our disposition of the case makes it unnecessary to address the specific terms of the District Court's decree.

<sup>12</sup> At oral argument counsel informed us that the named respondents have been convicted. Their pretrial detention therefore has ended. This case belongs, however, to that narrow class of cases in which the termination of a class representative's claim does not moot the claims of the unnamed members of the class. See *Sosna v. Iowa*, — U. S. — (1975). Pretrial detention is by nature temporary, and it is most unlikely that any given individual could have his constitutional claim decided on appeal before he is either released or convicted. The individual could nonetheless suffer repeated deprivations, and it is certain that other persons similarly situated will be detained under the allegedly unconstitutional procedures. The claim, in short, is one that is distinctly "capable of repetition, yet evading review."

At the time the complaint was filed, the named respondents were members of a class of persons detained without a judicial probable cause determination, but the record does not indicate whether any of them were still in custody awaiting trial when the District Court certified the class. Such a showing ordinarily would be required to avoid mootness under *Sosna*. But this case is a suitable exception to that requirement. See *Sosna*, *supra*, at — n. 11; cf. *Rivera v. Freeman*, 469 F. 2d 1159, 1162-1163 (CA9 1972). The length of pretrial custody cannot be ascertained at the outset, and it may be ended at any time by release on recognizance, dismissal of the charges, or a guilty plea, as well as by acquittal or conviction after trial. It is by no means certain that any given individual, named as plaintiff, would be in pretrial custody long enough for a district judge to certify the class. Moreover, in this case the constant existence of a class of persons suffering the deprivation is certain. The attorney representing the named respondents is a public defender, and we can safely assume that he has other clients with a continuing live interest in the case.



## II

As framed by the proceedings below, this case presents two issues: whether a person arrested and held for trial on an information is entitled to a judicial determination of probable cause for detention, and if so, whether the adversary hearing ordered by the District Court and approved by the Court of Appeals is required by the Constitution.

## A

Both the standards and procedures for arrest and detention have been derived from the Fourth Amendment and its common-law antecedents. See *Cupp v. Murphy*, 412 U. S. 291, 294-295 (1973); *Ex parte Bollman*, 8 U. S. (4 Cranch) 75 (1807); *Ex parte Burford*, 7 U. S. (3 Cranch) 448 (1806). 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." *Beck v. Ohio*, 379 U. S. 89, 91 (1964). See also *Henry v. United States*, 361 U. S. 98 (1959); *Brinegar v. United States*, 338 U. S. 160, 175-176 (1949). This standard, like those for searches and seizures, represents a necessary accommodation between the individual's right to liberty and the State's duty to control crime.

"These long-prevailing standards seek to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime. They also seek to give fair leeway for enforcing the law in the community's protection. Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to



their conclusions of probability. The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating these often opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice." *Brinegar v. United States*, *supra*, at 176.

To implement the Fourth Amendment's protection against unfounded invasions of liberty and privacy, the Court has required that the existence of probable cause be decided by a neutral and detached magistrate whenever possible. The classic statement of this principle appears in *Johnson v. United States*, 333 U. S. 10, 13-14 (1948):

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

See also *Terry v. Ohio*, 392 U. S. 1, 20-22 (1968).<sup>18</sup>

Maximum protection of individual rights could be assured by requiring a magistrate's review of the factual justification prior to any arrest, but such a requirement

<sup>18</sup> We reiterated this principle in *United States v. United States District Court*, 407 U. S. 297 (1972). In terms that apply equally to arrests, we described the "very heart of the Fourth Amendment directive" as a requirement that "where practical, a governmental search and seizure should represent both the efforts of the officer to gather evidence of wrongful acts and the judgment of the magistrate that the collected evidence is sufficient to justify invasion of a citizen's private premises or conversation." *Id.*, at 316. See also *Terry v. Ohio*, 392 U. S. 1, 20-22 (1968).



would constitute an intolerable handicap for legitimate law enforcement. Thus, while the Court has expressed a preference for the use of arrest warrants when feasible, *Beck v. Ohio*, *supra*, at 96; *Wong Sun v. United States*, 371 U. S. 471, 479-482 (1963), it has never invalidated an arrest supported by probable cause solely because the officers failed to secure a warrant. See *Ker v. California*, 374 U. S. 23 (1963); *Draper v. United States*, 358 U. S. 307 (1959); *Trupiano v. United States*, 334 U. S. 699, 705 (1948).<sup>14</sup>

Under this practical compromise, a policeman's on-the-scene assessment of probable cause provides legal justification for arresting a person suspected of crime, and for a brief period of detention to take the administrative steps incident to arrest. Once the suspect is in custody, however, the reasons that justify dispensing with the magistrate's neutral judgment evaporate. There no longer is any danger that the suspect will escape or commit further crimes while the police submit their evidence to a magistrate. And, while the State's reasons for taking summary action subside, the suspect's need for a neutral determination of probable cause increases significantly. The consequences of prolonged detention may be more serious than the interference occasioned by arrest. Pretrial confinement may imperil the suspect's job, interrupt his source of income, and impair his family relationships. See R. Goldfarb, *Ransom* 32-91 (1965); L. Katz, *Justice*

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<sup>14</sup> Another aspect of *Trupiano* was overruled in *United States v. Robinowitz*, 339 U. S. 56 (1950), which was overruled in turn by *Chimel v. California*, 395 U. S. 752 (1969).

The issue of warrantless arrest that has generated the most controversy, and which remains unsettled, is whether and under what circumstances an officer may enter a suspect's home to make a warrantless arrest. See *Coolidge v. New Hampshire*, 403 U. S. 443, 474-481 (1971); *id.*, at 510-512 n. 1 (WHITE, J., dissenting); *Jones v. United States*, 357 U. S. 493, 499-500 (1958).



Is the Crime 51-62 (1972). Even pretrial release may be accompanied by burdensome conditions that effect a significant restraint on liberty. See, e. g., 18 U. S. C. § 3146 (a)(2), (5). When the stakes are this high, the detached judgment of a neutral magistrate is essential if the Fourth Amendment is to furnish meaningful protection from unfounded interference with liberty. Accordingly, we hold that the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint on liberty following arrest.

This result has historical support in the common law that has guided interpretation of the Fourth Amendment. See *Carroll v. United States*, 267 U. S. 132, 149 (1925). At common law it was customary, if not obligatory, for an arrested person to be brought before a justice of the peace shortly after arrest. 2 M. Hale, *Pleas of the Crown* 77, 81, 95, 121 (1736); 2 W. Hawkins, *Pleas of the Crown* 116-117 (4th ed. 1792). See also *Kurtz v. Moffitt*, 115 U. S. 487, 498-499 (1885).<sup>15</sup> The justice of the peace

<sup>15</sup> The primary motivation for the requirement seems to have been the penalty for allowing an offender to escape, if he had in fact committed the crime, and the fear of liability for false imprisonment, if he had not. But Hale also recognized that a judicial warrant of commitment, called a *mittimus*, was required for more than brief detention.

"When a private person hath arrested a felon, or one suspected of felony, he may detain him in custody till he can reasonably dismiss himself of him; but with as much speed as conveniently he can, he may do either of these things.

"1. He may carry him to the common gaol, . . . but that is now rarely done.

"2. He may deliver him to the constable of the vill, who may either carry him to the common gaol, . . . or to a justice of peace to be examined, and farther proceeded against as case shall require. . . .

"3. Or he may carry him immediately to any justice of peace of the county where he is taken, who upon examination may discharge, bail, or commit him, as the case shall require.

"And the bringing the offender either by the constable or private



would "examine" the prisoner and the witnesses to determine whether there was reason to believe the prisoner had committed a crime. If there was, the suspect would be committed to jail or bailed pending trial. If not, he would be discharged from custody. 1 M. Hale, *supra*, at 583-586; 2 W. Hawkins, *supra*, at 116-119; 1 J. Stephen, *History of the Criminal Law of England* 233 (1883).<sup>16</sup> The initial determination of probable cause also could be reviewed by higher courts on a writ of habeas corpus. 2 W. Hawkins, *supra*, at 112-115; 1 J. Stephen, *supra*, at 243; see *Ex parte Bollman*, 8 U. S. (4 Cranch) 75, 97-101 (1807). This practice furnished the model for criminal procedure in America immediately following the adoption of the Fourth Amendment, see *Ex parte Bollman*, 8 U. S. (4 Cranch) 75 (1807);<sup>17</sup> *Ex parte Burford*, 7 U. S. (3 Cranch) 448 (1806); *United States v. Hamilton*, 3 U. S. (3 Dall.) 17 (1795), and there are indications that the Framers of the Bill of Rights regarded it as a model

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person to a justice of peace is most usual and safe, because a gaoler will expect a *Mittimus* for his warrant of detaining."

1 M. Hale, *supra*, at 589-590.

<sup>16</sup> The examination of the prisoner was inquisitorial, and the witnesses were questioned outside the prisoner's presence. Although this method of proceeding was considered quite harsh, 1 J. Stephen, at 219-225, it was well established that the prisoner was entitled to be discharged if the investigation turned up insufficient evidence of his guilt. *Id.*, at 233.

<sup>17</sup> In *Ex parte Bollman*, two men charged in the Aaron Burr case were committed following an examination in the circuit court of the District of Columbia. They filed a petition for writ of habeas corpus in the Supreme Court. The Court, in an opinion by Chief Justice Marshall, affirmed its jurisdiction to issue habeas corpus to persons in custody by order of federal trial courts. Then, following arguments on the Fourth Amendment requirement of probable cause, the Court surveyed the evidence against the prisoners and held that it did not establish probable cause that they were guilty of treason. The prisoners were discharged.



for a "reasonable" seizure. See *Draper v. United States*, 358 U. S. 307, 317-320 (1959) (DOUGLAS, J., dissenting).<sup>18</sup>

## B

Under the Florida procedures challenged here, a person arrested without a warrant and charged by information may be jailed or subjected to other restraints pending trial without any opportunity for a probable cause determination.<sup>19</sup> Petitioner defends this practice on the ground that the prosecutor's decision to file an information is itself a determination of probable cause that furnishes sufficient reason to detain a defendant pending trial. Although a conscientious decision that the evidence warrants prosecution affords a measure of protection against unfounded detention, we do not think prosecutorial judgment standing alone meets the requirements of the Fourth Amendment. Indeed, we think the Court's previous decisions compel disapproval of the Florida procedure. In *Albrecht v. United States*, 273

<sup>18</sup> See also N. Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* 15-16 (1937). A similar procedure at common law, the warrant for recovery of stolen goods, is said to have furnished the model for a "reasonable" search under the Fourth Amendment. The victim was required to appear before a justice of the peace and make an oath of probable cause that his goods could be found in a particular place. After the warrant was executed, and the goods seized, the victim and the alleged thief would appear before the justice of the peace for a prompt determination of the cause for seizure of the goods and detention of the thief. 2 M. Hale, *supra*, at 149-152; T. Taylor, *Two Studies in Constitutional Interpretation* 24-25, 39-40 (1969); see *Boyd v. United States*, 116 U. S. 616, 626-629 (1886).

<sup>19</sup> A person arrested under a warrant would have received a prior judicial determination of probable cause. Under Fla. Rule Crim. Proc. 3.120, a warrant may be issued upon a sworn complaint that states facts showing that the suspect has committed a crime. The magistrate may also take testimony under oath to determine if there is reasonable ground to believe the complaint is true.



U. S. 1, 5 (1927), the Court held that an arrest warrant issued solely upon a United States Attorney's information was invalid because the accompanying affidavits were defective. Although the Court's opinion did not explicitly state that the prosecutor's official oath could not furnish probable cause, that conclusion was implicit in the judgment that the arrest was illegal under the Fourth Amendment.<sup>20</sup> More recently, in *Coolidge v. New Hampshire*, 403 U. S. 443, 449-453 (1971), the Court held that a prosecutor's responsibility to law enforcement is inconsistent with the constitutional role of a neutral and detached magistrate. We reaffirmed that principle in *Shadwick v. City of Tampa*, 407 U. S. 345 (1972), and held that probable cause for the issuance of an arrest warrant must be determined by someone independent of police and prosecution. See also *United States v. United States District Court*, 407 U. S. 297, 317 (1972).<sup>21</sup> The reason

<sup>20</sup> By contrast, the Court has held that an indictment, "fair upon its face," and returned by a "properly constituted grand jury" conclusively determines the existence of probable cause and requires issuance of an arrest warrant without further inquiry. *Ex parte United States*, 287 U. S. 241, 250 (1932). See also *Giordenello v. United States*, 357 U. S. 480, 487 (1958). The willingness to let a grand jury's judgment substitute for that of a neutral and detached magistrate is attributable to the grand jury's relationship to the courts and its historical role of protecting individuals from unjust prosecution. See *United States v. Calandra*, 414 U. S. 338, 342-346 (1974).

<sup>21</sup> The Court had earlier reached a different result in *Ocampo v. United States*, 234 U. S. 91 (1914), a criminal appeal from the Philippine Islands. Interpreting a statutory guarantee substantially identical to the Fourth Amendment, Act of July 1, 1902, c. 1309, § 5, 32 Stat. 693, the Court held that an arrest warrant could issue solely upon a prosecutor's information. The Court has since held that interpretation of a statutory guarantee applicable to the Philippines is not conclusive for interpretation of a cognate provision in the Federal Constitution, *Green v. United States*, 355 U. S. 184, 194-198 (1957). Even if it were, the result reached in *Ocampo*



for this separation of functions was expressed by Justice Frankfurter in a similar context:

"A democratic society, in which respect for the dignity of all men is central, naturally guards against the misuse of the law enforcement process. Zeal in tracking down crime is not in itself an assurance of soberness of judgment. Disinterestedness in law enforcement does not alone prevent disregard of cherished liberties. Experience has therefore counseled that safeguards must be provided against the dangers of the overzealous as well as the despotic. The awful instruments of the criminal law cannot be entrusted to a single functionary. The complicated process of criminal justice is therefore divided into different parts, responsibility for which is separately vested in the various participants upon whom the criminal law relies for its vindication." *McNabb v. United States*, 318 U. S. 332, 343 (1943).

In holding that the prosecutor's assessment of probable cause is not sufficient alone to justify restraint on liberty pending trial, we do not imply that the accused is entitled to judicial oversight or review of the decision to prosecute. Instead, we adhere to the Court's prior holding that a judicial hearing is not prerequisite to prosecution by information. *Beck v. Washington*, 369 U. S. 541, 545 (1962); *Lem Woon v. Oregon*, 229 U. S. 586 (1913). Nor do we retreat from the established rule that illegal arrest or detention does not void a subsequent conviction. *Frisbie v. Collins*, 342 U. S. 519 (1952); *Ker v. Illinois*, 119 U. S. 436 (1886). Thus, as the Court of Appeals noted below, although a suspect who is presently detained may challenge the probable cause for

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is incompatible with the later holdings of *Albrecht*, *Coolidge*, and *Shadwick*.



that confinement, a conviction will not be vacated on the ground that the defendant was detained pending trial without a determination of probable cause. 483 F. 2d, at 786-787. Compare *Scarborough v. Dutton*, 393 F. 2d 6 (CA5 1968), with *Brown v. Fauntleroy*, — U. S. App. D. C. —, 442 F. 2d 838 (1971), and *Cooley v. Stone*, — U. S. App. D. C. —, 414 F. 2d 1213 (1969).

### III

Both the District Court and the Court of Appeals held that the determination of probable cause must be accompanied by the full panoply of adversary safeguards—counsel, confrontation, cross-examination, and compulsory process for witnesses. A full preliminary hearing of this sort is modeled after the procedure used in many States to determine whether the evidence justifies going to trial under an information or presenting the case to a grand jury. See *Coleman v. Alabama*, 399 U. S. 1 (1970); Y. Kamisar, W. LaFare & J. Israel, *Modern Criminal Procedure* 957-967, 996-1000 (4th ed. 1974). The standard of proof required of the prosecution is usually referred to as "probable cause," but in some jurisdictions it may approach a *prima facie* case of guilt. A. L. I. Model Code of Pre-arraignment Procedure, Commentary on Article 330, at 90-91 (Tent. Draft No. 5, 1972). When the hearing takes this form, adversary procedures are customarily employed. The importance of the issue to both the State and the accused justifies the presentation of witnesses and full exploration of their testimony on cross-examination. This kind of hearing also requires appointment of counsel for indigent defendants. *Coleman v. Alabama*, *supra*. And, as the hearing assumes increased importance and the procedures become more complex, the likelihood that it can be held promptly



after arrest diminishes. See A. L. I. Model Code of Pre-arraignment Procedure, *supra*, at 33-34.

These adversary safeguards are not essential for the probable cause determination required by the Fourth Amendment. The sole issue is whether there is probable cause for detaining the arrested person pending further proceedings. This issue can be determined reliably without an adversary hearing. The standard is the same as that for arrest.<sup>22</sup> That standard—probable cause to believe the suspect has committed a crime—traditionally has been decided by a magistrate in a nonadversary proceeding on hearsay and written testimony, and the Court has approved these informal modes of proof.

"Guilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined to that which long experience in the common-law tradition, to some extent embodied in the Constitution, has crystallized into rules of evidence consistent with that standard. These rules are historically grounded rights of our system, developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property.

"In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and

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<sup>22</sup> Because the standards are identical, ordinarily there is no need for further investigation before the probable cause determination can be made.

"Presumably, whomever the police arrest they must arrest on 'probable cause.' It is not the function of the police to arrest, as it were, at large and to use an interrogating process at police headquarters in order to determine whom they should charge before a committing magistrate on 'probable cause.'" *Mallory v. United States*, 354 U.S. 449, 456 (1957).



practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved." *Brinegar v. United States*, 338 U. S. 160, 174-175 (1949).

Cf. *McCray v. Illinois*, 386 U. S. 300 (1967).

The use of an informal procedure is justified not only by the lesser consequences of a probable cause determination but also by the nature of the determination itself. It does not require the fine resolution of conflicting evidence that a reasonable-doubt or even a preponderance standard demands, and credibility determinations are seldom crucial in deciding whether the evidence supports a reasonable belief in guilt. See F. Miller, *Prosecution: The Decision to Charge a Suspect with a Crime* 64-109 (1969).<sup>23</sup> This is not to say that confrontation and cross-examination might not enhance the reliability of

<sup>23</sup> In *Morrissey v. Brewer*, 408 U. S. 471 (1972), and *Gagnon v. Scarpelli*, 411 U. S. 778 (1973), we held that a parolee or probationer arrested prior to revocation is entitled to an informal preliminary hearing at the place of arrest, with some provision for live testimony. 408 U. S., at 487; 411 U. S., at 786. That preliminary hearing, more than the probable cause determination required by the Fourth Amendment, serves the purpose of gathering and preserving live testimony, since the final revocation hearing frequently is held at some distance from the place where the violation occurred. 408 U. S., at 485; 411 U. S., at 782-783 n. 5. Moreover, revocation proceedings may offer less protection from initial error than the more formal criminal process, where violations are defined by statute and the prosecutor has a professional duty not to charge a suspect with crime unless he is satisfied of probable cause. See ABA Code of Professional Responsibility, DR 7-103 (A) (a prosecutor "shall not institute or cause to be instituted criminal charges when he knows or it is obvious that the charges are not supported by probable cause"); ABA Standards Relating to the Administration of Criminal Justice, *The Prosecution Function*, §§ 1.1, 3.4, 3.9 (1974); American College of Trial Lawyers, *Code of Trial Conduct*, rule 4 (c) (1972).



probable cause determinations in some cases. In most cases, however, their value would be too slight to justify holding, as a matter of constitutional principle, that these formalities and safeguards designed for trial must also be employed in making the Fourth Amendment determination of probable cause.<sup>24</sup>

Because of its limited function and its nonadversary character, the probable cause determination is not a "critical stage" in the prosecution that would require appointed counsel. The Court has identified as "critical stages" those pretrial procedures that would impair defense on the merits if the accused is required to proceed without counsel. *Coleman v. Alabama*, 399 U. S. 1 (1970); *United States v. Wade*, 388 U. S. 218, 226-227 (1967). In *Coleman v. Alabama*, where the Court held that a preliminary hearing was a critical stage of an Alabama prosecution, the majority and concurring opinions identified two critical factors that distinguish the Alabama preliminary hearing from the probable cause determination required by the Fourth Amendment. First, under Alabama law the function of the preliminary hearing was to determine whether the evidence justified charging the suspect with an offense. A finding of no probable cause could mean that he would not be tried at all. The Fourth Amendment probable cause determination is addressed only to pretrial custody. To be sure, pretrial custody may affect to some extent the defendant's ability to assist in preparation of his defense, but this does not present the high probability of substantial harm identified as controlling in *Wade* and *Coleman*. Second, Ala-

<sup>24</sup> Criminal justice is already overburdened by the volume of cases and the complexities of our system. The processing of misdemeanors, in particular, and the early stages of prosecution generally are marked by delays that can seriously affect the quality of justice. A constitutional doctrine requiring adversary hearings for all persons detained pending trial could exacerbate the problem of pretrial delay.



bama allowed the suspect to confront and cross-examine prosecution witnesses at the preliminary hearing. The Court noted that the suspect's defense on the merits could be compromised if he had no legal assistance for exploring of preserving the witnesses' testimony. This consideration does not apply when the prosecution is not required to produce witnesses for cross-examination.

Although we conclude that the Constitution does not require an adversary determination of probable cause, we recognize that state systems of criminal procedure vary widely. There is no single preferred pretrial procedure, and the nature of the probable cause determination usually will be shaped to accord with a State's pretrial procedure viewed as a whole. While we limit our holding to the precise requirement of the Fourth Amendment, we recognize the desirability of flexibility and experimentation by the States. It may be found desirable, for example, to make the probable cause determination at the suspect's first appearance before a judicial officer,<sup>25</sup> see *McNabb v. United States*, 318 U. S. 332, 342-344 (1943), or the determination may be incorporated into the procedure for setting bail or fixing other conditions of pretrial release. In some States, existing procedures may satisfy the requirement of the Fourth Amendment. Others may require only minor adjustment, such as acceleration of their existing preliminary hearings. Current proposals for criminal procedure reform suggest other

<sup>25</sup> Several States already authorize a determination of probable cause at this stage or immediately thereafter. See Colo. Rev. Stat. § 39-2-3 (1965 Supp.); Hawaii Rev. Stat. § 708-9 (5) (1968); Vt. Rules Crim. Proc. 3 (b), 5 (c) (1974). This Court has interpreted the Federal Rules of Criminal Procedure to require a determination of probable cause at the first appearance. *Jaben v. United States*, 381 U. S. 214, 218 (1965); *Mallory v. United States*, 354 U. S. 449, 454 (1957).



ways of testing probable cause for detention.<sup>26</sup> Whatever procedure a State may adopt, it must provide a fair and reliable determination of probable cause as a condition for any significant pretrial restraint on liberty,<sup>27</sup> and this

<sup>26</sup> Under the Uniform Rules of Criminal Procedure (Proposed Final Draft 1974), a person arrested without a warrant is entitled, "without unnecessary delay," to a first appearance before a magistrate and a determination that grounds exist for issuance of an arrest warrant. The determination may be made on affidavits or testimony, in the presence of the accused. Rule 311. Persons who remain in custody for inability to qualify for pretrial release are offered another opportunity for a probable cause determination at the detention hearing, held no more than five days after arrest. This is an adversary hearing, and the parties may summon witnesses, but reliable hearsay evidence may be considered. Rule 344.

The A. L. I. Model Code of Pre-arraignment Procedure (Tent. Draft No. 5, 1972, and Tent. Draft No. 5A, 1973) also provides a first appearance, at which a warrantless arrest must be supported by a reasonably detailed written statement of facts. § 310. The magistrate may make a determination of probable cause to hold the accused, but he is not required to do so and the accused may request an attorney for an "adjourned session" of the first appearance to be held within 2 "court days." At that session, the magistrate makes a determination of probable cause upon a combination of written and live testimony:

"The arrested person may present written and testimonial evidence and arguments for his discharge and the state may present additional written and testimonial evidence and arguments that there is reasonable cause to believe that he has committed the crime of which he is accused. The state's submission may be made by means of affidavits, and no witnesses shall be required to appear unless the court, in the light of the evidence and arguments submitted by the parties, determines that there is a basis for believing that the appearance of one or more witnesses for whom the arrested person seeks subpoenas might lead to a finding that there is no reasonable cause." § 310.2 (2) (Tent. Draft No. 5A, 1973).

<sup>27</sup> Because the probable cause determination is not a constitutional prerequisite to the charging decision, it is required only for those suspects who suffer restraints on liberty other than the condition that they appear for trial. There are many kinds of pretrial release



determination must be made by a judicial officer either before or promptly after arrest.

## IV

We agree with the Court of Appeals that the Fourth Amendment requires a timely judicial determination of probable cause as a prerequisite to detention, and we accordingly affirm that much of the judgment. As we do not agree that the Fourth Amendment requires the adversary hearing outlined in the District Court's decree, we reverse in part and remand to the Court of Appeals for further proceedings consistent with this opinion.

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and many degrees of conditional liberty. See 18 U. S. C. § 3146; ABA Standards Relating to the Administration of Criminal Justice, Pretrial Release § 5.2 (1974); Uniform Rules of Criminal Procedure, Rule 341 (Proposed Final Draft 1974). We cannot define specifically those that would require a prior probable cause determination, but the key factor is significant restraint on liberty.



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SUPREME COURT OF THE UNITED STATES

No. 73-477

Richard E. Gerstein, State At- torney for Eleventh Judicial Circuit of Florida, Petitioner, v. Robert Pugh et al.	}	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.
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[December —, 1974]

MR. JUSTICE POWELL delivered the opinion of the Court.

The issue in this case is whether a person arrested under a prosecutor's information is constitutionally entitled to a judicial determination of probable cause for pretrial restraint of liberty.

I

In March 1971 respondents Pugh and Henderson were arrested in Dade County, Florida. Each was charged with several offenses under a prosecutor's information.<sup>1</sup> Pugh was denied bail because one of the charges against him carried a potential life sentence, and Henderson remained in custody because he was unable to post a \$4,500 bond.

<sup>1</sup> Respondent Pugh was arrested on March 3, 1971. On March 16 an information was filed charging him with robbery, carrying a concealed weapon, and possession of a firearm during commission of a felony. Respondent Henderson was arrested on March 2, and charged by information on March 19 with the offenses of breaking and entering and assault and battery. The record does not indicate whether there was an arrest warrant in either case.



In Florida, indictments are required only for prosecution of capital offenses. Prosecutors may charge all other crimes by information, without a prior preliminary hearing and without obtaining leave of court. Fla. Rule Crim. Proc. 3.140 (a); *State v. Hernandez*, 217 So. 2d 109 (Fla. 1968); *Di Bona v. State*, 121 So. 2d 192 (Fla. Ct. App. 1960). At the time respondents were arrested, a Florida rule seemed to authorize adversary preliminary hearings to test probable cause for detention in all cases, Fla. Rule Crim. Proc. 1.122 (amended 1972). But the Florida courts had held that the filing of an information foreclosed the suspect's right to a preliminary hearing. See *State ex rel. Hardy v. Blount*, 261 So. 2d 172 (Fla. 1972).<sup>2</sup> They had also held that habeas corpus could not be used, except perhaps in exceptional circumstances, to test the probable cause for detention under an information. See *Sullivan v. State ex rel. McCrory*, 29 So. 2d 794, 797 (Fla. 1951). The only possible methods for obtaining a judicial determination of probable cause were a special statute allowing a preliminary hearing after 30 days, Fla. Stat. Ann. § 907.045 (1973),<sup>3</sup> and arraignment, which the District Court found was often delayed a month or more after arrest. *Pugh v. Rainwater*, 332 F. Supp. 1107, 1110 (SD Fla. 1971).<sup>4</sup> As a result, a person charged

<sup>2</sup> Florida law also denies preliminary hearings to persons confined under indictment, see *Sangaree v. Hamlin*, 235 So. 2d 729 (Fla. 1970); Fla. Rule Crim. Proc. 3.131 (a), but that procedure is not challenged in this case. See n. 19, post, at 14.

<sup>3</sup> This statute may have been construed to make the hearing permissive instead of mandatory. See *Evans v. State*, 197 So. 2d 323 (Fla. Ct. App. 1967); Fla. Op. Att'y Gen. 067-29 (1967). But cf. *Karz v. Overton*, 249 So. 2d 763 (Fla. Ct. App. 1971). It may also have been superseded by the subsequent amendments to the rules of criminal procedure. *In re Florida Rules of Criminal Procedure*, 272 So. 2d 65 (1972).

<sup>4</sup> The Florida rules do not suggest that the issue of probable cause can be raised at arraignment, Fla. Rule Crim. Proc. 3.160, but



by information could be detained for a substantial period solely on the decision of a prosecutor.

Respondents Pugh and Henderson filed a class action against Dade County officials in the Federal District Court,<sup>5</sup> claiming a constitutional right to a judicial hearing on the issue of probable cause and requesting declaratory and injunctive relief.<sup>6</sup> Respondents Turner and Faulk, also in custody under informations, subsequently intervened.<sup>7</sup> Petitioner Gerstein, the State Attorney for Dade County, was one of several defendants.<sup>8</sup>

After an initial delay while the Florida legislature considered a bill that would have afforded preliminary hearings to persons charged by information, the District Court granted the relief sought. *Pugh v. Rainwater*, *supra*. The court certified the case as a class action under Fed.

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counsel for Petitioner represented at oral argument that arraignment affords the suspect an opportunity to "attack the sufficiency of the evidence to hold him." Tr. of Oral Arg., Mar. 25, 1974, at 17. The Court of Appeals assumed, without deciding, that this was true. 483 F. 2d 778, 781 n. 8.

<sup>5</sup> The complaint was framed under 42 U. S. C. § 1983, and jurisdiction in the District Court was based on 28 U. S. C. § 1343 (3).

<sup>6</sup> Respondents did not ask for release from state custody, even as an alternate remedy. They asked only that the state authorities be ordered to give them a probable cause determination. This was also the only relief that the District Court ordered for the named respondents. 332 F. Supp., at 1115-1116. Because release was neither asked nor ordered, the lawsuit did not come within the class of cases for which habeas corpus is the exclusive remedy. *Preiser v. Rodriguez*, 411 U. S. 475 (1973); see *Wolff v. McDonnell*, 417 U. S. —, — (1974).

<sup>7</sup> Turner was being held on a charge of auto theft, following arrest on March 11, 1971. Faulk was arrested on March 19 on charges of soliciting a ride and possession of marihuana.

<sup>8</sup> The named defendants included justices of the peace and judges of small-claims courts, who were authorized to hold preliminary hearings in criminal cases, and a group of law enforcement officers with power to make arrests in Dade County. Gerstein was the only one who petitioned for certiorari.



Rule Civ. Proc. 23 (b)(2), and held that the Fourth and Fourteenth Amendments give all arrested persons charged by information a right to a judicial hearing on the question of probable cause. The District Court ordered the Dade County defendants to give the named plaintiffs an immediate preliminary hearing to determine probable cause for further detention.<sup>9</sup> It also ordered them to submit a plan providing preliminary hearings in all cases instituted by information.

The defendants submitted a plan authored by Sheriff E. Wilson Purdy, and the District Court adopted it with modifications. The final order prescribed a detailed post-arrest procedure. 336 F. Supp. 490. Upon arrest the accused would be taken before a magistrate for a "first appearance hearing." The magistrate would explain the charges, advise the accused of his rights, appoint counsel if he was indigent, and proceed with a probable cause determination unless either the prosecutor or the accused was unprepared. If either requested more time, the magistrate would set the date for a "preliminary hearing," to be held within four days if the accused was in custody and within 10 days if he had been released pending trial. The order provided sanctions for failure to hold the hearings at prescribed times. At the "preliminary hearing" the accused would be entitled to counsel, and he would be allowed to confront and cross-examine adverse witnesses,

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<sup>9</sup> The District Court correctly held that respondents' claim for relief was not barred by the equitable restrictions on federal intervention in state prosecutions, *Younger v. Harris*, 401 U. S. 37 (1971). The injunction was not directed at the state prosecutions as such, but only at the legality of pretrial detention without a judicial hearing, an issue that could not be raised in defense of the criminal prosecution. The order to hold preliminary hearings could not prejudice the conduct of trial on the merits. See *Conover v. Montemuro*, 477 F. 2d 1073, 1082 (CA3 1973); cf. *Perez v. Ledesma*, 401 U. S. 82 (1971); *Stefanelli v. Minard*, 342 U. S. 117 (1951).



to summon favorable witnesses, and to have a transcript made on request. If the magistrate found no probable cause, the accused would be discharged. He then could not be charged with the same offense by complaint or information, but only by indictment returned within 30 days.

The Court of Appeals for the Fifth Circuit stayed the District Court's order pending appeal, but while the case was awaiting decision, the Dade County judiciary voluntarily adopted a similar procedure of its own. Upon learning of this development, the Court of Appeals remanded the case for specific findings on the constitutionality of the new Dade County system. Before the District Court issued its findings, however, the Florida Supreme Court amended the procedural rules governing preliminary hearings statewide, and the parties agreed that the District Court should direct its inquiry to the new rules rather than the Dade County procedures.

Under the amended rules every arrested person must be taken before a judicial officer within 24 hours. Fla. Rule Crim. Proc. 3.130 (b). This "first appearance" is similar to the "first appearance hearing" ordered by the District Court in all respects but the crucial one: the magistrate does not make a determination of probable cause. The rule amendments also changed the procedure for preliminary hearings, restricting them to felony charges and codifying the rule that no hearings are available to persons charged by information or indictment. Rule 3.131; see *In re Rule 3.131 (b)*, *Florida Rules of Criminal Procedure*, 289 So. 2d 3 (Fla. 1974).

In a supplemental opinion the District Court held that the amended rules had not answered the basic constitutional objection, since a defendant charged by information still could be detained pending trial without a judicial determination of probable cause. 355 F. Supp.



1286. Reaffirming its original ruling, the District Court declared that the continuation of this practice was unconstitutional.<sup>10</sup> The Court of Appeals affirmed, 483 F. 2d 778, modifying the District Court's decree in minor particulars and suggesting that the form of preliminary hearing provided by the amended Florida rules would be acceptable, as long as it was provided to all defendants in custody pending trial. *Id.*, at 788-789.

State Attorney Gerstein petitioned for review, and we granted certiorari because of the importance of the issue.<sup>11</sup> 414 U. S. 1062. We affirm in part and reverse in part.

<sup>10</sup> Although this ruling held a statewide "legislative rule" unconstitutional, it was not outside the jurisdiction of a single judge by virtue of 28 U. S. C. § 2281. The original complaint did not ask for an injunction against enforcement of any state statute or legislative rule of statewide application, since the practice of denying preliminary hearings to persons charged by information was then embodied only in judicial decisions. The District Court therefore had jurisdiction to issue the initial injunction, and the Court of Appeals had jurisdiction over the appeal. On remand, the constitutionality of a state "statute" was drawn into question for the first time when the criminal rules were amended. The District Court's supplemental opinion can fairly be read as a declaratory judgment that the amended rules were unconstitutional; the injunctive decree was never amended to incorporate that holding; and the opinion in the Court of Appeals is not inconsistent with the conclusion that the District Court did not enjoin enforcement of the statewide rule. See 483 F. 2d, at 788-790. Accordingly, a district court of three judges was not required for the issuance of this order. See *Kennedy v. Mendoza-Martinez*, 372 U. S. 144, 152-155 (1963); *Flemming v. Nestor*, 363 U. S. 603, 606-608 (1960).

<sup>11</sup> At oral argument counsel informed us that the named respondents have been convicted. Their pretrial detention therefore has ended. This case belongs, however, to that narrow class of cases in which the termination of a class representative's claim does not moot the claims of the unnamed members of the class. See *Sosa v. Iowa*, — U. S. — (1975). Pretrial detention is by nature temporary, and it is most unlikely that any given individual could have his



## II

As framed by the proceedings below, this case presents two issues: whether a person arrested and held for trial on an information is entitled to a judicial determination of probable cause for detention, and if so, whether the adversary hearing ordered by the District Court and approved by the Court of Appeals is required by the Constitution.

## A

Both the standards and procedures for arrest and detention have been derived from the Fourth Amendment and its common-law antecedents. See *Cupp v. Murphy*, 412 U. S. 291, 294-295 (1973); *Ex parte Bollman*, 8 U. S. (4 Cranch) 75 (1807); *Ex parte Bur-*

constitutional claim decided on appeal before he is either released or convicted. The individual could nonetheless suffer repeated deprivations, and it is certain that other persons similarly situated will be detained under the allegedly unconstitutional procedures. The claim, in short, is one that is distinctly "capable of repetition, yet evading review."

At the time the complaint was filed, the named respondents were members of a class of persons detained without a judicial probable cause determination, but the record does not indicate whether any of them were still in custody awaiting trial when the District Court certified the class. Such a showing ordinarily would be required to avoid mootness under *Sosa*. But this case is a suitable exception to that requirement. See *Sosa*, *supra*, at — n. 11; cf. *Rivera v. Freeman*, 469 F.2d 1159, 1162-1163 (CA9 1972). The length of pretrial custody cannot be ascertained at the outset, and it may be ended at any time by release on recognizance, dismissal of the charges, or a guilty plea, as well as by acquittal or conviction after trial. It is by no means certain that any given individual, named as plaintiff, would be in pretrial custody long enough for a district judge to certify the class. Moreover, in this case the constant existence of a class of persons suffering the deprivation is certain. The attorney representing the named respondents is a public defender, and we can safely assume that he has other clients with a continuing live interest in the case.



*ford*, 7 U. S. (3 Cranch) 448 (1806). 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." *Beck v. Ohio*, 379 U. S. 89, 91 (1964). See also *Henry v. United States*, 361 U. S. 98 (1959); *Brinegar v. United States*, 338 U. S. 160, 175-176 (1949). This standard, like those for searches and seizures, represents a necessary accommodation between the individual's right to liberty and the State's duty to control crime.

"These long-prevailing standards seek to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime. They also seek to give fair leeway for enforcing the law in the community's protection. Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability. The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating these often opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice." *Brinegar v. United States*, *supra*, at 176.

To implement the Fourth Amendment's protection against unfounded invasions of liberty and privacy, the Court has required that the existence of probable cause be decided by a neutral and detached magistrate whenever possible. The classic statement of this principle



appears in *Johnson v. United States*, 333 U. S. 10, 13-14 (1948):

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

See also *Terry v. Ohio*, 392 U. S. 1, 20-22 (1968).<sup>12</sup>

Maximum protection of individual rights could be assured by requiring a magistrate's review of the factual justification prior to any arrest, but such a requirement would constitute an intolerable handicap for legitimate law enforcement. Thus, while the Court has expressed a preference for the use of arrest warrants when feasible, *Beck v. Ohio*, *supra*, at 96; *Wong Sun v. United States*, 371 U. S. 471, 479-482 (1963), it has never invalidated an arrest supported by probable cause solely because the officers failed to secure a warrant. See *Ker v. California*, 374 U. S. 23 (1963); *Draper v. United States*, 358 U. S. 307 (1959); *Trupiano v. United States*, 334 U. S. 699, 705 (1948).<sup>13</sup>

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<sup>12</sup> We reiterated this principle in *United States v. United States District Court*, 407 U. S. 297 (1972). In terms that apply equally to arrests, we described the "very heart of the Fourth Amendment directive" as a requirement that "where practical, a governmental search and seizure should represent both the efforts of the officer to gather evidence of wrongful acts and the judgment of the magistrate that the collected evidence is sufficient to justify invasion of a citizen's private premises or conversation." *Id.*, at 316. See also *Terry v. Ohio*, 392 U. S. 1, 20-22 (1968).

<sup>13</sup> Another aspect of *Trupiano* was overruled in *United States v.*



Under this practical compromise, a policeman's on-the-scene assessment of probable cause provides legal justification for arresting a person suspected of crime, and for a brief period of detention to take the administrative steps incident to arrest. Once the suspect is in custody, however, the reasons that justify dispensing with the magistrate's neutral judgment evaporate. There no longer is any danger that the suspect will escape or commit further crimes while the police submit their evidence to a magistrate. And, while the State's reasons for taking summary action subside, the suspect's need for a neutral determination of probable cause increases significantly. The consequences of prolonged detention may be more serious than the interference occasioned by arrest. Pretrial confinement may imperil the suspect's job, interrupt his source of income, and impair his family relationships. See R. Goldfarb, *Ransom* 32-91 (1965); L. Katz, *Justice Is the Crime* 51-62 (1972). Even pretrial release may be accompanied by burdensome conditions that effect a significant restraint on liberty. See, e. g., 18 U. S. C. § 3146 (a)(2), (5). When the stakes are this high, the detached judgment of a neutral magistrate is essential if the Fourth Amendment is to furnish meaningful protection from unfounded interference with liberty. Accordingly, we hold that the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint on liberty following arrest.

This result has historical support in the common law

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*Rabinowitz*, 339 U. S. 56 (1950), which was overruled in turn by *Chimel v. California*, 395 U. S. 752 (1969).

The issue of warrantless arrest that has generated the most controversy, and which remains unsettled, is whether and under what circumstances an officer may enter a suspect's home to make a warrantless arrest. See *Coolidge v. New Hampshire*, 403 U. S. 443, 474-481 (1971); *id.*, at 510-512 n. 1 (WHITE, J., dissenting); *Jones v. United States*, 357 U. S. 493, 499-500 (1958).



that has guided interpretation of the Fourth Amendment. See *Carroll v. United States*, 267 U. S. 132, 149 (1925). At common law it was customary, if not obligatory, for an arrested person to be brought before a justice of the peace shortly after arrest. 2 M. Hale, *Pleas of the Crown* 77, 81, 95, 121 (1736); 2 W. Hawkins, *Pleas of the Crown* 116-117 (4th ed. 1792). See also *Kurtz v. Moffitt*, 115 U. S. 487, 498-499 (1885).<sup>14</sup> The justice of the peace would "examine" the prisoner and the witnesses to determine whether there was reason to believe the prisoner had committed a crime. If there was, the suspect would be committed to jail or bailed pending trial. If not, he would be discharged from custody. 1 M. Hale, *supra*, at 583-586; 2 W. Hawkins, *supra*, at 116-119; 1 J. Stephen, *History of the Criminal Law of England* 233 (1883).<sup>15</sup>

<sup>14</sup> The primary motivation for the requirement seems to have been the penalty for allowing an offender to escape, if he had in fact committed the crime, and the fear of liability for false imprisonment, if he had not. But Hale also recognized that a judicial warrant of commitment, called a *mittimus*, was required for more than brief detention.

"When a private person hath arrested a felon, or one suspected of felony, he may detain him in custody till he can reasonably dismiss himself of him; but with as much speed as conveniently he can, he may do either of these things.

"1. He may carry him to the common gaol, . . . but that is now rarely done.

"2. He may deliver him to the constable of the vill, who may either carry him to the common gaol, . . . or to a justice of peace to be examined, and farther proceeded against as case shall require. . . .

"3. Or he may carry him immediately to any justice of peace of the county where he is taken, who upon examination may discharge, bail, or commit him, as the case shall require.

"And the bringing the offender either by the constable or private person to a justice of peace is most usual and safe, because a gaoler will expect a *Mittimus* for his warrant of detaining."

1 M. Hale, *supra*, at 589-590.

<sup>15</sup> The examination of the prisoner was inquisitorial, and the witnesses were questioned outside the prisoner's presence. Although



The initial determination of probable cause also could be reviewed by higher courts on a writ of habeas corpus. 2 W. Hawkins, *supra*, at 112-115; 1 J. Stephen, *supra*, at 243; see *Ex parte Bollman*, 8 U. S. (4 Cranch) 75, 97-101 (1807). This practice furnished the model for criminal procedure in America immediately following the adoption of the Fourth Amendment, see *Ex parte Bollman*, 8 U. S. (4 Cranch) 75 (1807); <sup>16</sup> *Ex parte Burford*, 7 U. S. (3 Cranch) 448 (1806); *United States v. Hamilton*, 3 U. S. (3 Dall.) 17 (1795), and there are indications that the Framers of the Bill of Rights regarded it as a model for a "reasonable" seizure. See *Draper v. United States*, 358 U. S. 307, 317-320 (1959) (DOUGLAS, J., concurring).<sup>17</sup>

this method of proceeding was considered quite harsh, 1 J. Stephen, at 219-225, it was well established that the prisoner was entitled to be discharged if the investigation turned up insufficient evidence of his guilt. *Id.*, at 233.

<sup>16</sup> In *Ex parte Bollman*, two men charged in the Aaron Burr case were committed following an examination in the circuit court of the District of Columbia. They filed a petition for writ of habeas corpus in the Supreme Court. The Court, in an opinion by Chief Justice Marshall, affirmed its jurisdiction to issue habeas corpus to persons in custody by order of federal trial courts. Then, following arguments on the Fourth Amendment requirement of probable cause, the Court surveyed the evidence against the prisoners and held that it did not establish probable cause that they were guilty of treason. The prisoners were discharged.

<sup>17</sup> See also N. Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* 15-16 (1937). A similar procedure at common law, the warrant for recovery of stolen goods, is said to have furnished the model for a "reasonable" search under the Fourth Amendment. The victim was required to appear before a justice of the peace and make an oath of probable cause that his goods could be found in a particular place. After the warrant was executed, and the goods seized, the victim and the alleged thief would appear before the justice of the peace for a prompt determination of the cause for seizure of the goods and detention of the thief. 2 M. Hale, *supra*, at 149-152; T. Taylor,



## B

Under the Florida procedures challenged here, a person arrested without a warrant and charged by information may be jailed or subjected to other restraints pending trial without any opportunity for a probable cause determination.<sup>18</sup> Petitioner defends this practice on the ground that the prosecutor's decision to file an information is itself a determination of probable cause that furnishes sufficient reason to detain a defendant pending trial. Although a conscientious decision that the evidence warrants prosecution affords a measure of protection against unfounded detention, we do not think prosecutorial judgment standing alone meets the requirements of the Fourth Amendment. Indeed, we think the Court's previous decisions compel disapproval of the Florida procedure. In *Albrecht v. United States*, 273 U. S. 1, 5 (1927), the Court held that an arrest warrant issued solely upon a United States Attorney's information was invalid because the accompanying affidavits were defective. Although the Court's opinion did not explicitly state that the prosecutor's official oath could not furnish probable cause, that conclusion was implicit in the judgment that the arrest was illegal under the Fourth Amendment.<sup>19</sup> More recently, in *Coolidge v. New Hampshire*,

Two Studies in Constitutional Interpretation 24-25, 39-40 (1969); see *Boyd v. United States*, 116 U. S. 616, 626-629 (1886).

<sup>18</sup> A person arrested under a warrant would have received a prior judicial determination of probable cause. Under Fla. Rule Crim. Proc. 3.120, a warrant may be issued upon a sworn complaint that states facts showing that the suspect has committed a crime. The magistrate may also take testimony under oath to determine if there is reasonable ground to believe the complaint is true.

<sup>19</sup> By contrast, the Court has held that an indictment, "fair upon its face," and returned by a "properly constituted grand jury" conclusively determines the existence of probable cause and requires issuance of an arrest warrant without further inquiry. *Ex parte*



403 U. S. 443, 449-453 (1971), the Court held that a prosecutor's responsibility to law enforcement is inconsistent with the constitutional role of a neutral and detached magistrate. We reaffirmed that principle in *Shadwick v. City of Tampa*, 407 U. S. 345 (1972), and held that probable cause for the issuance of an arrest warrant must be determined by someone independent of police and prosecution. See also *United States v. United States District Court*, 407 U. S. 297, 317 (1972).<sup>20</sup> The reason for this separation of functions was expressed by Justice Frankfurter in a similar context:

"A democratic society, in which respect for the dignity of all men is central, naturally guards against the misuse of the law enforcement process. Zeal in tracking down crime is not in itself an assurance of soberness of judgment. Disinterestedness in law enforcement does not alone prevent disregard of cherished liberties. Experience has therefore counseled

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*United States*, 287 U. S. 241, 250 (1932). See also *Giordenello v. United States*, 357 U. S. 480, 487 (1958). The willingness to let a grand jury's judgment substitute for that of a neutral and detached magistrate is attributable to the grand jury's relationship to the courts and its historical role of protecting individuals from unjust prosecution. See *United States v. Calandra*, 414 U. S. 338, 342-346 (1974).

<sup>20</sup> The Court had earlier reached a different result in *Ocampo v. United States*, 234 U. S. 91 (1914), a criminal appeal from the Philippine Islands. Interpreting a statutory guarantee substantially identical to the Fourth Amendment, Act of July 1, 1902, c. 1369, § 5, 32 Stat. 693, the Court held that an arrest warrant could issue solely upon a prosecutor's information. The Court has since held that interpretation of a statutory guarantee applicable to the Philippines is not conclusive for interpretation of a cognate provision in the Federal Constitution, *Green v. United States*, 355 U. S. 184, 194-198 (1957). Even if it were, the result reached in *Ocampo* is incompatible with the later holdings of *Albrecht*, *Coolidge*, and *Shadwick*.



that safeguards must be provided against the dangers of the overzealous as well as the despotic. The awful instruments of the criminal law cannot be entrusted to a single functionary. The complicated process of criminal justice is therefore divided into different parts, responsibility for which is separately vested in the various participants upon whom the criminal law relies for its vindication." *McNabb v. United States*, 318 U. S. 332, 343 (1943).

In holding that the prosecutor's assessment of probable cause is not sufficient alone to justify restraint on liberty pending trial, we do not imply that the accused is entitled to judicial oversight or review of the decision to prosecute. Instead, we adhere to the Court's prior holding that a judicial hearing is not prerequisite to prosecution by information. *Beck v. Washington*, 369 U. S. 541, 545 (1962); *Lem Woon v. Oregon*, 229 U. S. 586 (1913). Nor do we retreat from the established rule that illegal arrest or detention does not void a subsequent conviction. *Frisbie v. Collins*, 342 U. S. 519 (1952); *Ker v. Illinois*, 119 U. S. 436 (1886). Thus, as the Court of Appeals noted below, although a suspect who is presently detained may challenge the probable cause for that confinement, a conviction will not be vacated on the ground that the defendant was detained pending trial without a determination of probable cause. 483 F. 2d, at 786-787. Compare *Scarborough v. Dutton*, 393 F. 2d 6 (CA5 1968), with *Brown v. Fauntleroy*, — U. S. App. D. C. —, 442 F. 2d 838 (1971), and *Cooley v. Stone*, — U. S. App. D. C. —, 414 F. 2d 1213 (1969).

### III

Both the District Court and the Court of Appeals held that the determination of probable cause must be accompanied by the full panoply of adversary safe-



guards—counsel, confrontation, cross-examination, and compulsory process for witnesses. A full preliminary hearing of this sort is modeled after the procedure used in many States to determine whether the evidence justifies going to trial under an information or presenting the case to a grand jury. See *Coleman v. Alabama*, 399 U. S. 1 (1970); Y. Kamisar, W. LaFare & J. Israel, *Modern Criminal Procedure* 957-967, 996-1000 (4th ed. 1974). The standard of proof required of the prosecution is usually referred to as "probable cause," but in some jurisdictions it may approach a *prima facie* case of guilt. A. L. I. Model Code of Pre-arraignment Procedure, Commentary on Article 330, at 90-91 (Tent. Draft No. 5, 1972). When the hearing takes this form, adversary procedures are customarily employed. The importance of the issue to both the State and the accused justifies the presentation of witnesses and full exploration of their testimony on cross-examination. This kind of hearing also requires appointment of counsel for indigent defendants. *Coleman v. Alabama*, *supra*. And, as the hearing assumes increased importance and the procedures become more complex, the likelihood that it can be held promptly after arrest diminishes. See A. L. I. Model Code of Pre-arraignment Procedure, *supra*, at 33-34.

These adversary safeguards are not essential for the probable cause determination required by the Fourth Amendment. The sole issue is whether there is probable cause for detaining the arrested person pending further proceedings. This issue can be determined reliably without an adversary hearing. The standard is the same as that for arrest.<sup>21</sup> That standard—probable cause to

<sup>21</sup> Because the standards are identical, ordinarily there is no need for further investigation before the probable cause determination can be made.

"Presumably, whomever the police arrest they must arrest on 'probable cause.' It is not the function of the police to arrest, as it were,



believe the suspect has committed a crime—traditionally has been decided by a magistrate in a nonadversary proceeding on hearsay and written testimony, and the Court has approved these informal modes of proof.

"Guilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined to that which long experience in the common-law tradition, to some extent embodied in the Constitution, has crystallized into rules of evidence consistent with that standard. These rules are historically grounded rights of our system, developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property.

"In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved." *Brinegar v. United States*, 338 U. S. 160, 174-175 (1949).

Cf. *McCray v. Illinois*, 386 U. S. 300 (1967).

The use of an informal procedure is justified not only by the lesser consequences of a probable cause determination but also by the nature of the determination itself. It does not require the fine resolution of conflicting evidence that a reasonable-doubt or even a preponderance standard demands, and credibility determinations are seldom crucial in deciding whether the evidence supports a reasonable belief in guilt. See F. Miller, *Prosecu-*

at large and to use an interrogating process at police headquarters in order to determine whom they should charge before a committing magistrate on "probable cause." *Mallory v. United States*, 354 U. S. 449, 456 (1957).



tion: The Decision to Charge a Suspect with a Crime 64-109 (1969).<sup>22</sup> This is not to say that confrontation and cross-examination might not enhance the reliability of probable cause determinations in some cases. In most cases, however, their value would be too slight to justify holding, as a matter of constitutional principle, that these formalities and safeguards designed for trial must also be employed in making the Fourth Amendment determination of probable cause.<sup>23</sup>

Because of its limited function and its nonadversary character, the probable cause determination is not a "critical stage" in the prosecution that would require

<sup>22</sup> In *Morrissey v. Brewer*, 408 U. S. 471 (1972), and *Gagnon v. Scarpelli*, 411 U. S. 778 (1973), we held that a parolee or probationer arrested prior to revocation is entitled to an informal preliminary hearing at the place of arrest, with some provision for live testimony. 408 U. S., at 487; 411 U. S., at 786. That preliminary hearing, more than the probable cause determination required by the Fourth Amendment, serves the purpose of gathering and preserving live testimony, since the final revocation hearing frequently is held at some distance from the place where the violation occurred. 408 U. S., at 485; 411 U. S., at 782-783 n. 5. Moreover, revocation proceedings may offer less protection from initial error than the more formal criminal process, where violations are defined by statute and the prosecutor has a professional duty not to charge a suspect with crime unless he is satisfied of probable cause. See ABA Code of Professional Responsibility, DR 7-103 (A) (a prosecutor "shall not institute or cause to be instituted criminal charges when he knows or it is obvious that the charges are not supported by probable cause"); ABA Standards Relating to the Administration of Criminal Justice, The Prosecution Function, §§ 1.1, 3.4, 3.9 (1974); American College of Trial Lawyers, Code of Trial Conduct, rule 4 (e) (1972).

<sup>23</sup> Criminal justice is already overburdened by the volume of cases and the complexities of our system. The processing of misdemeanors, in particular, and the early stages of prosecution generally are marked by delays that can seriously affect the quality of justice. A constitutional doctrine requiring adversary hearings for all persons detained pending trial could exacerbate the problem of pretrial delay.



appointed counsel. The Court has identified as "critical stages" those pretrial procedures that would impair defense on the merits if the accused is required to proceed without counsel. *Coleman v. Alabama*, 399 U. S. 1 (1970); *United States v. Wade*, 388 U. S. 218, 226-227 (1967). In *Coleman v. Alabama*, where the Court held that a preliminary hearing was a critical stage of an Alabama prosecution, the majority and concurring opinions identified two critical factors that distinguish the Alabama preliminary hearing from the probable cause determination required by the Fourth Amendment. First, under Alabama law the function of the preliminary hearing was to determine whether the evidence justified charging the suspect with an offense. A finding of no probable cause could mean that he would not be tried at all. The Fourth Amendment probable cause determination is addressed only to pretrial custody. To be sure, pretrial custody may affect to some extent the defendant's ability to assist in preparation of his defense, but this does not present the high probability of substantial harm identified as controlling in *Wade* and *Coleman*. Second, Alabama allowed the suspect to confront and cross-examine prosecution witnesses at the preliminary hearing. The Court noted that the suspect's defense on the merits could be compromised if he had no legal assistance for exploring or preserving the witnesses' testimony. This consideration does not apply when the prosecution is not required to produce witnesses for cross-examination.

Although we conclude that the Constitution does not require an adversary determination of probable cause, we recognize that state systems of criminal procedure vary widely. There is no single preferred pretrial procedure, and the nature of the probable cause determination usually will be shaped to accord with a State's pretrial procedure viewed as a whole. While we limit our hold-



ing to the precise requirement of the Fourth Amendment, we recognize the desirability of flexibility and experimentation by the States. It may be found desirable, for example, to make the probable cause determination at the suspect's first appearance before a judicial officer;<sup>24</sup> see *McNabb v. United States*, 318 U. S. 332, 342-344 (1943), or the determination may be incorporated into the procedure for setting bail or fixing other conditions of pretrial release. In some States, existing procedures may satisfy the requirement of the Fourth Amendment. Others may require only minor adjustment, such as acceleration of existing preliminary hearings. Current proposals for criminal procedure reform suggest other ways of testing probable cause for detention.<sup>25</sup> Whatever

<sup>24</sup> Several States already authorize a determination of probable cause at this stage or immediately thereafter. See Colo. Rev. Stat. § 39-2-3 (1965 Supp.); Hawaii Rev. Stat. § 708-9 (5) (1968); Vt. Rules Crim. Proc. 3 (b), 5 (c) (1974). This Court has interpreted the Federal Rules of Criminal Procedure to require a determination of probable cause at the first appearance. *Jaben v. United States*, 381 U. S. 214, 218 (1965); *Mallory v. United States*, 354 U. S. 449, 454 (1957).

<sup>25</sup> Under the Uniform Rules of Criminal Procedure (Proposed Final Draft 1974), a person arrested without a warrant is entitled, "without unnecessary delay," to a first appearance before a magistrate and a determination that grounds exist for issuance of an arrest warrant. The determination may be made on affidavits or testimony, in the presence of the accused. Rule 311. Persons who remain in custody for inability to qualify for pretrial release are offered another opportunity for a probable cause determination at the detention hearing, held no more than five days after arrest. This is an adversary hearing, and the parties may summon witnesses, but reliable hearsay evidence may be considered. Rule 344.

The A. L. I. Model Code of Pre-arraignment Procedure (Tent. Draft No. 5, 1972, and Tent. Draft No. 5A, 1973) also provides a first appearance, at which a warrantless arrest must be supported by a reasonably detailed written statement of facts. § 310. The magistrate may make a determination of probable cause to hold the



procedure a State may adopt, it must provide a fair and reliable determination of probable cause as a condition for any significant pretrial restraint on liberty,<sup>26</sup> and this determination must be made by a judicial officer either before or promptly after arrest.<sup>27</sup>

accused, but he is not required to do so and the accused may request an attorney for an "adjourned session" of the first appearance to be held within 2 "court days." At that session, the magistrate makes a determination of probable cause upon a combination of written and live testimony:

"The arrested person may present written and testimonial evidence and arguments for his discharge and the state may present additional written and testimonial evidence and arguments that there is reasonable cause to believe that he has committed the crime of which he is accused. The state's submission may be made by means of affidavits, and no witnesses shall be required to appear unless the court, in the light of the evidence and arguments submitted by the parties, determines that there is a basis for believing that the appearance of one or more witnesses for whom the arrested person seeks subpoenas might lead to a finding that there is no reasonable cause." § 310.2 (2) (Tent. Draft No. 5A, 1973).

<sup>26</sup> Because the probable cause determination is not a constitutional prerequisite to the charging decision, it is required only for those suspects who suffer restraints on liberty other than the condition that they appear for trial. There are many kinds of pretrial release and many degrees of conditional liberty. See 18 U. S. C. § 3148; ABA Standards Relating to the Administration of Criminal Justice, Pretrial Release § 5.2 (1974); Uniform Rules of Criminal Procedure, Rule 341 (Proposed Final Draft 1974). We cannot define specifically those that would require a prior probable cause determination, but the key factor is significant restraint on liberty.

<sup>27</sup> In his concurring opinion, *post*, at — n. —, Mr. Justice STEWART suggests that the Court offers less procedural protection to a person in jail than it requires in certain civil cases. Here we deal with the complex procedures of a criminal case and a threshold right guaranteed by the Fourth Amendment. The historical basis of the probable cause requirement is quite different from the relatively recent application of variable procedural due process in debtor-creditor disputes and termination of government-created benefits. The Fourth Amendment ~~also~~ was tailored explicitly for the criminal

objects to the Court's choice of the Fourth Amendment as the rationale for decision and



## IV

We agree with the Court of Appeals that the Fourth Amendment requires a timely judicial determination of probable cause as a prerequisite to detention, and we accordingly affirm that much of the judgment. As we do not agree that the Fourth Amendment requires the adversary hearing outlined in the District Court's decree, we reverse in part and remand to the Court of Appeals for further proceedings consistent with this opinion.

justice system, and its balance between individual and public interests always has been thought to define the "process that is due" for seizures of person or property in criminal cases. Moreover, the Fourth Amendment probable cause determination is in fact only the first stage of an elaborate system, unique in jurisprudence, designed to safeguard the rights of those accused of criminal conduct. The relatively simple civil procedures (e. g., prior interview with school principal before suspension) presented in the cases cited in the concurring opinion are inapposite and irrelevant in the wholly different context of the criminal justice system.

¶ It would not be practicable to follow the further suggestion implicit in Mr. Justice Stewart's concurring opinion that we leave for another day determination of the procedural safeguards that are required in making a probable cause determination under the Fourth Amendment. The judgment under review both declares the right not to be ~~■~~ detained without a probable cause determination and affirms the District Court's order prescribing an adversary hearing for the implementation of that right. The circumstances of the case thus require a decision on both issues.

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PP 2.6, ~~222~~ 21-22

To: The Chief Justice  
Mr. Justice Douglas  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Rehnquist

4th DRAFT

SUPREME COURT OF THE UNITED STATES Powell, J.

No. 73-477

Circulated: \_\_\_\_\_

Recirculated: FEB 7 1975

Richard E. Gerstein, State At-  
torney for Eleventh Judicial  
Circuit of Florida,  
Petitioner,  
v.  
Robert Pugh et al.

On Writ of Certiorari  
to the United States  
Court of Appeals for  
the Fifth Circuit.

[December —, 1974]

MR. JUSTICE POWELL delivered the opinion of the  
Court.

The issue in this case is whether a person arrested  
under a prosecutor's information is constitutionally en-  
titled to a judicial determination of probable cause for  
pretrial restraint of liberty.

I

In March 1971 respondents Pugh and Henderson were  
arrested in Dade County, Florida. Each was charged  
with several offenses under a prosecutor's information.<sup>1</sup>  
Pugh was denied bail because one of the charges against  
him carried a potential life sentence, and Henderson re-  
mained in custody because he was unable to post a \$4,500  
bond.

<sup>1</sup> Respondent Pugh was arrested on March 3, 1971. On March 16  
an information was filed charging him with robbery, carrying a con-  
cealed weapon, and possession of a firearm during commission of a  
felony. Respondent Henderson was arrested on March 2, and charged  
by information on March 19 with the offenses of breaking and  
entering and assault and battery. The record does not indicate  
whether there was an arrest warrant in either case.



In Florida, indictments are required only for prosecution of capital offenses. Prosecutors may charge all other crimes by information, without a prior preliminary hearing and without obtaining leave of court. Fla. Rule Crim. Proc. 3.140 (a); *State v. Hernandez*, 217 So. 2d 109 (Fla. 1968); *Di Bona v. State*, 121 So. 2d 192 (Fla. Ct. App. 1960). At the time respondents were arrested, a Florida rule seemed to authorize adversary preliminary hearings to test probable cause for detention in all cases. Fla. Rule Crim. Proc. 1.122 (amended 1972). But the Florida courts had held that the filing of an information foreclosed the suspect's right to a preliminary hearing. See *State ex rel. Hardy v. Blount*, 261 So. 2d 172 (Fla. 1972).<sup>2</sup> They had also held that habeas corpus could not be used, except perhaps in exceptional circumstances, to test the probable cause for detention under an information. See *Sullivan v. State ex rel. McCrory*, 29 So. 2d 794, 797 (Fla. 1951). The only possible methods for obtaining a judicial determination of probable cause were a special statute allowing a preliminary hearing after 30 days, Fla. Stat. Ann. § 907.045 (1973),<sup>3</sup> and arraignment, which the District Court found was often delayed a month or more after arrest. *Pugh v. Rainwater*, 332 F. Supp. 1107, 1110 (SD Fla. 1971).<sup>4</sup> As a result, a person charged

<sup>2</sup> Florida law also denies preliminary hearings to persons confined under indictment, see *Sangaree v. Hamlin*, 235 So. 2d 729 (Fla. 1970); Fla. Rule Crim. Proc. 3.131 (a), but that procedure is not challenged in this case. See n. 19, *post*, at 14.

<sup>3</sup> This statute may have been construed to make the hearing permissive instead of mandatory. See *Evans v. State*, 197 So. 2d 323 (Fla. Ct. App. 1967); Fla. Op. Att'y Gen. 067-29 (1967). But cf. *Karz v. Overton*, 249 So. 2d 763 (Fla. Ct. App. 1971). It may also have been superseded by the subsequent amendments to the rules of criminal procedure. *In re Florida Rules of Criminal Procedure*, 272 So. 2d 65 (1972).

<sup>4</sup> The Florida rules do not suggest that the issue of probable cause can be raised at arraignment, Fla. Rule Crim. Proc. 3.160, but



by information could be detained for a substantial period solely on the decision of a prosecutor.

Respondents Pugh and Henderson filed a class action against Dade County officials in the Federal District Court,<sup>5</sup> claiming a constitutional right to a judicial hearing on the issue of probable cause and requesting declaratory and injunctive relief.<sup>6</sup> Respondents Turner and Faulk, also in custody under informations, subsequently intervened.<sup>7</sup> Petitioner Gerstein, the State Attorney for Dade County, was one of several defendants.<sup>8</sup>

After an initial delay while the Florida legislature considered a bill that would have afforded preliminary hearings to persons charged by information, the District Court granted the relief sought. *Pugh v. Rainwater*, *supra*. The court certified the case as a class action under Fed.

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counsel for Petitioner represented at oral argument that arraignment affords the suspect an opportunity to "attack the sufficiency of the evidence to hold him." Tr. of Oral Arg., Mar. 25, 1974, at 17. The Court of Appeals assumed, without deciding, that this was true. 483 F. 2d 778, 781 n. 8.

<sup>5</sup> The complaint was framed under 42 U. S. C. § 1983, and jurisdiction in the District Court was based on 28 U. S. C. § 1343 (3).

<sup>6</sup> Respondents did not ask for release from state custody, even as an alternate remedy. They asked only that the state authorities be ordered to give them a probable cause determination. This was also the only relief that the District Court ordered for the named respondents, 332 F. Supp., at 1115-1116. Because release was neither asked nor ordered, the lawsuit did not come within the class of cases for which habeas corpus is the exclusive remedy. *Preiser v. Rodriguez*, 411 U. S. 475 (1973); see *Wolff v. McDonnell*, 417 U. S. —, — (1974).

<sup>7</sup> Turner was being held on a charge of auto theft, following arrest on March 11, 1971. Faulk was arrested on March 19 on charges of soliciting a ride and possession of marihuana.

<sup>8</sup> The named defendants included justices of the peace and judges of small-claims courts, who were authorized to hold preliminary hearings in criminal cases, and a group of law enforcement officers with power to make arrests in Dade County. Gerstein was the only one who petitioned for certiorari.



Rule Civ. Proc. 23 (b) (2), and held that the Fourth and Fourteenth Amendments give all arrested persons charged by information a right to a judicial hearing on the question of probable cause. The District Court ordered the Dade County defendants to give the named plaintiffs an immediate preliminary hearing to determine probable cause for further detention.<sup>9</sup> It also ordered them to submit a plan providing preliminary hearings in all cases instituted by information.

The defendants submitted a plan authored by Sheriff E. Wilson Purdy, and the District Court adopted it with modifications. The final order prescribed a detailed post-arrest procedure. 336 F. Supp. 490. Upon arrest the accused would be taken before a magistrate for a "first appearance hearing." The magistrate would explain the charges, advise the accused of his rights, appoint counsel if he was indigent, and proceed with a probable cause determination unless either the prosecutor or the accused was unprepared. If either requested more time, the magistrate would set the date for a "preliminary hearing," to be held within four days if the accused was in custody and within 10 days if he had been released pending trial. The order provided sanctions for failure to hold the hearings at prescribed times. At the "preliminary hearing" the accused would be entitled to counsel, and he would be allowed to confront and cross-examine adverse witnesses,

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<sup>9</sup>The District Court correctly held that respondents' claim for relief was not barred by the equitable restrictions on federal intervention in state prosecutions, *Younger v. Harris*, 401 U. S. 37 (1971). The injunction was not directed at the state prosecutions as such, but only at the legality of pretrial detention without a judicial hearing, an issue that could not be raised in defense of the criminal prosecution. The order to hold preliminary hearings could not prejudice the conduct of trial on the merits. See *Conover v. Montemuro*, 477 F. 2d 1073, 1082 (CA3 1973); cf. *Perez v. Ledesma*, 401 U. S. 82 (1971); *Stefanelli v. Minard*, 342 U. S. 117 (1951).



to summon favorable witnesses, and to have a transcript made on request. If the magistrate found no probable cause, the accused would be discharged. He then could not be charged with the same offense by complaint or information, but only by indictment returned within 30 days.

The Court of Appeals for the Fifth Circuit stayed the District Court's order pending appeal, but while the case was awaiting decision, the Dade County judiciary voluntarily adopted a similar procedure of its own. Upon learning of this development, the Court of Appeals remanded the case for specific findings on the constitutionality of the new Dade County system. Before the District Court issued its findings, however, the Florida Supreme Court amended the procedural rules governing preliminary hearings statewide, and the parties agreed that the District Court should direct its inquiry to the new rules rather than the Dade County procedures.

Under the amended rules every arrested person must be taken before a judicial officer within 24 hours. Fla. Rule Crim. Proc. 3.130 (b). This "first appearance" is similar to the "first appearance hearing" ordered by the District Court in all respects but the crucial one: the magistrate does not make a determination of probable cause. The rule amendments also changed the procedure for preliminary hearings, restricting them to felony charges and codifying the rule that no hearings are available to persons charged by information or indictment. Rule 3.131; see *In re Rule 3.131 (b)*, *Florida Rules of Criminal Procedure*, 289 So. 2d 3 (Fla. 1974).

In a supplemental opinion the District Court held that the amended rules had not answered the basic constitutional objection, since a defendant charged by information still could be detained pending trial without a judicial determination of probable cause. 355 F. Supp.



1286. Reaffirming its original ruling, the District Court declared that the continuation of this practice was unconstitutional.<sup>10</sup> The Court of Appeals affirmed, 483 F. 2d 778, modifying the District Court's decree in minor particulars and suggesting that the form of preliminary hearing provided by the amended Florida rules would be acceptable, as long as it was provided to all defendants in custody pending trial. *Id.*, at 788-789.

State Attorney Gerstein petitioned for review, and we granted certiorari because of the importance of the issue.<sup>11</sup> 414 U. S. 1062. We affirm in part and reverse in part.

<sup>10</sup> Although this ruling held a statewide "legislative rule" unconstitutional, it was not outside the jurisdiction of a single judge by virtue of 28 U. S. C. § 2281. The original complaint did not ask for an injunction against enforcement of any state statute or legislative rule of statewide application, since the practice of denying preliminary hearings to persons charged by information was then embodied only in judicial decisions. The District Court therefore had jurisdiction to issue the initial injunction, and the Court of Appeals had jurisdiction over the appeal. On remand, the constitutionality of a state "statute" was drawn into question for the first time when the criminal rules were amended. The District Court's supplemental opinion can fairly be read as a declaratory judgment that the amended rules were unconstitutional; the injunctive decree was never amended to incorporate that holding; and the opinion in the Court of Appeals is not inconsistent with the conclusion that the District Court did not enjoin enforcement of the statewide rule. See 483 F. 2d, at 788-790. Accordingly, a district court of three judges was not required for the issuance of this order. See *Kennedy v. Mendoza-Martinez*, 372 U. S. 144, 152-155 (1963); *Flemming v. Nestor*, 363 U. S. 603, 608-608 (1960).

<sup>11</sup> At oral argument counsel informed us that the named respondents have been convicted. Their pretrial detention therefore has ended. This case belongs, however, to that narrow class of cases in which the termination of a class representative's claim does not moot the claims of the unnamed members of the class. See *Sosa v. Iowa*, — U. S. — (1975). Pretrial detention is by nature temporary, and it is most unlikely that any given individual could have his

*Former  
footnote 11  
omitted*



## II

As framed by the proceedings below, this case presents two issues: whether a person arrested and held for trial on an information is entitled to a judicial determination of probable cause for detention, and if so, whether the adversary hearing ordered by the District Court and approved by the Court of Appeals is required by the Constitution.

## A

Both the standards and procedures for arrest and detention have been derived from the Fourth Amendment and its common-law antecedents. See *Cupp v. Murphy*, 412 U. S. 291, 294-295 (1973); *Ex parte Bollman*, 8 U. S. (4 Cranch) 75 (1807); *Ex parte Bur-*

constitutional claim decided on appeal before he is either released or convicted. The individual could nonetheless suffer repeated deprivations, and it is certain that other persons similarly situated will be detained under the allegedly unconstitutional procedures. The claim, in short, is one that is distinctly "capable of repetition, yet evading review."

At the time the complaint was filed, the named respondents were members of a class of persons detained without a judicial probable cause determination, but the record does not indicate whether any of them were still in custody awaiting trial when the District Court certified the class. Such a showing ordinarily would be required to avoid mootness under *Soona*. But this case is a suitable exception to that requirement. See *Soona*, *supra*, at — n. 11; cf. *Rivera v. Freeman*, 469 F. 2d 1159, 1162-1163 (CA9 1972). The length of pretrial custody cannot be ascertained at the outset, and it may be ended at any time by release on recognizance, dismissal of the charges, or a guilty plea, as well as by acquittal or conviction after trial. It is by no means certain that any given individual, named as plaintiff, would be in pretrial custody long enough for a district judge to certify the class. Moreover, in this case the constant existence of a class of persons suffering the deprivation is certain. The attorney representing the named respondents is a public defender, and we can safely assume that he has other clients with a continuing live interest in the case.



*ford*, 7 U. S. (3 Cranch) 448 (1806). 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." *Beck v. Ohio*, 379 U. S. 89, 91 (1964). See also *Henry v. United States*, 361 U. S. 98 (1959); *Brinegar v. United States*, 338 U. S. 160, 175-176 (1949). This standard, like those for searches and seizures, represents a necessary accommodation between the individual's right to liberty and the State's duty to control crime.

"These long-prevailing standards seek to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime. They also seek to give fair leeway for enforcing the law in the community's protection. Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability. The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating these often opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice." *Brinegar v. United States*, *supra*, at 176.

To implement the Fourth Amendment's protection against unfounded invasions of liberty and privacy, the Court has required that the existence of probable cause be decided by a neutral and detached magistrate whenever possible. The classic statement of this principle



appears in *Johnson v. United States*, 333 U. S. 10, 13-14 (1948):

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

See also *Terry v. Ohio*, 392 U. S. 1, 20-22 (1968).<sup>12</sup>

Maximum protection of individual rights could be assured by requiring a magistrate's review of the factual justification prior to any arrest, but such a requirement would constitute an intolerable handicap for legitimate law enforcement. Thus, while the Court has expressed a preference for the use of arrest warrants when feasible, *Beck v. Ohio*, *supra*, at 96; *Wong Sun v. United States*, 371 U. S. 471, 479-482 (1963), it has never invalidated an arrest supported by probable cause solely because the officers failed to secure a warrant. See *Ker v. California*, 374 U. S. 23 (1963); *Draper v. United States*, 358 U. S. 307 (1959); *Trupiano v. United States*, 334 U. S. 699, 705 (1948).<sup>13</sup>

<sup>12</sup> We reiterated this principle in *United States v. United States District Court*, 407 U. S. 297 (1972). In terms that apply equally to arrests, we described the "very heart of the Fourth Amendment directive" as a requirement that "where practical, a governmental search and seizure should represent both the efforts of the officer to gather evidence of wrongful acts and the judgment of the magistrate that the collected evidence is sufficient to justify invasion of a citizen's private premises or conversation." *Id.*, at 316. See also *Terry v. Ohio*, 392 U. S. 1, 20-22 (1968).

<sup>13</sup> Another aspect of *Trupiano* was overruled in *United States v.*



Under this practical compromise, a policeman's on-the-scene assessment of probable cause provides legal justification for arresting a person suspected of crime, and for a brief period of detention to take the administrative steps incident to arrest. Once the suspect is in custody, however, the reasons that justify dispensing with the magistrate's neutral judgment evaporate. There no longer is any danger that the suspect will escape or commit further crimes while the police submit their evidence to a magistrate. And, while the State's reasons for taking summary action subside, the suspect's need for a neutral determination of probable cause increases significantly. The consequences of prolonged detention may be more serious than the interference occasioned by arrest. Pretrial confinement may imperil the suspect's job, interrupt his source of income, and impair his family relationships. See R. Goldfarb, *Ransom* 32-91 (1965); L. Katz, *Justice Is the Crime* 51-62 (1972). Even pretrial release may be accompanied by burdensome conditions that effect a significant restraint on liberty. See, e. g., 18 U. S. C. § 3146 (a)(2), (5). When the stakes are this high, the detached judgment of a neutral magistrate is essential if the Fourth Amendment is to furnish meaningful protection from unfounded interference with liberty. Accordingly, we hold that the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint on liberty following arrest.

This result has historical support in the common law

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*Rabinowitz*, 339 U. S. 56 (1950), which was overruled in turn by *Chimel v. California*, 395 U. S. 752 (1969).

The issue of warrantless arrest that has generated the most controversy, and which remains unsettled, is whether and under what circumstances an officer may enter a suspect's home to make a warrantless arrest. See *Coolidge v. New Hampshire*, 403 U. S. 443, 474-481 (1971); *id.*, at 510-512 n. 1 (Warren, J., dissenting); *Jones v. United States*, 357 U. S. 493, 499-500 (1958).



that has guided interpretation of the Fourth Amendment. See *Carroll v. United States*, 267 U. S. 132, 149 (1925). At common law it was customary, if not obligatory, for an arrested person to be brought before a justice of the peace shortly after arrest. 2 M. Hale, *Pleas of the Crown* 77, 81, 95, 121 (1736); 2 W. Hawkins, *Pleas of the Crown* 116-117 (4th ed. 1792). See also *Kurtz v. Moffitt*, 115 U. S. 487, 498-499 (1885).<sup>14</sup> The justice of the peace would "examine" the prisoner and the witnesses to determine whether there was reason to believe the prisoner had committed a crime. If there was, the suspect would be committed to jail or bailed pending trial. If not, he would be discharged from custody. 1 M. Hale, *supra*, at 583-586; 2 W. Hawkins, *supra*, at 116-119; 1 J. Stephen, *History of the Criminal Law of England* 233 (1883).<sup>15</sup>

<sup>14</sup> The primary motivation for the requirement seems to have been the penalty for allowing an offender to escape, if he had in fact committed the crime, and the fear of liability for false imprisonment, if he had not. But Hale also recognized that a judicial warrant of commitment, called a *mittimus*, was required for more than brief detention.

"When a private person hath arrested a felon, or one suspected of felony, he may detain him in custody till he can reasonably dismiss himself of him; but with as much speed as conveniently he can, he may do either of these things.

"1. He may carry him to the common gaol, . . . but that is now rarely done.

"2. He may deliver him to the constable of the vill, who may either carry him to the common gaol, . . . or to a justice of peace to be examined, and farther proceeded against as case shall require. . . .

"3. Or he may carry him immediately to any justice of peace of the county where he is taken, who upon examination may discharge, bail, or commit him, as the case shall require.

"And the bringing the offender either by the constable or private person to a justice of peace is most usual and safe, because a gaoler will expect a *Mittimus* for his warrant of detaining."

1 M. Hale, *supra*, at 589-590.

<sup>15</sup> The examination of the prisoner was inquisitorial, and the witnesses were questioned outside the prisoner's presence. Although



The initial determination of probable cause also could be reviewed by higher courts on a writ of habeas corpus. 2 W. Hawkins, *supra*, at 112-115; 1 J. Stephen, *supra*, at 243; see *Ex parte Bollman*, 8 U. S. (4 Cranch) 75, 97-101 (1807). This practice furnished the model for criminal procedure in America immediately following the adoption of the Fourth Amendment, see *Ex parte Bollman*, 8 U. S. (4 Cranch) 75 (1807); <sup>16</sup> *Ex parte Burford*, 7 U. S. (3 Cranch) 448 (1806); *United States v. Hamilton*, 3 U. S. (3 Dall.) 17 (1795), and there are indications that the Framers of the Bill of Rights regarded it as a model for a "reasonable" seizure. See *Draper v. United States*, 358 U.S. 307, 317-320 (1959) (DOUGLAS, J., concurring).<sup>17</sup>

this method of proceeding was considered quite harsh, 1 J. Stephen, at 219-225, it was well established that the prisoner was entitled to be discharged if the investigation turned up insufficient evidence of his guilt. *Id.*, at 233.

<sup>16</sup> In *Ex parte Bollman*, two men charged in the Aaron Burr case were committed following an examination in the circuit court of the District of Columbia. They filed a petition for writ of habeas corpus in the Supreme Court. The Court, in an opinion by Chief Justice Marshall, affirmed its jurisdiction to issue habeas corpus to persons in custody by order of federal trial courts. Then, following arguments on the Fourth Amendment requirement of probable cause, the Court surveyed the evidence against the prisoners and held that it did not establish probable cause that they were guilty of treason. The prisoners were discharged.

<sup>17</sup> See also N. Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* 15-16 (1937). A similar procedure at common law, the warrant for recovery of stolen goods, is said to have furnished the model for a "reasonable" search under the Fourth Amendment. The victim was required to appear before a justice of the peace and make an oath of probable cause that his goods could be found in a particular place. After the warrant was executed, and the goods seized, the victim and the alleged thief would appear before the justice of the peace for a prompt determination of the cause for seizure of the goods and detention of the thief. 2 M. Hale, *supra*, at 149-152; T. Taylor,



## B

Under the Florida procedures challenged here, a person arrested without a warrant and charged by information may be jailed or subjected to other restraints pending trial without any opportunity for a probable cause determination.<sup>18</sup> Petitioner defends this practice on the ground that the prosecutor's decision to file an information is itself a determination of probable cause that furnishes sufficient reason to detain a defendant pending trial. Although a conscientious decision that the evidence warrants prosecution affords a measure of protection against unfounded detention, we do not think prosecutorial judgment standing alone meets the requirements of the Fourth Amendment. Indeed, we think the Court's previous decisions compel disapproval of the Florida procedure. In *Albrecht v. United States*, 273 U. S. 1, 5 (1927), the Court held that an arrest warrant issued solely upon a United States Attorney's information was invalid because the accompanying affidavits were defective. Although the Court's opinion did not explicitly state that the prosecutor's official oath could not furnish probable cause, that conclusion was implicit in the judgment that the arrest was illegal under the Fourth Amendment.<sup>19</sup> More recently, in *Coolidge v. New Hampshire*,

Two Studies in Constitutional Interpretation 24-25, 39-40 (1969); see *Boyd v. United States*, 116 U. S. 616, 626-629 (1886).

<sup>18</sup> A person arrested under a warrant would have received a prior judicial determination of probable cause. Under Fla. Rule Crim. Proc. 3.120, a warrant may be issued upon a sworn complaint that states facts showing that the suspect has committed a crime. The magistrate may also take testimony under oath to determine if there is reasonable ground to believe the complaint is true.

<sup>19</sup> By contrast, the Court has held that an indictment, "fair upon its face," and returned by a "properly constituted grand jury" conclusively determines the existence of probable cause and requires issuance of an arrest warrant without further inquiry. *Ex parte*



403 U. S. 443, 449-453 (1971), the Court held that a prosecutor's responsibility to law enforcement is inconsistent with the constitutional role of a neutral and detached magistrate. We reaffirmed that principle in *Shadwick v. City of Tampa*, 407 U. S. 345 (1972), and held that probable cause for the issuance of an arrest warrant must be determined by someone independent of police and prosecution. See also *United States v. United States District Court*, 407 U. S. 297, 317 (1972).<sup>20</sup> The reason for this separation of functions was expressed by Justice Frankfurter in a similar context:

"A democratic society, in which respect for the dignity of all men is central, naturally guards against the misuse of the law enforcement process. Zeal in tracking down crime is not in itself an assurance of soberness of judgment. Disinterestedness in law enforcement does not alone prevent disregard of cherished liberties. Experience has therefore counseled

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*United States*, 287 U. S. 241, 250 (1932). See also *Giordenello v. United States*, 357 U. S. 480, 487 (1958). The willingness to let a grand jury's judgment substitute for that of a neutral and detached magistrate is attributable to the grand jury's relationship to the courts and its historical role of protecting individuals from unjust prosecution. See *United States v. Calandra*, 414 U. S. 338, 342-346 (1974).

<sup>20</sup> The Court had earlier reached a different result in *Ocampo v. United States*, 234 U. S. 91 (1914), a criminal appeal from the Philippine Islands. Interpreting a statutory guarantee substantially identical to the Fourth Amendment, Act of July 1, 1902, c. 1369, § 5, 32 Stat. 693, the Court held that an arrest warrant could issue solely upon a prosecutor's information. The Court has since held that interpretation of a statutory guarantee applicable to the Philippines is not conclusive for interpretation of a cognate provision in the Federal Constitution, *Green v. United States*, 355 U. S. 184, 194-198 (1957). Even if it were, the result reached in *Ocampo* is incompatible with the later holdings of *Albrecht*, *Coolidge*, and *Shadwick*.



that safeguards must be provided against the dangers of the overzealous as well as the despotic. The awful instruments of the criminal law cannot be entrusted to a single functionary. The complicated process of criminal justice is therefore divided into different parts, responsibility for which is separately vested in the various participants upon whom the criminal law relies for its vindication." *McNabb v. United States*, 318 U. S. 332, 343 (1943).

In holding that the prosecutor's assessment of probable cause is not sufficient alone to justify restraint on liberty pending trial, we do not imply that the accused is entitled to judicial oversight or review of the decision to prosecute. Instead, we adhere to the Court's prior holding that a judicial hearing is not prerequisite to prosecution by information. *Beck v. Washington*, 369 U. S. 541, 545 (1962); *Lem Woon v. Oregon*, 229 U. S. 586 (1913). Nor do we retreat from the established rule that illegal arrest or detention does not void a subsequent conviction. *Frisbie v. Collins*, 342 U. S. 519 (1952); *Ker v. Illinois*, 119 U. S. 436 (1886). Thus, as the Court of Appeals noted below, although a suspect who is presently detained may challenge the probable cause for that confinement, a conviction will not be vacated on the ground that the defendant was detained pending trial without a determination of probable cause. 483 F. 2d, at 786-787. Compare *Scarborough v. Dutton*, 393 F. 2d 6 (CA5 1968), with *Brown v. Fauntleroy*, — U. S. App. D. C. —, 442 F. 2d 838 (1971), and *Cooley v. Stone*, — U. S. App. D. C. —, 414 F. 2d 1213 (1969).

### III

Both the District Court and the Court of Appeals held that the determination of probable cause must be accompanied by the full panoply of adversary safe-



guards—counsel, confrontation, cross-examination, and compulsory process for witnesses. A full preliminary hearing of this sort is modeled after the procedure used in many States to determine whether the evidence justifies going to trial under an information or presenting the case to a grand jury. See *Coleman v. Alabama*, 399 U. S. 1 (1970); Y. Kamisar, W. LaFare & J. Israel, *Modern Criminal Procedure* 957-967, 996-1000 (4th ed. 1974). The standard of proof required of the prosecution is usually referred to as "probable cause," but in some jurisdictions it may approach a *prima facie* case of guilt. A. L. I. Model Code of Pre-arraignment Procedure, Commentary on Article 330, at 90-91 (Tent. Draft No. 5, 1972). When the hearing takes this form, adversary procedures are customarily employed. The importance of the issue to both the State and the accused justifies the presentation of witnesses and full exploration of their testimony on cross-examination. This kind of hearing also requires appointment of counsel for indigent defendants. *Coleman v. Alabama*, *supra*. And, as the hearing assumes increased importance and the procedures become more complex, the likelihood that it can be held promptly after arrest diminishes. See A. L. I. Model Code of Pre-arraignment Procedure, *supra*, at 33-34.

These adversary safeguards are not essential for the probable cause determination required by the Fourth Amendment. The sole issue is whether there is probable cause for detaining the arrested person pending further proceedings. This issue can be determined reliably without an adversary hearing. The standard is the same as that for arrest.<sup>21</sup> That standard—probable cause to

<sup>21</sup> Because the standards are identical, ordinarily there is no need for further investigation before the probable cause determination can be made.

"Presumably, whenever the police arrest they must arrest on 'probable cause.' It is not the function of the police to arrest, as it were,



believe the suspect has committed a crime—traditionally has been decided by a magistrate in a nonadversary proceeding on hearsay and written testimony, and the Court has approved these informal modes of proof.

"Guilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined to that which long experience in the common-law tradition, to some extent embodied in the Constitution, has crystallized into rules of evidence consistent with that standard. These rules are historically grounded rights of our system, developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property.

"In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved." *Brinegar v. United States*, 338 U. S. 160, 174-175 (1949).

Cf. *McCray v. Illinois*, 386 U. S. 300 (1967).

The use of an informal procedure is justified not only by the lesser consequences of a probable cause determination but also by the nature of the determination itself. It does not require the fine resolution of conflicting evidence that a reasonable-doubt or even a preponderance standard demands, and credibility determinations are seldom crucial in deciding whether the evidence supports a reasonable belief in guilt. See F. Miller, *Prosecu-*

at large and to use an interrogating process at police headquarters in order to determine whom they should charge before a committing magistrate on 'probable cause.' " *Mallory v. United States*, 354 U. S. 449, 456 (1957).



appointed counsel. The Court has identified as "critical stages" those pretrial procedures that would impair defense on the merits if the accused is required to proceed without counsel. *Coleman v. Alabama*, 399 U. S. 1 (1970); *United States v. Wade*, 388 U. S. 218, 226-227 (1967). In *Coleman v. Alabama*, where the Court held that a preliminary hearing was a critical stage of an Alabama prosecution, the majority and concurring opinions identified two critical factors that distinguish the Alabama preliminary hearing from the probable cause determination required by the Fourth Amendment. First, under Alabama law the function of the preliminary hearing was to determine whether the evidence justified charging the suspect with an offense. A finding of no probable cause could mean that he would not be tried at all. The Fourth Amendment probable cause determination is addressed only to pretrial custody. To be sure, pretrial custody may affect to some extent the defendant's ability to assist in preparation of his defense, but this does not present the high probability of substantial harm identified as controlling in *Wade* and *Coleman*. Second, Alabama allowed the suspect to confront and cross-examine prosecution witnesses at the preliminary hearing. The Court noted that the suspect's defense on the merits could be compromised if he had no legal assistance for exploring or preserving the witnesses' testimony. This consideration does not apply when the prosecution is not required to produce witnesses for cross-examination.

Although we conclude that the Constitution does not require an adversary determination of probable cause, we recognize that state systems of criminal procedure vary widely. There is no single preferred pretrial procedure, and the nature of the probable cause determination usually will be shaped to accord with a State's pretrial procedure viewed as a whole. While we limit our hold-



ing to the precise requirement of the Fourth Amendment, we recognize the desirability of flexibility and experimentation by the States. It may be found desirable, for example, to make the probable cause determination at the suspect's first appearance before a judicial officer,<sup>24</sup> see *McNabb v. United States*, 318 U. S. 332, 342-344 (1943), or the determination may be incorporated into the procedure for setting bail or fixing other conditions of pretrial release. In some States, existing procedures may satisfy the requirement of the Fourth Amendment. Others may require only minor adjustment, such as acceleration of existing preliminary hearings. Current proposals for criminal procedure reform suggest other ways of testing probable cause for detention.<sup>25</sup> Whatever

<sup>24</sup> Several States already authorize a determination of probable cause at this stage or immediately thereafter. See Colo. Rev. Stat. § 39-2-3 (1965 Supp.); Hawaii Rev. Stat. § 708-9 (5) (1968); Vt. Rules Crim. Proc. 3 (b), 5 (c) (1974). This Court has interpreted the Federal Rules of Criminal Procedure to require a determination of probable cause at the first appearance. *Jaben v. United States*, 381 U. S. 214, 218 (1965); *Mallory v. United States*, 354 U. S. 449, 454 (1957).

<sup>25</sup> Under the Uniform Rules of Criminal Procedure (Proposed Final Draft 1974), a person arrested without a warrant is entitled, "without unnecessary delay," to a first appearance before a magistrate and a determination that grounds exist for issuance of an arrest warrant. The determination may be made on affidavits or testimony, in the presence of the accused. Rule 311. Persons who remain in custody for inability to qualify for pretrial release are offered another opportunity for a probable cause determination at the detention hearing, held no more than five days after arrest. This is an adversary hearing, and the parties may summon witnesses, but reliable hearsay evidence may be considered. Rule 344.

The A. L. I. Model Code of Pre-arraignment Procedure (Tent. Draft No. 5, 1972, and Tent. Draft No. 5A, 1973) also provides a first appearance, at which a warrantless arrest must be supported by a reasonably detailed written statement of facts. § 310. The magistrate may make a determination of probable cause to hold the



procedure a State may adopt, it must provide a fair and reliable determination of probable cause as a condition for any significant pretrial restraint on liberty,<sup>26</sup> and this determination must be made by a judicial officer either before or promptly after arrest.<sup>27</sup>

accused, but he is not required to do so and the accused may request an attorney for an "adjourned session" of the first appearance to be held within 2 "court days." At that session, the magistrate makes a determination of probable cause upon a combination of written and live testimony:

"The arrested person may present written and testimonial evidence and arguments for his discharge and the state may present additional written and testimonial evidence and arguments that there is reasonable cause to believe that he has committed the crime of which he is accused. The state's submission may be made by means of affidavits, and no witnesses shall be required to appear unless the court, in the light of the evidence and arguments submitted by the parties, determines that there is a basis for believing that the appearance of one or more witnesses for whom the arrested person seeks subpoenas might lead to a finding that there is no reasonable cause." § 310.2 (2) (Tent. Draft No. 5A, 1973).

<sup>26</sup> Because the probable cause determination is not a constitutional prerequisite to the charging decision, it is required only for those suspects who suffer restraints on liberty other than the condition that they appear for trial. There are many kinds of pretrial release and many degrees of conditional liberty. See 18 U. S. C. § 3148; ABA Standards Relating to the Administration of Criminal Justice, Pretrial Release § 5.2 (1974); Uniform Rules of Criminal Procedure, Rule 341 (Proposed Final Draft 1974). We cannot define specifically those that would require a prior probable cause determination, but the key factor is significant restraint on liberty.

<sup>27</sup> In his concurring opinion, *post*, at — n. —, Mr. Justice STEWART objects to the Court's choice of the Fourth Amendment as the rationale for decision and suggests that the Court offers less procedural protection to a person in jail than it requires in certain civil cases. Here we deal with the complex procedures of a criminal case and a threshold right guaranteed by the Fourth Amendment. The historical basis of the probable cause requirement is quite different from the relatively recent application of variable procedural due process in debtor-creditor disputes and termination of government-



## IV

We agree with the Court of Appeals that the Fourth Amendment requires a timely judicial determination of probable cause as a prerequisite to detention, and we accordingly affirm that much of the judgment. As we do not agree that the Fourth Amendment requires the adversary hearing outlined in the District Court's decree, we reverse in part and remand to the Court of Appeals for further proceedings consistent with this opinion.

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created benefits. The Fourth Amendment was tailored explicitly for the criminal justice system, and its balance between individual and public interests always has been thought to define the "process that is due" for seizures of person or property in criminal cases. Moreover, the Fourth Amendment probable cause determination is in fact only the *first* stage of an elaborate system, unique in jurisprudence, designed to safeguard the rights of those accused of criminal conduct. The relatively simple civil procedures (*e. g.*, prior interview with school principal before suspension) presented in the cases cited in the concurring opinion are inapposite and irrelevant in the wholly different context of the criminal justice system.

It would not be practicable to follow the further suggestion implicit in Mr. Justice STEWART's concurring opinion that we leave for another day determination of the procedural safeguards that are required in making a probable cause determination under the Fourth Amendment. The judgment under review both declares the right not to be detained without a probable cause determination and affirms the District Court's order prescribing an adversary hearing for the implementation of that right. The circumstances of the case thus require a decision on both issues.



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ONLY CHANGES

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# SUPREME COURT OF THE UNITED STATES

No. 73-477

Richard E. Gerstein, State At-  
torney for Eleventh Judicial  
Circuit of Florida,  
Petitioner,  
v.  
Robert Pugh et al.

On Writ of Certiorari  
to the United States  
Court of Appeals for  
the Fifth Circuit.

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[December —, 1974]

MR. JUSTICE POWELL delivered the opinion of the  
Court.

The issue in this case is whether a person arrested  
under a prosecutor's information is constitutionally en-  
titled to a judicial determination of probable cause for  
pretrial restraint of liberty.

## I

In March 1971 respondents Pugh and Henderson were  
arrested in Dade County, Florida. Each was charged  
with several offenses under a prosecutor's information.<sup>1</sup>  
Pugh was denied bail because one of the charges against  
him carried a potential life sentence, and Henderson re-  
mained in custody because he was unable to post a \$4,500  
bond.

<sup>1</sup> Respondent Pugh was arrested on March 3, 1971. On March 16  
an information was filed charging him with robbery, carrying a con-  
cealed weapon, and possession of a firearm during commission of a  
felony. Respondent Henderson was arrested on March 2, and charged  
by information on March 19 with the offenses of breaking and  
entering and assault and battery. The record does not indicate  
whether there was an arrest warrant in either case.



In Florida, indictments are required only for prosecution of capital offenses. Prosecutors may charge all other crimes by information, without a prior preliminary hearing and without obtaining leave of court. Fla. Rule Crim. Proc. 3.140 (a); *State v. Hernandez*, 217 So. 2d 109 (Fla. 1968); *Di Bona v. State*, 121 So. 2d 192 (Fla. Ct. App. 1960). At the time respondents were arrested, a Florida rule seemed to authorize adversary preliminary hearings to test probable cause for detention in all cases. Fla. Rule Crim. Proc. 1.122 (amended 1972). But the Florida courts had held that the filing of an information foreclosed the suspect's right to a preliminary hearing. See *State ex rel. Hardy v. Blount*, 261 So. 2d 172 (Fla. 1972).<sup>2</sup> They had also held that habeas corpus could not be used, except perhaps in exceptional circumstances, to test the probable cause for detention under an information. See *Sullivan v. State ex rel. McCrory*, 29 So. 2d 794, 797 (Fla. 1951). The only possible methods for obtaining a judicial determination of probable cause were a special statute allowing a preliminary hearing after 30 days, Fla. Stat. Ann. § 907.045 (1973),<sup>3</sup> and arraignment, which the District Court found was often delayed a month or more after arrest. *Pugh v. Rainwater*, 332 F. Supp. 1107, 1110 (SD Fla. 1971).<sup>4</sup> As a result, a person charged

<sup>2</sup> Florida law also denies preliminary hearings to persons confined under indictment, see *Sangaree v. Hamlin*, 235 So. 2d 729 (Fla. 1970); Fla. Rule Crim. Proc. 3.131 (a), but that procedure is not challenged in this case. See n. 19, *post*, at 14.

<sup>3</sup> This statute may have been construed to make the hearing permissive instead of mandatory. See *Evans v. State*, 197 So. 2d 323 (Fla. Ct. App. 1967); Fla. Op. Att'y Gen. 067-29 (1967). But cf. *Karz v. Overton*, 249 So. 2d 763 (Fla. Ct. App. 1971). It may also have been superseded by the subsequent amendments to the rules of criminal procedure. *In re Florida Rules of Criminal Procedure*, 272 So. 2d 65 (1972).

<sup>4</sup> The Florida rules do not suggest that the issue of probable cause can be raised at arraignment, Fla. Rule Crim. Proc. 3.160, but



by information could be detained for a substantial period solely on the decision of a prosecutor.

Respondents Pugh and Henderson filed a class action against Dade County officials in the Federal District Court,<sup>5</sup> claiming a constitutional right to a judicial hearing on the issue of probable cause and requesting declaratory and injunctive relief.<sup>6</sup> Respondents Turner and Faulk, also in custody under informations, subsequently intervened.<sup>7</sup> Petitioner Gerstein, the State Attorney for Dade County, was one of several defendants.<sup>8</sup>

After an initial delay while the Florida legislature considered a bill that would have afforded preliminary hearings to persons charged by information, the District Court granted the relief sought. *Pugh v. Rainwater*, *supra*. The court certified the case as a class action under Fed.

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counsel for Petitioner represented at oral argument that arraignment affords the suspect an opportunity to "attack the sufficiency of the evidence to hold him." Tr. of Oral Arg., Mar. 25, 1974, at 17. The Court of Appeals assumed, without deciding, that this was true. 483 F.2d 778, 781 n. 8.

<sup>5</sup> The complaint was framed under 42 U. S. C. § 1983, and jurisdiction in the District Court was based on 28 U. S. C. § 1343 (3).

<sup>6</sup> Respondents did not ask for release from state custody, even as an alternate remedy. They asked only that the state authorities be ordered to give them a probable cause determination. This was also the only relief that the District Court ordered for the named respondents. 332 F. Supp., at 1115-1116. Because release was neither asked nor ordered, the lawsuit did not come within the class of cases for which habeas corpus is the exclusive remedy. *Preiser v. Rodriguez*, 411 U. S. 475 (1973); see *Wolff v. McDonnell*, 417 U. S. —, — (1974).

<sup>7</sup> Turner was being held on a charge of auto theft, following arrest on March 11, 1971. Faulk was arrested on March 19 on charges of soliciting a ride and possession of marijuana.

<sup>8</sup> The named defendants included justices of the peace and judges of small-claims courts, who were authorized to hold preliminary hearings in criminal cases, and a group of law enforcement officers with power to make arrests in Dade County. Gerstein was the only one who petitioned for certiorari.



Rule Civ. Proc. 23 (b) (2), and held that the Fourth and Fourteenth Amendments give all arrested persons charged by information a right to a judicial hearing on the question of probable cause. The District Court ordered the Dade County defendants to give the named plaintiffs an immediate preliminary hearing to determine probable cause for further detention.\* It also ordered them to submit a plan providing preliminary hearings in all cases instituted by information.

The defendants submitted a plan authored by Sheriff E. Wilson Purdy, and the District Court adopted it with modifications. The final order prescribed a detailed post-arrest procedure. 336 F. Supp. 490. Upon arrest the accused would be taken before a magistrate for a "first appearance hearing." The magistrate would explain the charges, advise the accused of his rights, appoint counsel if he was indigent, and proceed with a probable cause determination unless either the prosecutor or the accused was unprepared. If either requested more time, the magistrate would set the date for a "preliminary hearing," to be held within four days if the accused was in custody and within 10 days if he had been released pending trial. The order provided sanctions for failure to hold the hearings at prescribed times. At the "preliminary hearing" the accused would be entitled to counsel, and he would be allowed to confront and cross-examine adverse witnesses,

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\*The District Court correctly held that respondents' claim for relief was not barred by the equitable restrictions on federal intervention in state prosecutions, *Younger v. Harris*, 401 U. S. 37 (1971). The injunction was not directed at the state prosecutions as such, but only at the legality of pretrial detention without a judicial hearing, an issue that could not be raised in defense of the criminal prosecution. The order to hold preliminary hearings could not prejudice the conduct of trial on the merits. See *Conover v. Montemuro*, 477 F. 2d 1073, 1082 (CA3 1973); cf. *Perez v. Ledesma*, 401 U. S. 82 (1971); *Stefanelli v. Minard*, 342 U. S. 117 (1951).



to summon favorable witnesses, and to have a transcript made on request. If the magistrate found no probable cause, the accused would be discharged. He then could not be charged with the same offense by complaint or information, but only by indictment returned within 30 days.

The Court of Appeals for the Fifth Circuit stayed the District Court's order pending appeal, but while the case was awaiting decision, the Dade County judiciary voluntarily adopted a similar procedure of its own. Upon learning of this development, the Court of Appeals remanded the case for specific findings on the constitutionality of the new Dade County system. Before the District Court issued its findings, however, the Florida Supreme Court amended the procedural rules governing preliminary hearings statewide, and the parties agreed that the District Court should direct its inquiry to the new rules rather than the Dade County procedures.

Under the amended rules every arrested person must be taken before a judicial officer within 24 hours. Fla. Rule Crim. Proc. 3.130 (b). This "first appearance" is similar to the "first appearance hearing" ordered by the District Court in all respects but the crucial one: the magistrate does not make a determination of probable cause. The rule amendments also changed the procedure for preliminary hearings, restricting them to felony charges and codifying the rule that no hearings are available to persons charged by information or indictment. Rule 3.131; see *In re Rule 3.131 (b)*, *Florida Rules of Criminal Procedure*, 289 So. 2d 3 (Fla. 1974).

In a supplemental opinion the District Court held that the amended rules had not answered the basic constitutional objection, since a defendant charged by information still could be detained pending trial without a judicial determination of probable cause. 355 F. Supp.



1286. Reaffirming its original ruling, the District Court declared that the continuation of this practice was unconstitutional.<sup>10</sup> The Court of Appeals affirmed, 483 F. 2d 778, modifying the District Court's decree in minor particulars and suggesting that the form of preliminary hearing provided by the amended Florida rules would be acceptable, as long as it was provided to all defendants in custody pending trial. *Id.*, at 788-789.

State Attorney Gerstein petitioned for review, and we granted certiorari because of the importance of the issue.<sup>11</sup> 414 U. S. 1062. We affirm in part and reverse in part.

<sup>10</sup> Although this ruling held a statewide "legislative rule" unconstitutional, it was not outside the jurisdiction of a single judge by virtue of 28 U. S. C. § 2281. The original complaint did not ask for an injunction against enforcement of any state statute or legislative rule of statewide application, since the practice of denying preliminary hearings to persons charged by information was then embodied only in judicial decisions. The District Court therefore had jurisdiction to issue the initial injunction, and the Court of Appeals had jurisdiction over the appeal. On remand, the constitutionality of a state "statute" was drawn into question for the first time when the criminal rules were amended. The District Court's supplemental opinion can fairly be read as a declaratory judgment that the amended rules were unconstitutional; the injunctive decree was never amended to incorporate that holding; and the opinion in the Court of Appeals is not inconsistent with the conclusion that the District Court did not enjoin enforcement of the statewide rule. See 483 F. 2d, at 788-790. Accordingly, a district court of three judges was not required for the issuance of this order. See *Kennedy v. Mendoza-Martinez*, 372 U. S. 144, 152-155 (1963); *Flemming v. Nestor*, 363 U. S. 603, 606-608 (1960).

<sup>11</sup> At oral argument counsel informed us that the named respondents have been convicted. Their pretrial detention therefore has ended. This case belongs, however, to that narrow class of cases in which the termination of a class representative's claim does not moot the claims of the unnamed members of the class. See *Sosa v. Iowa*, — U. S. — (1975). Pretrial detention is by nature temporary, and it is most unlikely that any given individual could have his



## II

As framed by the proceedings below, this case presents two issues: whether a person arrested and held for trial on an information is entitled to a judicial determination of probable cause for detention, and if so, whether the adversary hearing ordered by the District Court and approved by the Court of Appeals is required by the Constitution.

## A

Both the standards and procedures for arrest and detention have been derived from the Fourth Amendment and its common-law antecedents. See *Cupp v. Murphy*, 412 U. S. 291, 294-295 (1973); *Ex parte Bollman*, 8 U. S. (4 Cranch) 75 (1807); *Ex parte Bur-*

constitutional claim decided on appeal before he is either released or convicted. The individual could nonetheless suffer repeated deprivations, and it is certain that other persons similarly situated will be detained under the allegedly unconstitutional procedures. The claim, in short, is one that is distinctly "capable of repetition, yet evading review."

At the time the complaint was filed, the named respondents were members of a class of persons detained without a judicial probable cause determination, but the record does not indicate whether any of them were still in custody awaiting trial when the District Court certified the class. Such a showing ordinarily would be required to avoid mootness under *Sosa*. But this case is a suitable exception to that requirement. See *Sosa*, *supra*, at — n. 11; cf. *Rivera v. Freeman*, 469 F. 2d 1159, 1162-1163 (CA9 1972). The length of pretrial custody cannot be ascertained at the outset, and it may be ended at any time by release on recognizance, dismissal of the charges, or a guilty plea, as well as by acquittal or conviction after trial. It is by no means certain that any given individual, named as plaintiff, would be in pretrial custody long enough for a district judge to certify the class. Moreover, in this case the constant existence of a class of persons suffering the deprivation is certain. The attorney representing the named respondents is a public defender, and we can safely assume that he has other clients with a continuing live interest in the case.



ford, 7 U. S. (3 Cranch) 448 (1806). 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." *Beck v. Ohio*, 379 U. S. 89, 91 (1964). See also *Henry v. United States*, 361 U. S. 98 (1959); *Brinegar v. United States*, 338 U. S. 160, 175-176 (1949). This standard, like those for searches and seizures, represents a necessary accommodation between the individual's right to liberty and the State's duty to control crime.

"These long-prevailing standards seek to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime. They also seek to give fair leeway for enforcing the law in the community's protection. Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability. The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating these often opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice." *Brinegar v. United States*, *supra*, at 176.

To implement the Fourth Amendment's protection against unfounded invasions of liberty and privacy, the Court has required that the existence of probable cause be decided by a neutral and detached magistrate whenever possible. The classic statement of this principle



appears in *Johnson v. United States*, 333 U. S. 10, 13-14 (1948):

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

See also *Terry v. Ohio*, 392 U. S. 1, 20-22 (1968).<sup>12</sup>

Maximum protection of individual rights could be assured by requiring a magistrate's review of the factual justification prior to any arrest, but such a requirement would constitute an intolerable handicap for legitimate law enforcement. Thus, while the Court has expressed a preference for the use of arrest warrants when feasible, *Beck v. Ohio*, *supra*, at 96; *Wong Sun v. United States*, 371 U. S. 471, 479-482 (1963), it has never invalidated an arrest supported by probable cause solely because the officers failed to secure a warrant. See *Ker v. California*, 374 U. S. 23 (1963); *Draper v. United States*, 358 U. S. 307 (1959); *Trupiano v. United States*, 334 U. S. 699, 705 (1948).<sup>13</sup>

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<sup>12</sup> We reiterated this principle in *United States v. United States District Court*, 407 U. S. 297 (1972). In terms that apply equally to arrests, we described the "very heart of the Fourth Amendment directive" as a requirement that "where practical, a governmental search and seizure should represent both the efforts of the officer to gather evidence of wrongful acts and the judgment of the magistrate that the collected evidence is sufficient to justify invasion of a citizen's private premises or conversation." *Id.*, at 316. See also *Terry v. Ohio*, 392 U. S. 1, 20-22 (1968).

<sup>13</sup> Another aspect of *Trupiano* was overruled in *United States v.*



Under this practical compromise, a policeman's on-the-scene assessment of probable cause provides legal justification for arresting a person suspected of crime, and for a brief period of detention to take the administrative steps incident to arrest. Once the suspect is in custody, however, the reasons that justify dispensing with the magistrate's neutral judgment evaporate. There no longer is any danger that the suspect will escape or commit further crimes while the police submit their evidence to a magistrate. And, while the State's reasons for taking summary action subside, the suspect's need for a neutral determination of probable cause increases significantly. The consequences of prolonged detention may be more serious than the interference occasioned by arrest. Pretrial confinement may imperil the suspect's job, interrupt his source of income, and impair his family relationships. See R. Goldfarb, *Ransom* 32-91 (1965); L. Katz, *Justice Is the Crime* 51-62 (1972). Even pretrial release may be accompanied by burdensome conditions that effect a significant restraint on liberty. See, e. g., 18 U. S. C. § 3146 (a)(2), (5). When the stakes are this high, the detached judgment of a neutral magistrate is essential if the Fourth Amendment is to furnish meaningful protection from unfounded interference with liberty. Accordingly, we hold that the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint on liberty following arrest.

This result has historical support in the common law

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*Rabinowitz*, 339 U. S. 56 (1950), which was overruled in turn by *Chimel v. California*, 395 U. S. 752 (1969).

The issue of warrantless arrest that has generated the most controversy, and which remains unsettled, is whether and under what circumstances an officer may enter a suspect's home to make a warrantless arrest. See *Coolidge v. New Hampshire*, 403 U. S. 443, 474-481 (1971); *id.*, at 510-512 n. 1 (WHITE, J., dissenting); *Jones v. United States*, 357 U. S. 493, 499-500 (1958).



that has guided interpretation of the Fourth Amendment. See *Carnoll v. United States*, 267 U. S. 132, 149 (1925). At common law it was customary, if not obligatory, for an arrested person to be brought before a justice of the peace shortly after arrest. 2 M. Hale, *Pleas of the Crown* 77, 81, 95, 121 (1736); 2 W. Hawkins, *Pleas of the Crown* 116-117 (4th ed. 1792). See also *Kurtz v. Moffitt*, 115 U. S. 487, 498-499 (1885).<sup>14</sup> The justice of the peace would "examine" the prisoner and the witnesses to determine whether there was reason to believe the prisoner had committed a crime. If there was, the suspect would be committed to jail or bailed pending trial. If not, he would be discharged from custody. 1 M. Hale, *supra*, at 583-586; 2 W. Hawkins, *supra*, at 116-119; 1 J. Stephen, *History of the Criminal Law of England* 233 (1883).<sup>15</sup>

<sup>14</sup> The primary motivation for the requirement seems to have been the penalty for allowing an offender to escape, if he had in fact committed the crime, and the fear of liability for false imprisonment, if he had not. But Hale also recognized that a judicial warrant of commitment, called a *mittimus*, was required for more than brief detention.

"When a private person hath arrested a felon, or one suspected of felony, he may detain him in custody till he can reasonably dismiss himself of him; but with as much speed as conveniently he can, he may do either of these things.

"1. He may carry him to the common gaol, . . . but that is now rarely done.

"2. He may deliver him to the constable of the vill, who may either carry him to the common gaol, . . . or to a justice of peace to be examined, and farther proceeded against as case shall require. . . .

"3. Or he may carry him immediately to any justice of peace of the county where he is taken, who upon examination may discharge, bail, or commit him, as the case shall require.

"And the bringing the offender either by the constable or private person to a justice of peace is most usual and safe, because a gaoler will expect a *Mittimus* for his warrant of detaining."

1 M. Hale, *supra*, at 589-590.

<sup>15</sup> The examination of the prisoner was inquisitorial, and the witnesses were questioned outside the prisoner's presence. Although



The initial determination of probable cause also could be reviewed by higher courts on a writ of habeas corpus. 2 W. Hawkins, *supra*, at 112-115; 1 J. Stephen, *supra*, at 243; see *Ex parte Bollman*, 8 U. S. (4 Cranch) 75, 97-101 (1807). This practice furnished the model for criminal procedure in America immediately following the adoption of the Fourth Amendment, see *Ex parte Bollman*, 8 U. S. (4 Cranch) 75 (1807); <sup>16</sup> *Ex parte Burford*, 7 U. S. (3 Cranch) 448 (1806); *United States v. Hamilton*, 3 U. S. (3 Dall.) 17 (1795), and there are indications that the Framers of the Bill of Rights regarded it as a model for a "reasonable" seizure. See *Draper v. United States*, 358 U.S. 307, 317-320 (1959) (DOUGLAS, J., concurring).<sup>17</sup>

this method of proceeding was considered quite harsh, 1 J. Stephen, at 219-225, it was well established that the prisoner was entitled to be discharged if the investigation turned up insufficient evidence of his guilt. *Id.*, at 233.

<sup>16</sup> In *Ex parte Bollman*, two men charged in the Aaron Burr case were committed following an examination in the circuit court of the District of Columbia. They filed a petition for writ of habeas corpus in the Supreme Court. The Court, in an opinion by Chief Justice Marshall, affirmed its jurisdiction to issue habeas corpus to persons in custody by order of federal trial courts. Then, following arguments on the Fourth Amendment requirement of probable cause, the Court surveyed the evidence against the prisoners and held that it did not establish probable cause that they were guilty of treason. The prisoners were discharged.

<sup>17</sup> See also N. Lason, *The History and Development of the Fourth Amendment to the United States Constitution* 15-16 (1937). A similar procedure at common law, the warrant for recovery of stolen goods, is said to have furnished the model for a "reasonable" search under the Fourth Amendment. The victim was required to appear before a justice of the peace and make an oath of probable cause that his goods could be found in a particular place. After the warrant was executed, and the goods seized, the victim and the alleged thief would appear before the justice of the peace for a prompt determination of the cause for seizure of the goods and detention of the thief. 2 M. Hale, *supra*, at 149-152; T. Taylor,



## B

Under the Florida procedures challenged here, a person arrested without a warrant and charged by information may be jailed or subjected to other restraints pending trial without any opportunity for a probable cause determination.<sup>18</sup> Petitioner defends this practice on the ground that the prosecutor's decision to file an information is itself a determination of probable cause that furnishes sufficient reason to detain a defendant pending trial. Although a conscientious decision that the evidence warrants prosecution affords a measure of protection against unfounded detention, we do not think prosecutorial judgment standing alone meets the requirements of the Fourth Amendment. Indeed, we think the Court's previous decisions compel disapproval of the Florida procedure. In *Albrecht v. United States*, 273 U. S. 1, 5 (1927), the Court held that an arrest warrant issued solely upon a United States Attorney's information was invalid because the accompanying affidavits were defective. Although the Court's opinion did not explicitly state that the prosecutor's official oath could not furnish probable cause, that conclusion was implicit in the judgment that the arrest was illegal under the Fourth Amendment.<sup>19</sup> More recently, in *Coolidge v. New Hampshire*,

Two Studies in Constitutional Interpretation 24-25, 39-40 (1969); see *Boyd v. United States*, 116 U. S. 616, 626-629 (1886).

<sup>18</sup> A person arrested under a warrant would have received a prior judicial determination of probable cause. Under Fla. Rule Crim. Proc. 3.120, a warrant may be issued upon a sworn complaint that states facts showing that the suspect has committed a crime. The magistrate may also take testimony under oath to determine if there is reasonable ground to believe the complaint is true.

<sup>19</sup> By contrast, the Court has held that an indictment, "fair upon its face," and returned by a "properly constituted grand jury" conclusively determines the existence of probable cause and requires issuance of an arrest warrant without further inquiry. *Ex parte*



403 U. S. 443, 449-453 (1971), the Court held that a prosecutor's responsibility to law enforcement is inconsistent with the constitutional role of a neutral and detached magistrate. We reaffirmed that principle in *Shadwick v. City of Tampa*, 407 U. S. 345 (1972), and held that probable cause for the issuance of an arrest warrant must be determined by someone independent of police and prosecution. See also *United States v. United States District Court*, 407 U. S. 297, 317 (1972).<sup>20</sup> The reason for this separation of functions was expressed by Justice Frankfurter in a similar context:

"A democratic society, in which respect for the dignity of all men is central, naturally guards against the misuse of the law enforcement process. Zeal in tracking down crime is not in itself an assurance of soberness of judgment. Disinterestedness in law enforcement does not alone prevent disregard of cherished liberties. Experience has therefore counseled

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*United States*, 287 U. S. 241, 250 (1932). See also *Giordenello v. United States*, 357 U. S. 480, 487 (1958). The willingness to let a grand jury's judgment substitute for that of a neutral and detached magistrate is attributable to the grand jury's relationship to the courts and its historical role of protecting individuals from unjust prosecution. See *United States v. Calandra*, 414 U. S. 338, 342-346 (1974).

<sup>20</sup> The Court had earlier reached a different result in *Ocampo v. United States*, 234 U. S. 91 (1914), a criminal appeal from the Philippine Islands. Interpreting a statutory guarantee substantially identical to the Fourth Amendment, Act of July 1, 1902, c. 1389, § 5, 32 Stat. 693, the Court held that an arrest warrant could issue solely upon a prosecutor's information. The Court has since held that interpretation of a statutory guarantee applicable to the Philippines is not conclusive for interpretation of a cognate provision in the Federal Constitution, *Green v. United States*, 355 U. S. 184, 194-198 (1957). Even if it were, the result reached in *Ocampo* is incompatible with the later holdings of *Albrecht*, *Coolidge*, and *Shadwick*.



that safeguards must be provided against the dangers of the overzealous as well as the despotic. The awful instruments of the criminal law cannot be entrusted to a single functionary. The complicated process of criminal justice is therefore divided into different parts, responsibility for which is separately vested in the various participants upon whom the criminal law relies for its vindication." *McNabb v. United States*, 318 U. S. 332, 343 (1943).

In holding that the prosecutor's assessment of probable cause is not sufficient alone to justify restraint on liberty pending trial, we do not imply that the accused is entitled to judicial oversight or review of the decision to prosecute. Instead, we adhere to the Court's prior holding that a judicial hearing is not prerequisite to prosecution by information. *Beck v. Washington*, 369 U. S. 541, 545 (1962); *Lem Woon v. Oregon*, 229 U. S. 586 (1913). Nor do we retreat from the established rule that illegal arrest or detention does not void a subsequent conviction. *Frisbie v. Collins*, 342 U. S. 519 (1952); *Ker v. Illinois*, 119 U. S. 436 (1886). Thus, as the Court of Appeals noted below, although a suspect who is presently detained may challenge the probable cause for that confinement, a conviction will not be vacated on the ground that the defendant was detained pending trial without a determination of probable cause. 483 F. 2d, at 786-787. Compare *Scarborough v. Dutton*, 393 F. 2d 6 (CA5 1968), with *Brown v. Fauntleroy*, — U. S. App. D. C. —, 442 F. 2d 838 (1971), and *Cooley v. Stone*, — U. S. App. D. C. —, 414 F. 2d 1213 (1969).

### III

Both the District Court and the Court of Appeals held that the determination of probable cause must be accompanied by the full panoply of adversary safe-



guards—counsel, confrontation, cross-examination, and compulsory process for witnesses. A full preliminary hearing of this sort is modeled after the procedure used in many States to determine whether the evidence justifies going to trial under an information or presenting the case to a grand jury. See *Coleman v. Alabama*, 399 U. S. 1 (1970); Y. Kamisar, W. LaFare & J. Israel, *Modern Criminal Procedure* 957-967, 996-1000 (4th ed. 1974). The standard of proof required of the prosecution is usually referred to as "probable cause," but in some jurisdictions it may approach a *prima facie* case of guilt. A. L. I. Model Code of Pre-arraignment Procedure, Commentary on Article 330, at 90-91 (Tent. Draft No. 5, 1972). When the hearing takes this form, adversary procedures are customarily employed. The importance of the issue to both the State and the accused justifies the presentation of witnesses and full exploration of their testimony on cross-examination. This kind of hearing also requires appointment of counsel for indigent defendants. *Coleman v. Alabama*, *supra*. And, as the hearing assumes increased importance and the procedures become more complex, the likelihood that it can be held promptly after arrest diminishes. See A. L. I. Model Code of Pre-arraignment Procedure, *supra*, at 33-34.

These adversary safeguards are not essential for the probable cause determination required by the Fourth Amendment. The sole issue is whether there is probable cause for detaining the arrested person pending further proceedings. This issue can be determined reliably without an adversary hearing. The standard is the same as that for arrest.<sup>21</sup> That standard—probable cause to

<sup>21</sup> Because the standards are identical, ordinarily there is no need for further investigation before the probable cause determination can be made.

"Presumably, whomever the police arrest they must arrest on 'probable cause.' It is not the function of the police to arrest, as it were,



believe the suspect has committed a crime—traditionally has been decided by a magistrate in a nonadversary proceeding on hearsay and written testimony, and the Court has approved these informal modes of proof.

"Guilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined to that which long experience in the common-law tradition, to some extent embodied in the Constitution, has crystallized into rules of evidence consistent with that standard. These rules are historically grounded rights of our system, developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property.

"In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved." *Brinegar v. United States*, 338 U. S. 160, 174-175 (1949).

Cf. *McCray v. Illinois*, 386 U. S. 300 (1967).

The use of an informal procedure is justified not only by the lesser consequences of a probable cause determination but also by the nature of the determination itself. It does not require the fine resolution of conflicting evidence that a reasonable-doubt or even a preponderance standard demands, and credibility determinations are seldom crucial in deciding whether the evidence supports a reasonable belief in guilt. See F. Miller, Prosecu-

at large and to use an interrogating process at police headquarters in order to determine whom they should charge before a committing magistrate on 'probable cause.'" *Mallory v. United States*, 354 U. S. 449, 456 (1957).



tion: The Decision to Charge a Suspect with a Crime 64-109 (1969).<sup>22</sup> This is not to say that confrontation and cross-examination might not enhance the reliability of probable cause determinations in some cases. In most cases, however, their value would be too slight to justify holding, as a matter of constitutional principle, that these formalities and safeguards designed for trial must also be employed in making the Fourth Amendment determination of probable cause.<sup>23</sup>

Because of its limited function and its nonadversary character, the probable cause determination is not a "critical stage" in the prosecution that would require

<sup>22</sup> In *Morrissey v. Brewer*, 408 U. S. 471 (1972), and *Gagnon v. Scarpelli*, 411 U. S. 778 (1973), we held that a parolee or probationer arrested prior to revocation is entitled to an informal preliminary hearing at the place of arrest, with some provision for live testimony. 408 U. S., at 487; 411 U. S., at 786. That preliminary hearing, more than the probable cause determination required by the Fourth Amendment, serves the purpose of gathering and preserving live testimony, since the final revocation hearing frequently is held at some distance from the place where the violation occurred. 408 U. S., at 485; 411 U. S., at 782-783 n. 5. Moreover, revocation proceedings may offer less protection from initial error than the more formal criminal process, where violations are defined by statute and the prosecutor has a professional duty not to charge a suspect with crime unless he is satisfied of probable cause. See ABA Code of Professional Responsibility, DR 7-103 (A) (a prosecutor "shall not institute or cause to be instituted criminal charges when he knows or it is obvious that the charges are not supported by probable cause"); ABA Standards Relating to the Administration of Criminal Justice, The Prosecution Function, §§ 1.1, 3.4, 3.9 (1974); American College of Trial Lawyers, Code of Trial Conduct, rule 4 (c) (1972).

<sup>23</sup> Criminal justice is already overburdened by the volume of cases and the complexities of our system. The processing of misdemeanors, in particular, and the early stages of prosecution generally are marked by delays that can seriously affect the quality of justice. A constitutional doctrine requiring adversary hearings for all persons detained pending trial could exacerbate the problem of pretrial delay.



appointed counsel. The Court has identified as "critical stages" those pretrial procedures that would impair defense on the merits if the accused is required to proceed without counsel. *Coleman v. Alabama*, 399 U. S. 1 (1970); *United States v. Wade*, 388 U. S. 218, 226-227 (1967). In *Coleman v. Alabama*, where the Court held that a preliminary hearing was a critical stage of an Alabama prosecution, the majority and concurring opinions identified two critical factors that distinguish the Alabama preliminary hearing from the probable cause determination required by the Fourth Amendment. First, under Alabama law the function of the preliminary hearing was to determine whether the evidence justified charging the suspect with an offense. A finding of no probable cause could mean that he would not be tried at all. The Fourth Amendment probable cause determination is addressed only to pretrial custody. To be sure, pretrial custody may affect to some extent the defendant's ability to assist in preparation of his defense, but this does not present the high probability of substantial harm identified as controlling in *Wade* and *Coleman*. Second, Alabama allowed the suspect to confront and cross-examine prosecution witnesses at the preliminary hearing. The Court noted that the suspect's defense on the merits could be compromised if he had no legal assistance for exploring or preserving the witnesses' testimony. This consideration does not apply when the prosecution is not required to produce witnesses for cross-examination.

Although we conclude that the Constitution does not require an adversary determination of probable cause, we recognize that state systems of criminal procedure vary widely. There is no single preferred pretrial procedure, and the nature of the probable cause determination usually will be shaped to accord with a State's pretrial procedure viewed as a whole. While we limit our hold-



ing to the precise requirement of the Fourth Amendment, we recognize the desirability of flexibility and experimentation by the States. It may be found desirable, for example, to make the probable cause determination at the suspect's first appearance before a judicial officer,<sup>24</sup> see *McNabb v. United States*, 318 U. S. 332, 342-344 (1943), or the determination may be incorporated into the procedure for setting bail or fixing other conditions of pretrial release. In some States, existing procedures may satisfy the requirement of the Fourth Amendment. Others may require only minor adjustment, such as acceleration of existing preliminary hearings. Current proposals for criminal procedure reform suggest other ways of testing probable cause for detention.<sup>25</sup> Whatever

<sup>24</sup> Several States already authorize a determination of probable cause at this stage or immediately thereafter. See Colo. Rev. Stat. § 39-2-3 (1965 Supp.); Hawaii Rev. Stat. § 708-9 (5) (1968); Vt. Rules Crim. Proc. 3 (b), 5 (c) (1974). This Court has interpreted the Federal Rules of Criminal Procedure to require a determination of probable cause at the first appearance. *Jaben v. United States*, 381 U. S. 214, 218 (1965); *Mallory v. United States*, 354 U. S. 449, 454 (1957).

<sup>25</sup> Under the Uniform Rules of Criminal Procedure (Proposed Final Draft 1974), a person arrested without a warrant is entitled, "without unnecessary delay," to a first appearance before a magistrate and a determination that grounds exist for issuance of an arrest warrant. The determination may be made on affidavits or testimony, in the presence of the accused. Rule 311. Persons who remain in custody for inability to qualify for pretrial release are offered another opportunity for a probable cause determination at the detention hearing, held no more than five days after arrest. This is an adversary hearing, and the parties may summon witnesses, but reliable hearsay evidence may be considered. Rule 344.

The A. L. I. Model Code of Pre-arraignment Procedure (Tent. Draft No. 5, 1972, and Tent. Draft No. 5A, 1973) also provides a first appearance, at which a warrantless arrest must be supported by a reasonably detailed written statement of facts. § 310. The magistrate may make a determination of probable cause to hold the



procedure a State may adopt, it must provide a fair and reliable determination of probable cause as a condition for any significant pretrial restraint on liberty,<sup>26</sup> and this determination must be made by a judicial officer either before or promptly after arrest.<sup>27</sup>

accused, but he is not required to do so and the accused may request an attorney for an "adjourned session" of the first appearance to be held within 2 "court days." At that session, the magistrate makes a determination of probable cause upon a combination of written and live testimony:

"The arrested person may present written and testimonial evidence and arguments for his discharge and the state may present additional written and testimonial evidence and arguments that there is reasonable cause to believe that he has committed the crime of which he is accused. The state's submission may be made by means of affidavits, and no witnesses shall be required to appear unless the court, in the light of the evidence and arguments submitted by the parties, determines that there is a basis for believing that the appearance of one or more witnesses for whom the arrested person seeks subpoenas might lead to a finding that there is no reasonable cause." § 310.2 (2) (Tent. Draft No. 5A, 1973).

<sup>26</sup> Because the probable cause determination is not a constitutional prerequisite to the charging decision, it is required only for those suspects who suffer restraints on liberty other than the condition that they appear for trial. There are many kinds of pretrial release and many degrees of conditional liberty. See 18 U. S. C. § 3146; ABA Standards Relating to the Administration of Criminal Justice, Pretrial Release § 5.2 (1974); Uniform Rules of Criminal Procedure, Rule 341 (Proposed Final Draft 1974). We cannot define specifically those that would require a prior probable cause determination, but the key factor is significant restraint on liberty.

<sup>27</sup> In his concurring opinion, *post*, at ———, Mr. Justice STEWART objects to the Court's choice of the Fourth Amendment as the rationale for decision and suggests that the Court offers less procedural protection to a person in jail than it requires in certain civil cases. Here we deal with the complex procedures of a criminal case and a threshold right guaranteed by the Fourth Amendment. The historical basis of the probable cause requirement is quite different from the relatively recent application of variable procedural due process in debtor-creditor disputes and termination of government-



## IV

We agree with the Court of Appeals that the Fourth Amendment requires a timely judicial determination of probable cause as a prerequisite to detention, and we accordingly affirm that much of the judgment. As we do not agree that the Fourth Amendment requires the adversary hearing outlined in the District Court's decree, we reverse in part and remand to the Court of Appeals for further proceedings consistent with this opinion.

created benefits. The Fourth Amendment was tailored explicitly for the criminal justice system, and its balance between individual and public interests always has been thought to define the "process that is due" for seizures of person or property in criminal cases. Moreover, the Fourth Amendment probable cause determination is in fact only the first stage of an elaborate system, unique in jurisprudence, designed to safeguard the rights of those accused of criminal conduct. The relatively simple civil procedures (e. g., prior interview with school principal before suspension) presented in the cases cited in the concurring opinion are inapposite and irrelevant in the wholly different context of the criminal justice system.

It would not be practicable to follow the further suggestion implicit in Mr. Justice STEWART's concurring opinion that we leave for another day determination of the procedural safeguards that are required in making a probable cause determination under the Fourth Amendment. The judgment under review both declares the right not to be detained without a probable cause determination and affirms the District Court's order prescribing an adversary hearing for the implementation of that right. The circumstances of the case thus require a decision on both issues.

including the  
detention of  
suspects pending  
trial. Part II-A,  
note.



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**SUPREME COURT OF THE UNITED STATES**

No. 73-477

Richard E. Gerstein, State At- torney for Eleventh Judicial Circuit of Florida, Petitioner, v. Robert Pugh et al.	}	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.
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[December —, 1974]

MR. JUSTICE POWELL delivered the opinion of the Court.

The issue in this case is whether a person arrested under a prosecutor's information is constitutionally entitled to a judicial determination of probable cause for pretrial restraint of liberty.

I

In March 1971 respondents Pugh and Henderson were arrested in Dade County, Florida. Each was charged with several offenses under a prosecutor's information.<sup>1</sup> Pugh was denied bail because one of the charges against him carried a potential life sentence, and Henderson remained in custody because he was unable to post a \$4,500 bond.

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<sup>1</sup> Respondent Pugh was arrested on March 3, 1971. On March 16 an information was filed charging him with robbery, carrying a concealed weapon, and possession of a firearm during commission of a felony. Respondent Henderson was arrested on March 2, and charged by information on March 19 with the offenses of breaking and entering and assault and battery. The record does not indicate whether there was an arrest warrant in either case.



In Florida, indictments are required only for prosecution of capital offenses. Prosecutors may charge all other crimes by information, without a prior preliminary hearing and without obtaining leave of court. Fla. Rule Crim. Proc. 3.140 (a); *State v. Hernandez*, 217 So. 2d 109 (Fla. 1968); *Di Bona v. State*, 121 So. 2d 192 (Fla. Ct. App. 1960). At the time respondents were arrested, a Florida rule seemed to authorize adversary preliminary hearings to test probable cause for detention in all cases, Fla. Rule Crim. Proc. 1.122 (amended 1972). But the Florida courts had held that the filing of an information foreclosed the suspect's right to a preliminary hearing. See *State ex rel. Hardy v. Blount*, 261 So. 2d 172 (Fla. 1972).<sup>2</sup> They had also held that habeas corpus could not be used, except perhaps in exceptional circumstances, to test the probable cause for detention under an information. See *Sullivan v. State ex rel. McCrory*, 29 So. 2d 794, 797 (Fla. 1951). The only possible methods for obtaining a judicial determination of probable cause were a special statute allowing a preliminary hearing after 30 days, Fla. Stat. Ann. § 907.045 (1973),<sup>3</sup> and arraignment, which the District Court found was often delayed a month or more after arrest. *Pugh v. Rainwater*, 332 F. Supp. 1107, 1110 (SD Fla. 1971).<sup>4</sup> As a result, a person charged

<sup>2</sup> Florida law also denies preliminary hearings to persons confined under indictment, see *Sangaree v. Hamlin*, 235 So. 2d 729 (Fla. 1970); Fla. Rule Crim. Proc. 3.131 (a), but that procedure is not challenged in this case. See n. 19, *post*, at 14.

<sup>3</sup> This statute may have been construed to make the hearing permissive instead of mandatory. See *Evans v. State*, 197 So. 2d 323 (Fla. Ct. App. 1967); Fla. Op. Att'y Gen. 067-29 (1967). But cf. *Karz v. Overton*, 249 So. 2d 763 (Fla. Ct. App. 1971). It may also have been superseded by the subsequent amendments to the rules of criminal procedure. *In re Florida Rules of Criminal Procedure*, 272 So. 2d 65 (1972).

<sup>4</sup> The Florida rules do not suggest that the issue of probable cause can be raised at arraignment, Fla. Rule Crim. Proc. 3.160, but



by information could be detained for a substantial period solely on the decision of a prosecutor.

Respondents Pugh and Henderson filed a class action against Dade County officials in the Federal District Court,<sup>5</sup> claiming a constitutional right to a judicial hearing on the issue of probable cause and requesting declaratory and injunctive relief.<sup>6</sup> Respondents Turner and Faulk, also in custody under informations, subsequently intervened.<sup>7</sup> Petitioner Gerstein, the State Attorney for Dade County, was one of several defendants.<sup>8</sup>

After an initial delay while the Florida legislature considered a bill that would have afforded preliminary hearings to persons charged by information, the District Court granted the relief sought. *Pugh v. Rainwater*, *supra*. The court certified the case as a class action under Fed.

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counsel for Petitioner represented at oral argument that arraignment affords the suspect an opportunity to "attack the sufficiency of the evidence to hold him." Tr. of Oral Arg., Mar. 25, 1974, at 17. The Court of Appeals assumed, without deciding, that this was true. 483 F.2d 778, 781 n. 8.

<sup>5</sup> The complaint was framed under 42 U. S. C. § 1983, and jurisdiction in the District Court was based on 28 U. S. C. § 1343 (3).

<sup>6</sup> Respondents did not ask for release from state custody, even as an alternate remedy. They asked only that the state authorities be ordered to give them a probable cause determination. This was also the only relief that the District Court ordered for the named respondents. 332 F. Supp., at 1115-1116. Because release was neither asked nor ordered, the lawsuit did not come within the class of cases for which habeas corpus is the exclusive remedy. *Preiser v. Rodriguez*, 411 U. S. 475 (1973); see *Wolff v. McDonnell*, 417 U. S. —, — (1974).

<sup>7</sup> Turner was being held on a charge of auto theft, following arrest on March 11, 1971. Faulk was arrested on March 19 on charges of soliciting a ride and possession of marihuana.

<sup>8</sup> The named defendants included justices of the peace and judges of small-claims courts, who were authorized to hold preliminary hearings in criminal cases, and a group of law enforcement officers with power to make arrests in Dade County. Gerstein was the only one who petitioned for certiorari.



Rule Civ. Proc. 23 (b)(2), and held that the Fourth and Fourteenth Amendments give all arrested persons charged by information a right to a judicial hearing on the question of probable cause. The District Court ordered the Dade County defendants to give the named plaintiffs an immediate preliminary hearing to determine probable cause for further detention.<sup>9</sup> It also ordered them to submit a plan providing preliminary hearings in all cases instituted by information.

The defendants submitted a plan authored by Sheriff E. Wilson Purdy, and the District Court adopted it with modifications. The final order prescribed a detailed post-arrest procedure. 336 F. Supp. 490. Upon arrest the accused would be taken before a magistrate for a "first appearance hearing." The magistrate would explain the charges, advise the accused of his rights, appoint counsel if he was indigent, and proceed with a probable cause determination unless either the prosecutor or the accused was unprepared. If either requested more time, the magistrate would set the date for a "preliminary hearing," to be held within four days if the accused was in custody and within 10 days if he had been released pending trial. The order provided sanctions for failure to hold the hearings at prescribed times. At the "preliminary hearing" the accused would be entitled to counsel, and he would be allowed to confront and cross-examine adverse witnesses,

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<sup>9</sup> The District Court correctly held that respondents' claim for relief was not barred by the equitable restrictions on federal intervention in state prosecutions, *Younger v. Harris*, 401 U. S. 37 (1971). The injunction was not directed at the state prosecutions as such, but only at the legality of pretrial detention without a judicial hearing, an issue that could not be raised in defense of the criminal prosecution. The order to hold preliminary hearings could not prejudice the conduct of trial on the merits. See *Conover v. Montemuro*, 477 F. 2d 1073, 1082 (CA3 1973); cf. *Perez v. Ledesma*, 401 U. S. 82 (1971); *Stefanelli v. Minard*, 342 U. S. 117 (1951).



to summon favorable witnesses, and to have a transcript made on request. If the magistrate found no probable cause, the accused would be discharged. He then could not be charged with the same offense by complaint or information, but only by indictment returned within 30 days.

The Court of Appeals for the Fifth Circuit stayed the District Court's order pending appeal, but while the case was awaiting decision, the Dade County judiciary voluntarily adopted a similar procedure of its own. Upon learning of this development, the Court of Appeals remanded the case for specific findings on the constitutionality of the new Dade County system. Before the District Court issued its findings, however, the Florida Supreme Court amended the procedural rules governing preliminary hearings statewide, and the parties agreed that the District Court should direct its inquiry to the new rules rather than the Dade County procedures.

Under the amended rules every arrested person must be taken before a judicial officer within 24 hours. Fla. Rule Crim. Proc. 3.130 (b). This "first appearance" is similar to the "first appearance hearing" ordered by the District Court in all respects but the crucial one: the magistrate does not make a determination of probable cause. The rule amendments also changed the procedure for preliminary hearings, restricting them to felony charges and codifying the rule that no hearings are available to persons charged by information or indictment. Rule 3.131; see *In re Rule 3.131 (b)*, *Florida Rules of Criminal Procedure*, 289 So. 2d 3 (Fla. 1974).

In a supplemental opinion the District Court held that the amended rules had not answered the basic constitutional objection, since a defendant charged by information still could be detained pending trial without a judicial determination of probable cause. 355 F. Supp.



1286. Reaffirming its original ruling, the District Court declared that the continuation of this practice was unconstitutional.<sup>10</sup> The Court of Appeals affirmed, 483 F. 2d 778, modifying the District Court's decree in minor particulars and suggesting that the form of preliminary hearing provided by the amended Florida rules would be acceptable, as long as it was provided to all defendants in custody pending trial. *Id.*, at 788-789.

State Attorney Gerstein petitioned for review, and we granted certiorari because of the importance of the issue.<sup>11</sup> 414 U. S. 1062. We affirm in part and reverse in part,

<sup>10</sup> Although this ruling held a statewide "legislative rule" unconstitutional, it was not outside the jurisdiction of a single judge by virtue of 28 U. S. C. § 2281. The original complaint did not ask for an injunction against enforcement of any state statute or legislative rule of statewide application, since the practice of denying preliminary hearings to persons charged by information was then embodied only in judicial decisions. The District Court therefore had jurisdiction to issue the initial injunction, and the Court of Appeals had jurisdiction over the appeal. On remand, the constitutionality of a state "statute" was drawn into question for the first time when the criminal rules were amended. The District Court's supplemental opinion can fairly be read as a declaratory judgment that the amended rules were unconstitutional; the injunctive decree was never amended to incorporate that holding; and the opinion in the Court of Appeals is not inconsistent with the conclusion that the District Court did not enjoin enforcement of the statewide rule. See 483 F. 2d, at 788-790. Accordingly, a district court of three judges was not required for the issuance of this order. See *Kennedy v. Mendoza-Martinez*, 372 U. S. 144, 152-155 (1963); *Flemming v. Nestor*, 363 U. S. 603, 606-608 (1960).

<sup>11</sup> At oral argument counsel informed us that the named respondents have been convicted. Their pretrial detention therefore has ended. This case belongs, however, to that narrow class of cases in which the termination of a class representative's claim does not moot the claims of the unnamed members of the class. See *Sosna v. Iowa*, — U. S. — (1975). Pretrial detention is by nature temporary, and it is most unlikely that any given individual could have his



## II

As framed by the proceedings below, this case presents two issues: whether a person arrested and held for trial on an information is entitled to a judicial determination of probable cause for detention, and if so, whether the adversary hearing ordered by the District Court and approved by the Court of Appeals is required by the Constitution.

## A

Both the standards and procedures for arrest and detention have been derived from the Fourth Amendment and its common-law antecedents. See *Cupp v. Murphy*, 412 U. S. 291, 294-295 (1973); *Ex parte Bollman*, 8 U. S. (4 Cranch) 75 (1807); *Ex parte Bur-*

constitutional claim decided on appeal before he is either released or convicted. The individual could nonetheless suffer repeated deprivations, and it is certain that other persons similarly situated will be detained under the allegedly unconstitutional procedures. The claim, in short, is one that is distinctly "capable of repetition, yet evading review."

At the time the complaint was filed, the named respondents were members of a class of persons detained without a judicial probable cause determination, but the record does not indicate whether any of them were still in custody awaiting trial when the District Court certified the class. Such a showing ordinarily would be required to avoid mootness under *Sosna*. But this case is a suitable exception to that requirement. See *Sosna*, *supra*, at — n. 11; cf. *Rivera v. Freeman*, 469 F. 2d 1159, 1162-1163 (CA9 1972). The length of pre-trial custody cannot be ascertained at the outset, and it may be ended at any time by release on recognizance, dismissal of the charges, or a guilty plea, as well as by acquittal or conviction after trial. It is by no means certain that any given individual, named as plaintiff, would be in pretrial custody long enough for a district judge to certify the class. Moreover, in this case the constant existence of a class of persons suffering the deprivation is certain. The attorney representing the named respondents is a public defender, and we can safely assume that he has other clients with a continuing live interest in the case.



*ford*, 7 U. S. (3 Cranch) 448 (1806). 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." *Beck v. Ohio*, 379 U. S. 89, 91 (1964). See also *Henry v. United States*, 361 U. S. 98 (1959); *Brinegar v. United States*, 338 U. S. 160, 175-176 (1949). This standard, like those for searches and seizures, represents a necessary accommodation between the individual's right to liberty and the State's duty to control crime.

"These long-prevailing standards seek to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime. They also seek to give fair leeway for enforcing the law in the community's protection. Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability. The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating these often opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice." *Brinegar v. United States*, *supra*, at 176.

To implement the Fourth Amendment's protection against unfounded invasions of liberty and privacy, the Court has required that the existence of probable cause be decided by a neutral and detached magistrate whenever possible. The classic statement of this principle



appears in *Johnson v. United States*, 333 U. S. 10, 13-14 (1948):

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

See also *Terry v. Ohio*, 392 U. S. 1, 20-22 (1968).<sup>12</sup>

Maximum protection of individual rights could be assured by requiring a magistrate's review of the factual justification prior to any arrest, but such a requirement would constitute an intolerable handicap for legitimate law enforcement. Thus, while the Court has expressed a preference for the use of arrest warrants when feasible, *Beck v. Ohio*, *supra*, at 96; *Wong Sun v. United States*, 371 U. S. 471, 479-482 (1963), it has never invalidated an arrest supported by probable cause solely because the officers failed to secure a warrant. See *Ker v. California*, 374 U. S. 23 (1963); *Draper v. United States*, 358 U. S. 307 (1959); *Trupiano v. United States*, 334 U. S. 699, 705 (1948).<sup>13</sup>

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<sup>12</sup> We reiterated this principle in *United States v. United States District Court*, 407 U. S. 297 (1972). In terms that apply equally to arrests, we described the "very heart of the Fourth Amendment directive" as a requirement that "where practical, a governmental search and seizure should represent both the efforts of the officer to gather evidence of wrongful acts and the judgment of the magistrate that the collected evidence is sufficient to justify invasion of a citizen's private premises or conversation." *Id.*, at 316. See also *Terry v. Ohio*, 392 U. S. 1, 20-22 (1968).

<sup>13</sup> Another aspect of *Trupiano* was overruled in *United States v.*



Under this practical compromise, a policeman's on-the-scene assessment of probable cause provides legal justification for arresting a person suspected of crime, and for a brief period of detention to take the administrative steps incident to arrest. Once the suspect is in custody, however, the reasons that justify dispensing with the magistrate's neutral judgment evaporate. There no longer is any danger that the suspect will escape or commit further crimes while the police submit their evidence to a magistrate. And, while the State's reasons for taking summary action subside, the suspect's need for a neutral determination of probable cause increases significantly. The consequences of prolonged detention may be more serious than the interference occasioned by arrest. Pretrial confinement may imperil the suspect's job, interrupt his source of income, and impair his family relationships. See R. Goldfarb, *Ransom* 32-91 (1965); L. Katz, *Justice Is the Crime* 51-62 (1972). Even pretrial release may be accompanied by burdensome conditions that effect a significant restraint on liberty. See, e. g., 18 U. S. C. § 3146 (a)(2), (5). When the stakes are this high, the detached judgment of a neutral magistrate is essential if the Fourth Amendment is to furnish meaningful protection from unfounded interference with liberty. Accordingly, we hold that the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint on liberty following arrest.

This result has historical support in the common law

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*Rabinowitz*, 339 U. S. 56 (1950), which was overruled in turn by *Chimel v. California*, 395 U. S. 752 (1969).

The issue of warrantless arrest that has generated the most controversy, and which remains unsettled, is whether and under what circumstances an officer may enter a suspect's home to make a warrantless arrest. See *Coolidge v. New Hampshire*, 403 U. S. 443, 474-481 (1971); *id.*, at 510-512 n. 1 (WHITE, J., dissenting); *Jones v. United States*, 357 U. S. 493, 499-500 (1958).



that has guided interpretation of the Fourth Amendment. See *Carroll v. United States*, 267 U. S. 132, 149 (1925). At common law it was customary, if not obligatory, for an arrested person to be brought before a justice of the peace shortly after arrest. 2 M. Hale, *Pleas of the Crown* 77, 81, 95, 121 (1736); 2 W. Hawkins, *Pleas of the Crown* 116-117 (4th ed. 1792). See also *Kurtz v. Moffitt*, 115 U.S. 487, 498-499 (1885).<sup>14</sup> The justice of the peace would "examine" the prisoner and the witnesses to determine whether there was reason to believe the prisoner had committed a crime. If there was, the suspect would be committed to jail or bailed pending trial. If not, he would be discharged from custody. 1 M. Hale, *supra*, at 583-586; 2 W. Hawkins, *supra*, at 116-119; 1 J. Stephen, *History of the Criminal Law of England* 233 (1883).<sup>15</sup>

<sup>14</sup> The primary motivation for the requirement seems to have been the penalty for allowing an offender to escape, if he had in fact committed the crime, and the fear of liability for false imprisonment, if he had not. But Hale also recognized that a judicial warrant of commitment, called a *mittimus*, was required for more than brief detention.

"When a private person hath arrested a felon, or one suspected of felony, he may detain him in custody till he can reasonably dismiss himself of him; but with as much speed as conveniently he can, he may do either of these things.

"1. He may carry him to the common gaol, . . . but that is now rarely done.

"2. He may deliver him to the constable of the vill, who may either carry him to the common gaol, . . . or to a justice of peace to be examined, and farther proceeded against as case shall require. . . .

"3. Or he may carry him immediately to any justice of peace of the county where he is taken, who upon examination may discharge, bail, or commit him, as the case shall require.

"And the bringing the offender either by the constable or private person to a justice of peace is most usual and safe, because a gaoler will expect a *Mittimus* for his warrant of detaining."

1 M. Hale, *supra*, at 589-590.

<sup>15</sup> The examination of the prisoner was inquisitorial, and the witnesses were questioned outside the prisoner's presence. Although



The initial determination of probable cause also could be reviewed by higher courts on a writ of habeas corpus. 2 W. Hawkins, *supra*, at 112-115; 1 J. Stephen, *supra*, at 243; see *Ex parte Bollman*, 8 U. S. (4 Cranch) 75, 97-101 (1807). This practice furnished the model for criminal procedure in America immediately following the adoption of the Fourth Amendment, see *Ex parte Bollman*, 8 U. S. (4 Cranch) 75 (1807); <sup>16</sup> *Ex parte Burford*, 7 U. S. (3 Cranch) 448 (1806); *United States v. Hamilton*, 3 U. S. (3 Dall.) 17 (1795), and there are indications that the Framers of the Bill of Rights regarded it as a model for a "reasonable" seizure. See *Draper v. United States*, 358 U.S. 307, 317-320 (1959) (DOUGLAS, J., concurring).<sup>17</sup>

this method of proceeding was considered quite harsh, 1 J. Stephen, at 219-225, it was well established that the prisoner was entitled to be discharged if the investigation turned up insufficient evidence of his guilt. *Id.*, at 233.

<sup>16</sup> In *Ex parte Bollman*, two men charged in the Aaron Burr case were committed following an examination in the circuit court of the District of Columbia. They filed a petition for writ of habeas corpus in the Supreme Court. The Court, in an opinion by Chief Justice Marshall, affirmed its jurisdiction to issue habeas corpus to persons in custody by order of federal trial courts. Then, following arguments on the Fourth Amendment requirement of probable cause, the Court surveyed the evidence against the prisoners and held that it did not establish probable cause that they were guilty of treason. The prisoners were discharged.

<sup>17</sup> See also N. Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* 15-16 (1937). A similar procedure at common law, the warrant for recovery of stolen goods, is said to have furnished the model for a "reasonable" search under the Fourth Amendment. The victim was required to appear before a justice of the peace and make an oath of probable cause that his goods could be found in a particular place. After the warrant was executed, and the goods seized, the victim and the alleged thief would appear before the justice of the peace for a prompt determination of the cause for seizure of the goods and detention of the thief. 2 M. Hale, *supra*, at 149-152; T. Taylor,



## B

Under the Florida procedures challenged here, a person arrested without a warrant and charged by information may be jailed or subjected to other restraints pending trial without any opportunity for a probable cause determination.<sup>18</sup> Petitioner defends this practice on the ground that the prosecutor's decision to file an information is itself a determination of probable cause that furnishes sufficient reason to detain a defendant pending trial. Although a conscientious decision that the evidence warrants prosecution affords a measure of protection against unfounded detention, we do not think prosecutorial judgment standing alone meets the requirements of the Fourth Amendment. Indeed, we think the Court's previous decisions compel disapproval of the Florida procedure. In *Albrecht v. United States*, 273 U. S. 1, 5 (1927), the Court held that an arrest warrant issued solely upon a United States Attorney's information was invalid because the accompanying affidavits were defective. Although the Court's opinion did not explicitly state that the prosecutor's official oath could not furnish probable cause, that conclusion was implicit in the judgment that the arrest was illegal under the Fourth Amendment.<sup>19</sup> More recently, in *Coolidge v. New Hampshire*,

Two Studies in Constitutional Interpretation 24-25, 39-40 (1969); see *Boyd v. United States*, 116 U. S. 616, 626-629 (1886).

<sup>18</sup> A person arrested under a warrant would have received a prior judicial determination of probable cause. Under Fla. Rule Crim. Proc. 3.120, a warrant may be issued upon a sworn complaint that states facts showing that the suspect has committed a crime. The magistrate may also take testimony under oath to determine if there is reasonable ground to believe the complaint is true.

<sup>19</sup> By contrast, the Court has held that an indictment, "fair upon its face," and returned by a "properly constituted grand jury" conclusively determines the existence of probable cause and requires issuance of an arrest warrant without further inquiry. *Ex parte*



403 U. S. 443, 449-453 (1971), the Court held that a prosecutor's responsibility to law enforcement is inconsistent with the constitutional role of a neutral and detached magistrate. We reaffirmed that principle in *Shadwick v. City of Tampa*, 407 U. S. 345 (1972), and held that probable cause for the issuance of an arrest warrant must be determined by someone independent of police and prosecution. See also *United States v. United States District Court*, 407 U. S. 297, 317 (1972).<sup>20</sup> The reason for this separation of functions was expressed by Justice Frankfurter in a similar context:

"A democratic society, in which respect for the dignity of all men is central, naturally guards against the misuse of the law enforcement process. Zeal in tracking down crime is not in itself an assurance of soberness of judgment. Disinterestedness in law enforcement does not alone prevent disregard of cherished liberties. Experience has therefore counseled

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*United States*, 287 U. S. 241, 250 (1932). See also *Giordenello v. United States*, 357 U. S. 480, 487 (1958). The willingness to let a grand jury's judgment substitute for that of a neutral and detached magistrate is attributable to the grand jury's relationship to the courts and its historical role of protecting individuals from unjust prosecution. See *United States v. Calandra*, 414 U. S. 338, 342-343 (1974).

<sup>20</sup> The Court had earlier reached a different result in *Ocampo v. United States*, 234 U. S. 91 (1914), a criminal appeal from the Philippine Islands. Interpreting a statutory guarantee substantially identical to the Fourth Amendment, Act of July 1, 1902, c. 1369, § 5, 32 Stat. 693, the Court held that an arrest warrant could issue solely upon a prosecutor's information. The Court has since held that interpretation of a statutory guarantee applicable to the Philippines is not conclusive for interpretation of a cognate provision in the Federal Constitution, *Green v. United States*, 355 U. S. 184, 194-198 (1957). Even if it were, the result reached in *Ocampo* is incompatible with the later holdings of *Aibrecht*, *Coolidge*, and *Shadwick*.



that safeguards must be provided against the dangers of the overzealous as well as the despotic. The awful instruments of the criminal law cannot be entrusted to a single functionary. The complicated process of criminal justice is therefore divided into different parts, responsibility for which is separately vested in the various participants upon whom the criminal law relies for its vindication." *McNabb v. United States*, 318 U. S. 332, 343 (1943).

In holding that the prosecutor's assessment of probable cause is not sufficient alone to justify restraint on liberty pending trial, we do not imply that the accused is entitled to judicial oversight or review of the decision to prosecute. Instead, we adhere to the Court's prior holding that a judicial hearing is not prerequisite to prosecution by information. *Beck v. Washington*, 369 U. S. 541, 545 (1962); *Lem Woon v. Oregon*, 229 U. S. 586 (1913). Nor do we retreat from the established rule that illegal arrest or detention does not void a subsequent conviction. *Frisbie v. Collins*, 342 U. S. 519 (1952); *Ker v. Illinois*, 119 U. S. 436 (1886). Thus, as the Court of Appeals noted below, although a suspect who is presently detained may challenge the probable cause for that confinement, a conviction will not be vacated on the ground that the defendant was detained pending trial without a determination of probable cause. 483 F. 2d, at 786-787. Compare *Scarborough v. Dutton*, 393 F. 2d 6 (CA5 1968), with *Brown v. Fauntleroy*, — U. S. App. D. C. —, 442 F. 2d 838 (1971), and *Cooley v. Stone*, — U. S. App. D. C. —, 414 F. 2d 1213 (1969).

### III

Both the District Court and the Court of Appeals held that the determination of probable cause must be accompanied by the full panoply of adversary safe-



guards—counsel, confrontation, cross-examination, and compulsory process for witnesses. A full preliminary hearing of this sort is modeled after the procedure used in many States to determine whether the evidence justifies going to trial under an information or presenting the case to a grand jury. See *Coleman v. Alabama*, 399 U. S. 1 (1970); Y. Kamisar, W. LaFare & J. Israel, *Modern Criminal Procedure* 957-967, 996-1000 (4th ed. 1974). The standard of proof required of the prosecution is usually referred to as "probable cause," but in some jurisdictions it may approach a *prima facie* case of guilt. A. L. I. Model Code of Pre-arraignment Procedure, Commentary on Article 330, at 90-91 (Tent. Draft No. 5, 1972). When the hearing takes this form, adversary procedures are customarily employed. The importance of the issue to both the State and the accused justifies the presentation of witnesses and full exploration of their testimony on cross-examination. This kind of hearing also requires appointment of counsel for indigent defendants. *Coleman v. Alabama*, *supra*. And, as the hearing assumes increased importance and the procedures become more complex, the likelihood that it can be held promptly after arrest diminishes. See A. L. I. Model Code of Pre-arraignment Procedure, *supra*, at 33-34.

These adversary safeguards are not essential for the probable cause determination required by the Fourth Amendment. The sole issue is whether there is probable cause for detaining the arrested person pending further proceedings. This issue can be determined reliably without an adversary hearing. The standard is the same as that for arrest.<sup>21</sup> That standard—probable cause to

<sup>21</sup> Because the standards are identical, ordinarily there is no need for further investigation before the probable cause determination can be made.

"Presumably, whomever the police arrest they must arrest on 'probable cause.' It is not the function of the police to arrest, as it were,



believe the suspect has committed a crime—traditionally has been decided by a magistrate in a nonadversary proceeding on hearsay and written testimony, and the Court has approved these informal modes of proof.

"Guilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined to that which long experience in the common-law tradition, to some extent embodied in the Constitution, has crystallized into rules of evidence consistent with that standard. These rules are historically grounded rights of our system, developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property.

"In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved." *Brinegar v. United States*, 338 U. S. 160, 174-175 (1949).

Cf. *McCray v. Illinois*, 386 U. S. 300 (1967).

The use of an informal procedure is justified not only by the lesser consequences of a probable cause determination but also by the nature of the determination itself. It does not require the fine resolution of conflicting evidence that a reasonable-doubt or even a preponderance standard demands, and credibility determinations are seldom crucial in deciding whether the evidence supports a reasonable belief in guilt. See F. Miller, Prosecu-

at large and to use an interrogating process at police headquarters in order to determine whom they should charge before a committing magistrate on 'probable cause.' " *Mallory v. United States*, 354 U. S. 449, 458 (1957).



tion: The Decision to Charge a Suspect with a Crime 64-109 (1969).<sup>22</sup> This is not to say that confrontation and cross-examination might not enhance the reliability of probable cause determinations in some cases. In most cases, however, their value would be too slight to justify holding, as a matter of constitutional principle, that these formalities and safeguards designed for trial must also be employed in making the Fourth Amendment determination of probable cause.<sup>23</sup>

Because of its limited function and its nonadversary character, the probable cause determination is not a "critical stage" in the prosecution that would require

<sup>22</sup> In *Morrissey v. Brewer*, 408 U. S. 471 (1972), and *Gagnon v. Scarpelli*, 411 U. S. 778 (1973), we held that a parolee or probationer arrested prior to revocation is entitled to an informal preliminary hearing at the place of arrest, with some provision for live testimony. 408 U. S., at 487; 411 U. S., at 786. That preliminary hearing, more than the probable cause determination required by the Fourth Amendment, serves the purpose of gathering and preserving live testimony, since the final revocation hearing frequently is held at some distance from the place where the violation occurred. 408 U. S., at 485; 411 U. S., at 782-783 n. 5. Moreover, revocation proceedings may offer less protection from initial error than the more formal criminal process, where violations are defined by statute and the prosecutor has a professional duty not to charge a suspect with crime unless he is satisfied of probable cause. See ABA Code of Professional Responsibility, DR 7-103 (A) (a prosecutor "shall not institute or cause to be instituted criminal charges when he knows or it is obvious that the charges are not supported by probable cause"); ABA Standards Relating to the Administration of Criminal Justice, The Prosecution Function, §§ 1.1, 3.4, 3.9 (1974); American College of Trial Lawyers, Code of Trial Conduct, rule 4 (c) (1972).

<sup>23</sup> Criminal justice is already overburdened by the volume of cases and the complexities of our system. The processing of misdemeanors, in particular, and the early stages of prosecution generally are marked by delays that can seriously affect the quality of justice. A constitutional doctrine requiring adversary hearings for all persons detained pending trial could exacerbate the problem of pretrial delay.



appointed counsel. The Court has identified as "critical stages" those pretrial procedures that would impair defense on the merits if the accused is required to proceed without counsel. *Coleman v. Alabama*, 399 U. S. 1 (1970); *United States v. Wade*, 388 U. S. 218, 226-227 (1967). In *Coleman v. Alabama*, where the Court held that a preliminary hearing was a critical stage of an Alabama prosecution, the majority and concurring opinions identified two critical factors that distinguish the Alabama preliminary hearing from the probable cause determination required by the Fourth Amendment. First, under Alabama law the function of the preliminary hearing was to determine whether the evidence justified charging the suspect with an offense. A finding of no probable cause could mean that he would not be tried at all. The Fourth Amendment probable cause determination is addressed only to pretrial custody. To be sure, pretrial custody may affect to some extent the defendant's ability to assist in preparation of his defense, but this does not present the high probability of substantial harm identified as controlling in *Wade* and *Coleman*. Second, Alabama allowed the suspect to confront and cross-examine prosecution witnesses at the preliminary hearing. The Court noted that the suspect's defense on the merits could be compromised if he had no legal assistance for exploring or preserving the witnesses' testimony. This consideration does not apply when the prosecution is not required to produce witnesses for cross-examination.

Although we conclude that the Constitution does not require an adversary determination of probable cause, we recognize that state systems of criminal procedure vary widely. There is no single preferred pretrial procedure, and the nature of the probable cause determination usually will be shaped to accord with a State's pretrial procedure viewed as a whole. While we limit our hold-



ing to the precise requirement of the Fourth Amendment, we recognize the desirability of flexibility and experimentation by the States. It may be found desirable, for example, to make the probable cause determination at the suspect's first appearance before a judicial officer,<sup>24</sup> see *McNabb v. United States*, 318 U. S. 332, 342-344 (1943), or the determination may be incorporated into the procedure for setting bail or fixing other conditions of pretrial release. In some States, existing procedures may satisfy the requirement of the Fourth Amendment. Others may require only minor adjustment, such as acceleration of existing preliminary hearings. Current proposals for criminal procedure reform suggest other ways of testing probable cause for detention.<sup>25</sup> Whatever

<sup>24</sup> Several States already authorize a determination of probable cause at this stage or immediately thereafter. See Colo. Rev. Stat. § 39-2-3 (1965 Supp.); Hawaii Rev. Stat. § 708-9 (5) (1968); Vt. Rules Crim. Proc. 3 (b), 3 (c) (1974). This Court has interpreted the Federal Rules of Criminal Procedure to require a determination of probable cause at the first appearance. *Jaben v. United States*, 381 U. S. 214, 218 (1965); *Mallory v. United States*, 364 U. S. 449, 454 (1957).

<sup>25</sup> Under the Uniform Rules of Criminal Procedure (Proposed Final Draft 1974), a person arrested without a warrant is entitled, "without unnecessary delay," to a first appearance before a magistrate and a determination that grounds exist for issuance of an arrest warrant. The determination may be made on affidavits or testimony, in the presence of the accused. Rule 311. Persons who remain in custody for inability to qualify for pretrial release are offered another opportunity for a probable cause determination at the detention hearing, held no more than five days after arrest. This is an adversary hearing, and the parties may summon witnesses, but reliable hearsay evidence may be considered. Rule 344.

The A. L. I. Model Code of Pre-arraignment Procedure (Tent. Draft No. 5, 1972, and Tent. Draft No. 5A, 1973) also provides a first appearance, at which a warrantless arrest must be supported by a reasonably detailed written statement of facts. § 310. The magistrate may make a determination of probable cause to hold the



procedure a State may adopt, it must provide a fair and reliable determination of probable cause as a condition for any significant pretrial restraint on liberty,<sup>26</sup> and this determination must be made by a judicial officer either before or promptly after arrest.<sup>27</sup>

accused, but he is not required to do so and the accused may request an attorney for an "adjourned session" of the first appearance to be held within 2 "court days." At that session, the magistrate makes a determination of probable cause upon a combination of written and live testimony:

"The arrested person may present written and testimonial evidence and arguments for his discharge and the state may present additional written and testimonial evidence and arguments that there is reasonable cause to believe that he has committed the crime of which he is accused. The state's submission may be made by means of affidavits, and no witnesses shall be required to appear unless the court, in the light of the evidence and arguments submitted by the parties, determines that there is a basis for believing that the appearance of one or more witnesses for whom the arrested person seeks subpoenas might lead to a finding that there is no reasonable cause." § 310.2 (2) (Tent. Draft No. 5A, 1973).

<sup>26</sup> Because the probable cause determination is not a constitutional prerequisite to the charging decision, it is required only for those suspects who suffer restraints on liberty other than the condition that they appear for trial. There are many kinds of pretrial release and many degrees of conditional liberty. See 18 U. S. C. § 3146; ABA Standards Relating to the Administration of Criminal Justice, Pretrial Release § 5.2 (1974); Uniform Rules of Criminal Procedure, Rule 341 (Proposed Final Draft 1974). We cannot define specifically those that would require a prior probable cause determination, but the key factor is significant restraint on liberty.

<sup>27</sup> In his concurring opinion, Mr. Justice STEWART objects to the Court's choice of the Fourth Amendment as the rationale for decision and suggests that the Court offers less procedural protection to a person in jail than it requires in certain civil cases. Here we deal with the complex procedures of a criminal case and a threshold right guaranteed by the Fourth Amendment. The historical basis of the probable cause requirement is quite different from the relatively recent application of variable procedural due process in debtor-creditor disputes and termination of government-



## IV

We agree with the Court of Appeals that the Fourth Amendment requires a timely judicial determination of probable cause as a prerequisite to detention, and we accordingly affirm that much of the judgment. As we do not agree that the Fourth Amendment requires the adversary hearing outlined in the District Court's decree, we reverse in part and remand to the Court of Appeals for further proceedings consistent with this opinion.

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created benefits. The Fourth Amendment was tailored explicitly for the criminal justice system, and its balance between individual and public interests always has been thought to define the "process that is due" for seizures of person or property in criminal cases, including the detention of suspects pending trial. Part II-A, *ante*. Moreover, the Fourth Amendment probable cause determination is in fact only the first stage of an elaborate system, unique in jurisprudence, designed to safeguard the rights of those accused of criminal conduct. The relatively simple civil procedures (*e. g.*, prior interview with school principal before suspension) presented in the cases cited in the concurring opinion are inapposite and irrelevant in the wholly different context of the criminal justice system.

It would not be practicable to follow the further suggestion implicit in Mr. Justice STEWART's concurring opinion that we leave for another day determination of the procedural safeguards that are required in making a probable cause determination under the Fourth Amendment. The judgment under review both declares the right not to be detained without a probable cause determination and affirms the District Court's order prescribing an adversary hearing for the implementation of that right. The circumstances of the case thus require a decision on both issues.



NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337.

## SUPREME COURT OF THE UNITED STATES

### Syllabus

#### GERSTEIN v. PUGH ET AL.

#### CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 73-477. Argued March 25, 1974—Reargued October 21, 1974—  
Decided February 18, 1975

1. The Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest. Accordingly, the Florida procedures challenged here whereby a person arrested without a warrant and charged by information may be jailed or subjected to other restraints pending trial without any opportunity for a probable cause determination are unconstitutional. Pp. 7-15.

(a) The prosecutor's assessment of probable cause, standing alone, does not meet the requirements of the Fourth Amendment and is insufficient to justify restraint of liberty pending trial. Pp. 13-15.

(b) The Constitution does not require, however, judicial oversight of the decision to prosecute by information, and a conviction will not be vacated on the ground that the defendant was detained pending trial without a probable cause determination. P. 15.

2. The probable cause determination, as an initial step in the criminal justice process, may be made by a judicial officer without an adversary hearing. Pp. 15-21.

(a) The sole issue is whether there is probable cause for detaining the arrested person pending further proceedings, and this issue can be determined reliably by the use of informal procedures. Pp. 16-18.

(b) Because of its limited function and its nonadversary character, the probable cause determination is not a "critical stage" in the prosecution that would require appointed counsel. Pp. 18-19.

483 F. 2d 778, affirmed in part, reversed in part, and remanded.



## Syllabus

POWELL, J., delivered the opinion of the Court, in Parts I and II of which all other Members joined, and in Parts III and IV of which BURGER, C. J., and WHITE, BLACKMUN, and REHNQUIST, JJ., joined. STEWART, J., filed a concurring opinion, in which DOUGLAS, BRENNAN, and MARSHALL, JJ., joined.



NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

## SUPREME COURT OF THE UNITED STATES

No. 73-477

Richard E. Gerstein, State At- torney for Eleventh Judicial Circuit of Florida, Petitioner, v. Robert Pugh et al.	}	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.
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[February 18, 1975]

MR. JUSTICE POWELL delivered the opinion of the Court.

The issue in this case is whether a person arrested under a prosecutor's information is constitutionally entitled to a judicial determination of probable cause for pretrial restraint of liberty.

### I

In March 1971 respondents Pugh and Henderson were arrested in Dade County, Florida. Each was charged with several offenses under a prosecutor's information.<sup>1</sup> Pugh was denied bail because one of the charges against him carried a potential life sentence, and Henderson remained in custody because he was unable to post a \$4,500 bond.

<sup>1</sup> Respondent Pugh was arrested on March 3, 1971. On March 16 an information was filed charging him with robbery, carrying a concealed weapon, and possession of a firearm during commission of a felony. Respondent Henderson was arrested on March 2, and charged by information on March 19 with the offenses of breaking and entering and assault and battery. The record does not indicate whether there was an arrest warrant in either case.



In Florida, indictments are required only for prosecution of capital offenses. Prosecutors may charge all other crimes by information, without a prior preliminary hearing and without obtaining leave of court. Fla. Rule Crim. Proc. 3.140 (a); *State v. Hernandez*, 217 So. 2d 109 (Fla. 1968); *Di Bona v. State*, 121 So. 2d 192 (Fla. Ct. App. 1960). At the time respondents were arrested, a Florida rule seemed to authorize adversary preliminary hearings to test probable cause for detention in all cases. Fla. Rule Crim. Proc. 1.122 (amended 1972). But the Florida courts had held that the filing of an information foreclosed the suspect's right to a preliminary hearing. See *State ex rel. Hardy v. Blount*, 261 So. 2d 172 (Fla. 1972).<sup>2</sup> They had also held that habeas corpus could not be used, except perhaps in exceptional circumstances, to test the probable cause for detention under an information. See *Sullivan v. State ex rel. McCrory*, 29 So. 2d 794, 797 (Fla. 1951). The only possible methods for obtaining a judicial determination of probable cause were a special statute allowing a preliminary hearing after 30 days, Fla. Stat. Ann. § 907.045 (1973),<sup>3</sup> and arraignment, which the District Court found was often delayed a month or more after arrest. *Pugh v. Rainwater*, 332 F. Supp. 1107, 1110 (SD Fla. 1971).<sup>4</sup> As a result, a person charged

<sup>2</sup> Florida law also denies preliminary hearings to persons confined under indictment, see *Songares v. Hamlin*, 235 So. 2d 729 (Fla. 1970); Fla. Rule Crim. Proc. 3.131 (a), but that procedure is not challenged in this case. See n. 19, *post*, at 14.

<sup>3</sup> This statute may have been construed to make the hearing permissive instead of mandatory. See *Evans v. State*, 197 So. 2d 323 (Fla. Ct. App. 1967); Fla. Op. Att'y Gen. 067-29 (1967). But cf. *Karz v. Overton*, 249 So. 2d 763 (Fla. Ct. App. 1971). It may also have been superseded by the subsequent amendments to the rules of criminal procedure. *In re Florida Rules of Criminal Procedure*, 272 So. 2d 85 (1972).

<sup>4</sup> The Florida rules do not suggest that the issue of probable cause can be raised at arraignment, Fla. Rule Crim. Proc. 3.160, but



by information could be detained for a substantial period solely on the decision of a prosecutor.

Respondents Pugh and Henderson filed a class action against Dade County officials in the Federal District Court,<sup>6</sup> claiming a constitutional right to a judicial hearing on the issue of probable cause and requesting declaratory and injunctive relief.<sup>6</sup> Respondents Turner and Faulk, also in custody under informations, subsequently intervened.<sup>7</sup> Petitioner Gerstein, the State Attorney for Dade County, was one of several defendants.<sup>8</sup>

After an initial delay while the Florida legislature considered a bill that would have afforded preliminary hearings to persons charged by information, the District Court granted the relief sought. *Pugh v. Rainwater*, *supra*. The court certified the case as a class action under Fed.

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counsel for Petitioner represented at oral argument that arraignment affords the suspect an opportunity to "attack the sufficiency of the evidence to hold him." Tr. of Oral Arg., Mar. 25, 1974, at 17. The Court of Appeals assumed, without deciding, that this was true. 483 F. 2d 778, 781 n. 8.

<sup>6</sup> The complaint was framed under 42 U. S. C. § 1983, and jurisdiction in the District Court was based on 28 U. S. C. § 1343 (3).

<sup>7</sup> Respondents did not ask for release from state custody, even as an alternate remedy. They asked only that the state authorities be ordered to give them a probable cause determination. This was also the only relief that the District Court ordered for the named respondents. 332 F. Supp., at 1115-1116. Because release was neither asked nor ordered, the lawsuit did not come within the class of cases for which habeas corpus is the exclusive remedy. *Preiser v. Rodriguez*, 411 U. S. 476 (1973); see *Walff v. McDonnell*, 417 U. S. —, — (1974).

<sup>8</sup> Turner was being held on a charge of auto theft, following arrest on March 11, 1971. Faulk was arrested on March 19 on charges of soliciting a ride and possession of marihuana.

<sup>9</sup> The named defendants included justices of the peace and judges of small-claims courts, who were authorized to hold preliminary hearings in criminal cases, and a group of law enforcement officers with power to make arrests in Dade County. Gerstein was the only one who petitioned for certiorari.



Rule Civ. Proc. 23 (b) (2), and held that the Fourth and Fourteenth Amendments give all arrested persons charged by information a right to a judicial hearing on the question of probable cause. The District Court ordered the Dade County defendants to give the named plaintiffs an immediate preliminary hearing to determine probable cause for further detention.\* It also ordered them to submit a plan providing preliminary hearings in all cases instituted by information.

The defendants submitted a plan authored by Sheriff E. Wilson Purdy, and the District Court adopted it with modifications. The final order prescribed a detailed post-arrest procedure. 336 F. Supp. 490. Upon arrest the accused would be taken before a magistrate for a "first appearance hearing." The magistrate would explain the charges, advise the accused of his rights, appoint counsel if he was indigent, and proceed with a probable cause determination unless either the prosecutor or the accused was unprepared. If either requested more time, the magistrate would set the date for a "preliminary hearing," to be held within four days if the accused was in custody and within 10 days if he had been released pending trial. The order provided sanctions for failure to hold the hearings at prescribed times. At the "preliminary hearing" the accused would be entitled to counsel, and he would be allowed to confront and cross-examine adverse witnesses,

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\* The District Court correctly held that respondents' claim for relief was not barred by the equitable restrictions on federal intervention in state prosecutions, *Younger v. Harris*, 401 U. S. 37 (1971). The injunction was not directed at the state prosecutions as such, but only at the legality of pretrial detention without a judicial hearing, an issue that could not be raised in defense of the criminal prosecution. The order to hold preliminary hearings could not prejudice the conduct of trial on the merits. See *Conover v. Montemuro*, 477 F. 2d 1073, 1082 (CA3 1973); cf. *Perez v. Ledesma*, 401 U. S. 82 (1971); *Stefanelli v. Minard*, 342 U. S. 117 (1951).



to summon favorable witnesses, and to have a transcript made on request. If the magistrate found no probable cause, the accused would be discharged. He then could not be charged with the same offense by complaint or information, but only by indictment returned within 30 days.

The Court of Appeals for the Fifth Circuit stayed the District Court's order pending appeal, but while the case was awaiting decision, the Dade County judiciary voluntarily adopted a similar procedure of its own. Upon learning of this development, the Court of Appeals remanded the case for specific findings on the constitutionality of the new Dade County system. Before the District Court issued its findings, however, the Florida Supreme Court amended the procedural rules governing preliminary hearings statewide, and the parties agreed that the District Court should direct its inquiry to the new rules rather than the Dade County procedures.

Under the amended rules every arrested person must be taken before a judicial officer within 24 hours. Fla. Rule Crim. Proc. 3.130 (b). This "first appearance" is similar to the "first appearance hearing" ordered by the District Court in all respects but the crucial one: the magistrate does not make a determination of probable cause. The rule amendments also changed the procedure for preliminary hearings, restricting them to felony charges and codifying the rule that no hearings are available to persons charged by information or indictment. Rule 3.131; see *In re Rule 3.131 (b)*, *Florida Rules of Criminal Procedure*, 289 So. 2d 3 (Fla. 1974).

In a supplemental opinion the District Court held that the amended rules had not answered the basic constitutional objection, since a defendant charged by information still could be detained pending trial without a judicial determination of probable cause. 355 F. Supp.



1286. Reaffirming its original ruling, the District Court declared that the continuation of this practice was unconstitutional.<sup>10</sup> The Court of Appeals affirmed, 483 F. 2d 778, modifying the District Court's decree in minor particulars and suggesting that the form of preliminary hearing provided by the amended Florida rules would be acceptable, as long as it was provided to all defendants in custody pending trial. *Id.*, at 788-789.

State Attorney Gerstein petitioned for review, and we granted certiorari because of the importance of the issue.<sup>11</sup> 414 U. S. 1062. We affirm in part and reverse in part.

<sup>10</sup> Although this ruling held a statewide "legislative rule" unconstitutional, it was not outside the jurisdiction of a single judge by virtue of 28 U. S. C. § 2281. The original complaint did not ask for an injunction against enforcement of any state statute or legislative rule of statewide application, since the practice of denying preliminary hearings to persons charged by information was then embodied only in judicial decisions. The District Court therefore had jurisdiction to issue the initial injunction, and the Court of Appeals had jurisdiction over the appeal. On remand, the constitutionality of a state "statute" was drawn into question for the first time when the criminal rules were amended. The District Court's supplemental opinion can fairly be read as a declaratory judgment that the amended rules were unconstitutional; the injunctive decree was never amended to incorporate that holding; and the opinion in the Court of Appeals is not inconsistent with the conclusion that the District Court did not enjoin enforcement of the statewide rule. See 483 F. 2d, at 788-790. Accordingly, a district court of three judges was not required for the issuance of this order. See *Kennedy v. Mendoza-Martinez*, 372 U. S. 144, 152-155 (1963); *Flemming v. Nestor*, 363 U. S. 603, 606-608 (1960).

<sup>11</sup> At oral argument counsel informed us that the named respondents have been convicted. Their pretrial detention therefore has ended. This case belongs, however, to that narrow class of cases in which the termination of a class representative's claim does not moot the claims of the unnamed members of the class. See *Soona v. Iowa*, — U. S. — (1975). Pretrial detention is by nature temporary, and it is most unlikely that any given individual could have his



## II

As framed by the proceedings below, this case presents two issues: whether a person arrested and held for trial on an information is entitled to a judicial determination of probable cause for detention, and if so, whether the adversary hearing ordered by the District Court and approved by the Court of Appeals is required by the Constitution.

## A

Both the standards and procedures for arrest and detention have been derived from the Fourth Amendment and its common-law antecedents. See *Cupp v. Murphy*, 412 U. S. 291, 294-295 (1973); *Ex parte Bollman*, 8 U. S. (4 Cranch) 75 (1807); *Ex parte Bur-*

constitutional claim decided on appeal before he is either released or convicted. The individual could nonetheless suffer repeated deprivations, and it is certain that other persons similarly situated will be detained under the allegedly unconstitutional procedures. The claim, in short, is one that is distinctly "capable of repetition, yet evading review."

At the time the complaint was filed, the named respondents were members of a class of persons detained without a judicial probable cause determination, but the record does not indicate whether any of them were still in custody awaiting trial when the District Court certified the class. Such a showing ordinarily would be required to avoid mootness under *Sosa*. But this case is a suitable exception to that requirement. See *Sosa*, *supra*, at — n. 11; cf. *Rivera v. Freeman*, 469 F. 2d 1159, 1162-1163 (CA9 1972). The length of pretrial custody cannot be ascertained at the outset, and it may be ended at any time by release on recognizance, dismissal of the charges, or a guilty plea, as well as by acquittal or conviction after trial. It is by no means certain that any given individual, named as plaintiff, would be in pretrial custody long enough for a district judge to certify the class. Moreover, in this case the constant existence of a class of persons suffering the deprivation is certain. The attorney representing the named respondents is a public defender, and we can safely assume that he has other clients with a continuing live interest in the case.



ford, 7 U. S. (3 Cranch) 448 (1806). 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." *Beck v. Ohio*, 379 U. S. 89, 91 (1964). See also *Henry v. United States*, 381 U. S. 98 (1959); *Brinegar v. United States*, 338 U. S. 160, 175-176 (1949). This standard, like those for searches and seizures, represents a necessary accommodation between the individual's right to liberty and the State's duty to control crime.

"These long-prevailing standards seek to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime. They also seek to give fair leeway for enforcing the law in the community's protection. Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability. The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating these often opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice." *Brinegar v. United States*, *supra*, at 176.

To implement the Fourth Amendment's protection against unfounded invasions of liberty and privacy, the Court has required that the existence of probable cause be decided by a neutral and detached magistrate whenever possible. The classic statement of this principle



appears in *Johnson v. United States*, 333 U. S. 10, 13-14 (1948):

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

See also *Terry v. Ohio*, 392 U. S. 1, 20-22 (1968).<sup>12</sup>

Maximum protection of individual rights could be assured by requiring a magistrate's review of the factual justification prior to any arrest, but such a requirement would constitute an intolerable handicap for legitimate law enforcement. Thus, while the Court has expressed a preference for the use of arrest warrants when feasible, *Beck v. Ohio*, *supra*, at 96; *Wong Sun v. United States*, 371 U. S. 471, 479-482 (1963), it has never invalidated an arrest supported by probable cause solely because the officers failed to secure a warrant. See *Ker v. California*, 374 U. S. 23 (1963); *Draper v. United States*, 358 U. S. 307 (1959); *Trupiano v. United States*, 334 U. S. 699, 705 (1948).<sup>13</sup>

<sup>12</sup> We reiterated this principle in *United States v. United States District Court*, 407 U. S. 297 (1972). In terms that apply equally to arrests, we described the "very heart of the Fourth Amendment directive" as a requirement that "where practical, a governmental search and seizure should represent both the efforts of the officer to gather evidence of wrongful acts and the judgment of the magistrate that the collected evidence is sufficient to justify invasion of a citizen's private premises or conversation." *Id.*, at 316. See also *Terry v. Ohio*, 392 U. S. 1, 20-22 (1968).

<sup>13</sup> Another aspect of *Trupiano* was overruled in *United States v.*



Under this practical compromise, a policeman's on-the-scene assessment of probable cause provides legal justification for arresting a person suspected of crime, and for a brief period of detention to take the administrative steps incident to arrest. Once the suspect is in custody, however, the reasons that justify dispensing with the magistrate's neutral judgment evaporate. There no longer is any danger that the suspect will escape or commit further crimes while the police submit their evidence to a magistrate. And, while the State's reasons for taking summary action subside, the suspect's need for a neutral determination of probable cause increases significantly. The consequences of prolonged detention may be more serious than the interference occasioned by arrest. Pretrial confinement may imperil the suspect's job, interrupt his source of income, and impair his family relationships. See R. Goldfarb, *Ransom* 32-91 (1965); L. Katz, *Justice Is the Crime* 51-62 (1972). Even pretrial release may be accompanied by burdensome conditions that effect a significant restraint on liberty. See, e. g., 18 U. S. C. § 3146 (a)(2), (5). When the stakes are this high, the detached judgment of a neutral magistrate is essential if the Fourth Amendment is to furnish meaningful protection from unfounded interference with liberty. Accordingly, we hold that the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint on liberty following arrest.

This result has historical support in the common law

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*Rabinowitz*, 339 U. S. 56 (1950), which was overruled in turn by *Chimel v. California*, 395 U. S. 752 (1969).

The issue of warrantless arrest that has generated the most controversy, and which remains unsettled, is whether and under what circumstances an officer may enter a suspect's home to make a warrantless arrest. See *Coolidge v. New Hampshire*, 403 U. S. 443, 474-481 (1971); *id.*, at 510-512 n. 1 (WHITE, J., dissenting); *Jones v. United States*, 357 U. S. 493, 499-500 (1958).



that has guided interpretation of the Fourth Amendment. See *Carroll v. United States*, 267 U. S. 132, 149 (1925). At common law it was customary, if not obligatory, for an arrested person to be brought before a justice of the peace shortly after arrest. 2 M. Hale, *Pleas of the Crown* 77, 81, 95, 121 (1736); 2 W. Hawkins, *Pleas of the Crown* 116-117 (4th ed. 1792). See also *Kurtz v. Moffitt*, 115 U. S. 487, 498-499 (1885).<sup>14</sup> The justice of the peace would "examine" the prisoner and the witnesses to determine whether there was reason to believe the prisoner had committed a crime. If there was, the suspect would be committed to jail or bailed pending trial. If not, he would be discharged from custody. 1 M. Hale, *supra*, at 583-586; 2 W. Hawkins, *supra*, at 116-119; 1 J. Stephen, *History of the Criminal Law of England* 233 (1883).<sup>15</sup>

<sup>14</sup> The primary motivation for the requirement seems to have been the penalty for allowing an offender to escape, if he had in fact committed the crime, and the fear of liability for false imprisonment, if he had not. But Hale also recognized that a judicial warrant of commitment, called a *mittimus*, was required for more than brief detention.

"When a private person hath arrested a felon, or one suspected of felony, he may detain him in custody till he can reasonably dismiss himself of him; but with as much speed as conveniently he can, he may do either of these things.

"1. He may carry him to the common gaol, . . . but that is now rarely done.

"2. He may deliver him to the constable of the vill, who may either carry him to the common gaol, . . . or to a justice of peace to be examined, and farther proceeded against as case shall require. . . .

"3. Or he may carry him immediately to any justice of peace of the county where he is taken, who upon examination may discharge, bail, or commit him, as the case shall require.

"And the bringing the offender either by the constable or private person to a justice of peace is most usual and safe, because a gaoler will expect a *Mittimus* for his warrant of detaining."

1 M. Hale, *supra*, at 589-590.

<sup>15</sup> The examination of the prisoner was inquisitorial, and the witnesses were questioned outside the prisoner's presence. Although



The initial determination of probable cause also could be reviewed by higher courts on a writ of habeas corpus. 2 W. Hawkins, *supra*, at 112-115; 1 J. Stephen, *supra*, at 243; see *Ex parte Bollman*, 8 U. S. (4 Cranch) 75, 97-101 (1807). This practice furnished the model for criminal procedure in America immediately following the adoption of the Fourth Amendment, see *Ex parte Bollman*, 8 U. S. (4 Cranch) 75 (1807); <sup>16</sup> *Ex parte Burford*, 7 U. S. (3 Cranch) 448 (1806); *United States v. Hamilton*, 3 U. S. (3 Dall.) 17 (1795), and there are indications that the Framers of the Bill of Rights regarded it as a model for a "reasonable" seizure. See *Draper v. United States*, 358 U.S. 307, 317-320 (1959) (DOUGLAS, J., concurring).<sup>17</sup>

this method of proceeding was considered quite harsh, 1 J. Stephen, at 219-225, it was well established that the prisoner was entitled to be discharged if the investigation turned up insufficient evidence of his guilt. *Id.*, at 233.

<sup>16</sup> In *Ex parte Bollman*, two men charged in the Aaron Burr case were committed following an examination in the circuit court of the District of Columbia. They filed a petition for writ of habeas corpus in the Supreme Court. The Court, in an opinion by Chief Justice Marshall, affirmed its jurisdiction to issue habeas corpus to persons in custody by order of federal trial courts. Then, following arguments on the Fourth Amendment requirement of probable cause, the Court surveyed the evidence against the prisoners and held that it did not establish probable cause that they were guilty of treason. The prisoners were discharged.

<sup>17</sup> See also N. Lason, *The History and Development of the Fourth Amendment to the United States Constitution* 15-16 (1937). A similar procedure at common law, the warrant for recovery of stolen goods, is said to have furnished the model for a "reasonable" search under the Fourth Amendment. The victim was required to appear before a justice of the peace and make an oath of probable cause that his goods could be found in a particular place. After the warrant was executed, and the goods seized, the victim and the alleged thief would appear before the justice of the peace for a prompt determination of the cause for seizure of the goods and detention of the thief. 2 M. Hale, *supra*, at 149-152; T. Taylor,



## B

Under the Florida procedures challenged here, a person arrested without a warrant and charged by information may be jailed or subjected to other restraints pending trial without any opportunity for a probable cause determination.<sup>13</sup> Petitioner defends this practice on the ground that the prosecutor's decision to file an information is itself a determination of probable cause that furnishes sufficient reason to detain a defendant pending trial. Although a conscientious decision that the evidence warrants prosecution affords a measure of protection against unfounded detention, we do not think prosecutorial judgment standing alone meets the requirements of the Fourth Amendment. Indeed, we think the Court's previous decisions compel disapproval of the Florida procedure. In *Albrecht v. United States*, 273 U. S. 1, 5 (1927), the Court held that an arrest warrant issued solely upon a United States Attorney's information was invalid because the accompanying affidavits were defective. Although the Court's opinion did not explicitly state that the prosecutor's official oath could not furnish probable cause, that conclusion was implicit in the judgment that the arrest was illegal under the Fourth Amendment.<sup>14</sup> More recently, in *Coolidge v. New Hampshire*,

Two Studies in Constitutional Interpretation 24-25, 39-40 (1969); see *Boyd v. United States*, 116 U. S. 616, 626-629 (1886).

<sup>13</sup> A person arrested under a warrant would have received a prior judicial determination of probable cause. Under Fla. Rule Crim. Proc. 3.120, a warrant may be issued upon a sworn complaint that states facts showing that the suspect has committed a crime. The magistrate may also take testimony under oath to determine if there is reasonable ground to believe the complaint is true.

<sup>14</sup> By contrast, the Court has held that an indictment, "fair upon its face," and returned by a "properly constituted grand jury" conclusively determines the existence of probable cause and requires issuance of an arrest warrant without further inquiry. *Ex parte*



403 U. S. 443, 449-453 (1971), the Court held that a prosecutor's responsibility to law enforcement is inconsistent with the constitutional role of a neutral and detached magistrate. We reaffirmed that principle in *Shadwick v. City of Tampa*, 407 U. S. 345 (1972), and held that probable cause for the issuance of an arrest warrant must be determined by someone independent of police and prosecution. See also *United States v. United States District Court*, 407 U. S. 297, 317 (1972).<sup>20</sup> The reason for this separation of functions was expressed by Justice Frankfurter in a similar context:

"A democratic society, in which respect for the dignity of all men is central, naturally guards against the misuse of the law enforcement process. Zeal in tracking down crime is not in itself an assurance of soberness of judgment. Disinterestedness in law enforcement does not alone prevent disregard of cherished liberties. Experience has therefore counseled

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*United States*, 287 U. S. 241, 250 (1932). See also *Giordenello v. United States*, 357 U. S. 480, 487 (1958). The willingness to let a grand jury's judgment substitute for that of a neutral and detached magistrate is attributable to the grand jury's relationship to the courts and its historical role of protecting individuals from unjust prosecution. See *United States v. Calandra*, 414 U. S. 338, 342-346 (1974).

<sup>20</sup> The Court had earlier reached a different result in *Ocampo v. United States*, 234 U. S. 91 (1914), a criminal appeal from the Philippine Islands. Interpreting a statutory guarantee substantially identical to the Fourth Amendment, Act of July 1, 1902, c. 1369, § 5, 32 Stat. 693, the Court held that an arrest warrant could issue solely upon a prosecutor's information. The Court has since held that interpretation of a statutory guarantee applicable to the Philippines is not conclusive for interpretation of a cognate provision in the Federal Constitution, *Green v. United States*, 355 U. S. 184, 194-198 (1957). Even if it were, the result reached in *Ocampo* is incompatible with the later holdings of *Albrecht*, *Coolidge*, and *Shadwick*.



that safeguards must be provided against the dangers of the overzealous as well as the despotic. The awful instruments of the criminal law cannot be entrusted to a single functionary. The complicated process of criminal justice is therefore divided into different parts, responsibility for which is separately vested in the various participants upon whom the criminal law relies for its vindication." *McNabb v. United States*, 318 U. S. 332, 343 (1943).

In holding that the prosecutor's assessment of probable cause is not sufficient alone to justify restraint on liberty pending trial, we do not imply that the accused is entitled to judicial oversight or review of the decision to prosecute. Instead, we adhere to the Court's prior holding that a judicial hearing is not prerequisite to prosecution by information. *Beck v. Washington*, 369 U. S. 541, 545 (1962); *Lem Woon v. Oregon*, 229 U. S. 586 (1913). Nor do we retreat from the established rule that illegal arrest or detention does not void a subsequent conviction. *Frisbie v. Collins*, 342 U. S. 519 (1952); *Ker v. Illinois*, 119 U. S. 436 (1886). Thus, as the Court of Appeals noted below, although a suspect who is presently detained may challenge the probable cause for that confinement, a conviction will not be vacated on the ground that the defendant was detained pending trial without a determination of probable cause. 483 F. 2d, at 786-787. Compare *Scarborough v. Dutton*, 393 F. 2d 6 (CA5 1968), with *Brown v. Fauntleroy*, — U. S. App. D. C. —, 442 F. 2d 838 (1971), and *Cooley v. Stone*, — U. S. App. D. C. —, 414 F. 2d 1213 (1969).

### III

Both the District Court and the Court of Appeals held that the determination of probable cause must be accompanied by the full panoply of adversary safe-



guards—counsel, confrontation, cross-examination, and compulsory process for witnesses. A full preliminary hearing of this sort is modeled after the procedure used in many States to determine whether the evidence justifies going to trial under an information or presenting the case to a grand jury. See *Coleman v. Alabama*, 399 U. S. 1 (1970); Y. Kamisar, W. LaFare & J. Israel, *Modern Criminal Procedure* 957-967, 996-1000 (4th ed. 1974). The standard of proof required of the prosecution is usually referred to as "probable cause," but in some jurisdictions it may approach a *prima facie* case of guilt. A. L. I. Model Code of Pre-arraignment Procedure, Commentary on Article 330, at 90-91 (Tent. Draft No. 5, 1972). When the hearing takes this form, adversary procedures are customarily employed. The importance of the issue to both the State and the accused justifies the presentation of witnesses and full exploration of their testimony on cross-examination. This kind of hearing also requires appointment of counsel for indigent defendants. *Coleman v. Alabama*, *supra*. And, as the hearing assumes increased importance and the procedures become more complex, the likelihood that it can be held promptly after arrest diminishes. See A. L. I. Model Code of Pre-arraignment Procedure, *supra*, at 33-34.

These adversary safeguards are not essential for the probable cause determination required by the Fourth Amendment. The sole issue is whether there is probable cause for detaining the arrested person pending further proceedings. This issue can be determined reliably without an adversary hearing. The standard is the same as that for arrest.<sup>21</sup> That standard—probable cause to

<sup>21</sup> Because the standards are identical, ordinarily there is no need for further investigation before the probable cause determination can be made.

"Presumably, whomever the police arrest they must arrest on 'probable cause.' It is not the function of the police to arrest, as it were,



believe the suspect has committed a crime—traditionally has been decided by a magistrate in a nonadversary proceeding on hearsay and written testimony, and the Court has approved these informal modes of proof.

"Guilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined to that which long experience in the common-law tradition, to some extent embodied in the Constitution, has crystallized into rules of evidence consistent with that standard. These rules are historically grounded rights of our system, developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property.

"In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved." *Brinegar v. United States*, 338 U. S. 160, 174-175 (1949).

*Cf. McCray v. Illinois*, 386 U. S. 300 (1967).

The use of an informal procedure is justified not only by the lesser consequences of a probable cause determination but also by the nature of the determination itself. It does not require the fine resolution of conflicting evidence that a reasonable-doubt or even a preponderance standard demands, and credibility determinations are seldom crucial in deciding whether the evidence supports a reasonable belief in guilt. See F. Miller, Prosecu-

at large and to use an interrogating process at police headquarters in order to determine whom they should charge before a committing magistrate on 'probable cause.'" *Mallory v. United States*, 354 U. S. 449, 456 (1957).



tion: The Decision to Charge a Suspect with a Crime 64-109 (1969).<sup>22</sup> This is not to say that confrontation and cross-examination might not enhance the reliability of probable cause determinations in some cases. In most cases, however, their value would be too slight to justify holding, as a matter of constitutional principle, that these formalities and safeguards designed for trial must also be employed in making the Fourth Amendment determination of probable cause.<sup>23</sup>

Because of its limited function and its nonadversary character, the probable cause determination is not a "critical stage" in the prosecution that would require

<sup>22</sup> In *Morrissey v. Brewer*, 408 U. S. 471 (1972), and *Gagnon v. Scarpelli*, 411 U. S. 778 (1973), we held that a parolee or probationer arrested prior to revocation is entitled to an informal preliminary hearing at the place of arrest, with some provision for live testimony. 408 U. S., at 487; 411 U. S., at 786. That preliminary hearing, more than the probable cause determination required by the Fourth Amendment, serves the purpose of gathering and preserving live testimony, since the final revocation hearing frequently is held at some distance from the place where the violation occurred. 408 U. S., at 485; 411 U. S., at 782-783 n. 5. Moreover, revocation proceedings may offer less protection from initial error than the more formal criminal process, where violations are defined by statute and the prosecutor has a professional duty not to charge a suspect with crime unless he is satisfied of probable cause. See ABA Code of Professional Responsibility, DR 7-103 (A) (a prosecutor "shall not institute or cause to be instituted criminal charges when he knows or it is obvious that the charges are not supported by probable cause"); ABA Standards Relating to the Administration of Criminal Justice, The Prosecution Function, §§ 1.1, 3.4, 3.9 (1974); American College of Trial Lawyers, Code of Trial Conduct, rule 4 (c) (1972).

<sup>23</sup> Criminal justice is already overburdened by the volume of cases and the complexities of our system. The processing of misdemeanors, in particular, and the early stages of prosecution generally are marked by delays that can seriously affect the quality of justice. A constitutional doctrine requiring adversary hearings for all persons detained pending trial could exacerbate the problem of pretrial delay.



appointed counsel. The Court has identified as "critical stages" those pretrial procedures that would impair defense on the merits if the accused is required to proceed without counsel. *Coleman v. Alabama*, 399 U. S. 1 (1970); *United States v. Wade*, 388 U. S. 218, 226-227 (1967). In *Coleman v. Alabama*, where the Court held that a preliminary hearing was a critical stage of an Alabama prosecution, the majority and concurring opinions identified two critical factors that distinguish the Alabama preliminary hearing from the probable cause determination required by the Fourth Amendment. First, under Alabama law the function of the preliminary hearing was to determine whether the evidence justified charging the suspect with an offense. A finding of no probable cause could mean that he would not be tried at all. The Fourth Amendment probable cause determination is addressed only to pretrial custody. To be sure, pretrial custody may affect to some extent the defendant's ability to assist in preparation of his defense, but this does not present the high probability of substantial harm identified as controlling in *Wade* and *Coleman*. Second, Alabama allowed the suspect to confront and cross-examine prosecution witnesses at the preliminary hearing. The Court noted that the suspect's defense on the merits could be compromised if he had no legal assistance for exploring or preserving the witnesses' testimony. This consideration does not apply when the prosecution is not required to produce witnesses for cross-examination.

Although we conclude that the Constitution does not require an adversary determination of probable cause, we recognize that state systems of criminal procedure vary widely. There is no single preferred pretrial procedure, and the nature of the probable cause determination usually will be shaped to accord with a State's pretrial procedure viewed as a whole. While we limit our hold-



ing to the precise requirement of the Fourth Amendment, we recognize the desirability of flexibility and experimentation by the States. It may be found desirable, for example, to make the probable cause determination at the suspect's first appearance before a judicial officer,<sup>24</sup> see *McNabb v. United States*, 318 U. S. 332, 342-344 (1943), or the determination may be incorporated into the procedure for setting bail or fixing other conditions of pretrial release. In some States, existing procedures may satisfy the requirement of the Fourth Amendment. Others may require only minor adjustment, such as acceleration of existing preliminary hearings. Current proposals for criminal procedure reform suggest other ways of testing probable cause for detention.<sup>25</sup> Whatever

<sup>24</sup> Several States already authorize a determination of probable cause at this stage or immediately thereafter. See Colo. Rev. Stat. § 39-2-3 (1965 Supp.); Hawaii Rev. Stat. § 708-9 (5) (1968); Vt. Rules Crim. Proc. 3 (b), 5 (c) (1974). This Court has interpreted the Federal Rules of Criminal Procedure to require a determination of probable cause at the first appearance. *Jaben v. United States*, 381 U. S. 214, 218 (1965); *Mallory v. United States*, 354 U. S. 449, 454 (1957).

<sup>25</sup> Under the Uniform Rules of Criminal Procedure (Proposed Final Draft 1974), a person arrested without a warrant is entitled, "without unnecessary delay," to a first appearance before a magistrate and a determination that grounds exist for issuance of an arrest warrant. The determination may be made on affidavits or testimony, in the presence of the accused. Rule 311. Persons who remain in custody for inability to qualify for pretrial release are offered another opportunity for a probable cause determination at the detention hearing, held no more than five days after arrest. This is an adversary hearing, and the parties may summon witnesses, but reliable hearsay evidence may be considered. Rule 344.

The A. L. I. Model Code of Pre-arraignment Procedure (Tent. Draft No. 5, 1972, and Tent. Draft No. 5A, 1973) also provides a first appearance, at which a warrantless arrest must be supported by a reasonably detailed written statement of facts. § 310. The magistrate may make a determination of probable cause to hold the



procedure a State may adopt, it must provide a fair and reliable determination of probable cause as a condition for any significant pretrial restraint on liberty,<sup>26</sup> and this determination must be made by a judicial officer either before or promptly after arrest.<sup>27</sup>

accused, but he is not required to do so and the accused may request an attorney for an "adjourned session" of the first appearance to be held within 2 "court days." At that session, the magistrate makes a determination of probable cause upon a combination of written and live testimony:

"The arrested person may present written and testimonial evidence and arguments for his discharge and the state may present additional written and testimonial evidence and arguments that there is reasonable cause to believe that he has committed the crime of which he is accused. The state's submission may be made by means of affidavits, and no witnesses shall be required to appear unless the court, in the light of the evidence and arguments submitted by the parties, determines that there is a basis for believing that the appearance of one or more witnesses for whom the arrested person seeks subpoenas might lead to a finding that there is no reasonable cause." § 310.2 (2) (Tent. Draft No. 5A, 1973).

<sup>26</sup> Because the probable cause determination is not a constitutional prerequisite to the charging decision, it is required only for those suspects who suffer restraints on liberty other than the condition that they appear for trial. There are many kinds of pretrial release and many degrees of conditional liberty. See 18 U. S. C. § 3146; ABA Standards Relating to the Administration of Criminal Justice, Pretrial Release § 5.2 (1974); Uniform Rules of Criminal Procedure, Rule 341 (Proposed Final Draft 1974). We cannot define specifically those that would require a prior probable cause determination, but the key factor is significant restraint on liberty.

<sup>27</sup> In his concurring opinion, Mr. Justice STEWART objects to the Court's choice of the Fourth Amendment as the rationale for decision and suggests that the Court offers less procedural protection to a person in jail than it requires in certain civil cases. Here we deal with the complex procedures of a criminal case and a threshold right guaranteed by the Fourth Amendment. The historical basis of the probable cause requirement is quite different from the relatively recent application of variable procedural due process in debtor-creditor disputes and termination of government-



## IV

We agree with the Court of Appeals that the Fourth Amendment requires a timely judicial determination of probable cause as a prerequisite to detention, and we accordingly affirm that much of the judgment. As we do not agree that the Fourth Amendment requires the adversary hearing outlined in the District Court's decree, we reverse in part and remand to the Court of Appeals for further proceedings consistent with this opinion.

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created benefits. The Fourth Amendment was tailored explicitly for the criminal justice system, and its balance between individual and public interests always has been thought to define the "process that is due" for seizures of person or property in criminal cases, including the detention of suspects pending trial. Part II-A, *ante*. Moreover, the Fourth Amendment probable cause determination is in fact only the *first* stage of an elaborate system, unique in jurisprudence, designed to safeguard the rights of those accused of criminal conduct. The relatively simple civil procedures (*e. g.*, prior interview with school principal before suspension) presented in the cases cited in the concurring opinion are inapposite and irrelevant in the wholly different context of the criminal justice system.

It would not be practicable to follow the further suggestion implicit in Mr. Justice STEWART's concurring opinion that we leave for another day determination of the procedural safeguards that are required in making a probable cause determination under the Fourth Amendment. The judgment under review both declares the right not to be detained without a probable cause determination and affirms the District Court's order prescribing an adversary hearing for the implementation of that right. The circumstances of the case thus require a decision on both issues.