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Gerstein v. Pugh, 420 U.S. 103 (1975); In re Florida Rules of Criminal Procedure, 309 So. 2d 544 (Fla. 1975)

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Criminal Procedure—PRELIMINARY HEARINGS—NONADVERSARY JUDICIAL DETERMINATION OF PROBABLE CAUSE TO DETAIN IS PREREQUISITE TO EXTENDED RESTRAINT OF LIBERTY FOLLOWING ARREST.—*Gerstein v. Pugh*, 420 U.S. 103 (1975); *In re Florida Rules of Criminal Procedure*, 309 So. 2d 544 (Fla. 1975).

In March 1971 Robert Pugh and Nathaniel Henderson were arrested and subsequently charged by information. Both were held for trial in the Metropolitan Dade County, Florida, Jail.[1] Pugh was denied bail and Henderson was unable to post a $4,500 bond.[2] Neither was given a judicial hearing on the issue of probable cause.[3] They filed a class action in federal court against Dade County officials. Plaintiffs asserted a constitutional right to a probable cause hearing as a prerequisite to extended restraint of liberty following arrest. The United States District Court for the Southern District of Florida held that in direct information cases the fourth and fourteenth amendments mandate a preliminary hearing on the question of probable cause, and ordered that such a hearing be given immediately to the plaintiffs.[4]

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1. Gerstein v. Pugh, 420 U.S. 103, 105 n.1, (1975). Pugh was charged with robbery, carrying a concealed weapon, and possession of a firearm during the commission of a felony. Henderson was charged with breaking and entering, and assault and battery. *Id.*

2. *Id.* at 105. Pugh could be denied bail because he was charged with robbery, a crime punishable by life imprisonment. FLA. CONST. art. I, § 14 states:

> Until adjudged guilty, every person charged with a crime or violation of municipal or county ordinance shall be entitled to release on reasonable bail with sufficient surety unless charged with a capital offense or an offense punishable by life imprisonment and the proof of guilt is evident or the presumption is great.

3. The Florida Supreme Court had consistently held that a preliminary hearing to determine if probable cause exists to hold an accused for trial was not a prerequisite to a criminal prosecution or to the filing of an indictment or information. *See* State *ex rel.* Hardy v. Blount, 261 So. 2d 172 (Fla. 1972); Baugus v. State, 141 So. 2d 264 (Fla.), *cert. denied*, 371 U.S. 879 (1962).

4. Pugh v. Rainwater, 332 F. Supp. 1107, 1115 (S.D. Fla. 1971). The district court also ordered the defendants to submit a plan providing for preliminary hearings before a judicial officer empowered to act as committing magistrate in all direct information cases. *Id.* at 1116. Subsequently a plan was submitted to the district court. It was adopted with certain modifications. Pugh v. Rainwater, 336 F. Supp. 490 (S.D. Fla. 1972). In March 1972 the Court of Appeals for the Fifth Circuit stayed the district court's order pending appeal, but in the meantime the Dade County judiciary voluntarily adopted a procedure similar to that ordered by the district court. The court of appeals remanded the case to the district court for specific findings concerning the Dade County plan. The Florida Supreme Court, however, had in the meantime amended the 1967 version of the Florida Rules of Criminal Procedure concerning preliminary hearings. *In re* Florida Rules of Criminal Procedure, 272 So. 2d 65 (Fla. 1972). (The Florida Rules of Criminal Procedure were initially adopted in 1967, *In re* Florida Rules of Criminal Procedure, 196 So. 2d 124 (Fla. 1967), and became effective on January 1, 1968.) The parties agreed that the district court should focus on the 1972 rules rather than the Dade County plan. The district court found the 1972 rules constitutionally

The Court of Appeals for the Fifth Circuit affirmed.[5] The United States Supreme Court granted certiorari[6] and in *Gerstein v. Pugh*[7] held that the fourth amendment makes a judicial determination of probable cause to detain a prerequisite to extended restraint of liberty following arrest,[8] but that such a determination can be reliably made without an adversary hearing.[9]

Prior to *Gerstein*, a Florida criminal defendant charged by a prosecutor's information did not have a right to a preliminary hearing on the issue of probable cause.[10] The rationale was that "[w]hen a prosecuting attorney files an information against a defendant, he conclusively determines that the evidence is adequate to establish probable cause to put the defendant on trial."[11]

Mr. Justice Powell, writing for a unanimous[12] Court on the issue of probable cause determinations, stated that "[b]oth the standards and procedures for *arrest* and *detention* have been derived from the Fourth Amendment and its common-law antecedents."[13] He found the probable cause standard for arrest "a necessary accommodation between the individual's right to liberty and the State's duty to control crime."[14] Powell noted that "[t]o 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."[15] Because

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infirm in the critical area of probable cause hearings for persons charged by an information. Pugh v. Rainwater, 355 F. Supp. 1286 (S.D. Fla. 1973).

5. Pugh v. Rainwater, 483 F.2d 778 (5th Cir. 1973).

6. Gerstein v. Pugh, 414 U.S. 1062 (1973).

7. 420 U.S. 103 (1975). Gerstein was the only defendant to petition for certiorari. *Id.* at 107 n.8.

8. *Id.* at 114.

9. *Id.* at 123.

10. The 1972 version of rule 3.131(a) stated in part: "A defendant, unless charged in an information or indictment, has the right to a preliminary hearing on any felony charge against him." FLA. R. CRIM. P. 3.131(a), 272 So. 2d 65, 84 (Fla. 1972).

11. State *ex rel.* Hardy v. Blount, 261 So. 2d 172, 174 (Fla. 1972). *See* note 3 *supra.*

12. Justice Stewart, in an opinion joined by Justices Douglas, Brennan, and Marshall, agreed that the Florida procedures at issue were constitutionally inadequate. He objected, however, to portions of the Court's opinion specifying those procedures for determining probable cause that are not mandated by the Constitution. 420 U.S. at 126-27. *See* note 27 *infra.*

13. 420 U.S. at 111 (emphasis added).

14. *Id.* at 112.

15. *Id.* Powell quoted Johnson v. United States, 333 U.S. 10, 13-14 (1948), as the "classic statement of this principle":

> 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

"[t]he consequences of prolonged detention may be more serious than the interference occasioned by arrest,"[16] Powell concluded that "the detached judgment of a neutral magistrate is essential if the Fourth Amendment is to furnish meaningful protection from unfounded interference with liberty."[17]

Looking at the 1972 Florida preliminary hearing procedure, the Court found that a prosecutorial judgment of probable cause to detain did not meet the requirements of the fourth amendment.[18] In calling for a judicial determination of probable cause, however, the Court did not specifically state who would be considered a judicial officer.[19]

The 1972 rules mandated preliminary hearings only for persons charged with felonies.[20] The trial and appellate courts found the exclusion of misdemeanants to be a denial of equal protection.[21] The Supreme Court did not specifically mention the plight of misdemean-

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judged by the officer engaged in the often competitive enterprise of ferreting out crime.

420 U.S. at 112-13.

16. 420 U.S. at 114. The Court noted that "[p]retrial confinement may imperil the suspect's job, interrupt his source of income, and impair his family relationships." *Id.*

17. *Id.*

18. *Id.* at 117. Powell stated that "[i]n *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." *Id.* In dicta the *Albrecht* Court stated:

> The information was filed by leave of court. Despite some practice and statements to the contrary, it may be accepted as settled, that leave must be obtained; and that before granting leave, the court must, in some way, satisfy itself that there is probable cause for the prosecution.

273 U.S. at 5 (footnote omitted). *See* Coolidge v. New Hampshire, 403 U.S. 443 (1971), where the Court found that a probable cause determination made by the Attorney General of New Hampshire was not equivalent to that of a neutral and detached magistrate, since the Attorney General was actively in charge of the murder investigation and later was to be the chief prosecutor at the trial. *Id.* at 450. *See also* note 19 *infra.*

19. One commentator has argued that the *Gerstein* Court impliedly overruled Shadwick v. City of Tampa, 407 U.S. 345 (1972), which held that a municipal court clerk's issuance of arrest warrants for breach of municipal ordinances satisfied the fourth amendment requirement that warrants be issued by a neutral and detached magistrate capable of determining whether probable cause exists for issuance of the warrant. *See* Rogow, *Gerstein v. Pugh—The Supreme Court Speaks,* 49 FLA. B.J. 205 (1975). (Rogow represented the respondents in *Gerstein.*) But the *Gerstein* Court cited *Shadwick* in support of its argument that a prosecutor's law enforcement responsibilities are inconsistent with the constitutional role of a neutral and detached magistrate. 420 U.S. at 117-18.

20. *See* note 10 *supra.*

21. Pugh v. Rainwater, 483 F.2d 778, 788 (5th Cir. 1973); Pugh v. Rainwater, 355 F. Supp. 1286, 1289 (S.D. Fla. 1973). The district court, however, held that misdemeanants accused of violations that entailed no possibility of imprisonment could be denied a preliminary hearing. 335 F. Supp. at 1290. The court of appeals held that such hearings could be denied misdemeanants who were either out on bond or who were charged with violating ordinances carrying no possibility of pretrial incarceration. 483 F.2d at 789.

ants, but its holding clearly implied that *any* person held in custody on a prosecutor's information must receive a judicial determination of probable cause as a prerequisite to extended restraint of liberty.[22]

In addition, the 1972 rules set specific time limits within which preliminary hearings were to be held.[23] The district court and the court of appeals held that different time limits for different offenses violated the equal protection clause.[24] The Supreme Court did not clearly respond to this issue.[25]

Prior to *Gerstein,* Florida's preliminary hearing rule provided for an adversary proceeding.[26] In reversing the Fifth Circuit and holding that the probable cause issue could be reliably determined without an adversary hearing,[27] the Court distinguished the probable cause proceeding required by the fourth amendment from a proceeding where the standard of proof required of the prosecution approaches a prima facie case of guilt.[28] In the latter type of proceeding, the Court indicated, adversary safeguards are necessary.[29] The Court noted that

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22. 420 U.S. at 114. Once it had determined that the fourth amendment required a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest, there was no reason for the Court to make a distinction based on the type of offense committed.

23. FLA. R. CRIM. P. 3.131(b), *as amended,* 289 So. 2d 3, 4 (Fla. 1974), provided *inter alia*:

> In all cases where the defendant is in custody, except capital offenses or offenses punishable by life imprisonment, the preliminary hearing shall be held within 96 hours from the time of the defendant's first appearance. In all capital offenses and offenses punishable by life imprisonment, the preliminary hearing shall be held within seven days of the time of the defendant's first appearance.

24. Pugh v. Rainwater, 483 F.2d 778, 790 (5th Cir. 1973); Pugh v. Rainwater, 355 F. Supp. 1286, 1292 (S.D. Fla. 1973).

25. The Court recognized that each state should be free to experiment in the area of probable cause determinations. 420 U.S. at 123. The Court stated that "[w]hatever procedure a State may adopt, it must provide a fair and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty, and this determination must be made by a judicial officer either before or promptly after arrest." 420 U.S. at 124-25 (footnotes omitted). The Court did not make clear whether a state could continue to set time limits based on different offenses so long as the probable cause determination was made either before or promptly after arrest.

26. Rule 3.131(a)(2) provided for the right to counsel; rule 3.131(d) provided for summoning witnesses; rule 3:131(f) provided for the examination of witnesses by the defendant; rule 3.131(g) provided for the exclusion of witnesses at the defendant's request; and rule 3.131(h) provided for a record of the proceedings. 272 So. 2d at 84-85.

27. 420 U.S. at 126. Justice Stewart, filing a concurring opinion in which Justices Douglas, Brennan, and Marshall joined, found it unnecessary to "attempt to specify those procedural protections that constitutionally need *not* be accorded incarcerated suspects awaiting trial." *Id.* He was unwilling to join the majority's effort to "foreclose any claim that the traditional requirements of constitutional due process are applicable in the context of pretrial detention." *Id.* at 127.

28. 420 U.S. at 119-20.

29. *Id.*

"as the hearing assumes increased importance and the procedures become more complex, the likelihood that it can be held promptly after arrest diminishes."[30]

In discussing the nature of the probable cause determination, the Court stated:

> 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. 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.
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> 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.[31]

The Court was careful to point out that while adversary safeguards were not constitutionally mandated, they were not prohibited.[32] Additionally, the Court stated that the probable cause determination was not a critical stage in the prosecution that would require appointed counsel.[33]

The *Gerstein* Court had effectively declared Florida's preliminary hearing rule unconstitutional. The Florida Supreme Court, acting

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30. *Id.* at 120.

31. *Id.* at 120-21 (footnote omitted).

32. *Id.* at 121-22. The Court recognized the impracticality of *requiring* adversary hearings for pretrial detainees:

> 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.

420 U.S. at 122 n.23.

33. 420 U.S. at 122. In Coleman v. Alabama, 399 U.S. 1 (1970), the Court held that Alabama's preliminary hearing procedure was a critical stage in the prosecution. Therefore counsel was required. In *Gerstein*, the Court distinguished *Coleman* by noting that "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." 420 U.S. at 123.

under its constitutional power to prescribe rules of practice and procedure,[34] filed amendments to the Florida Rules of Criminal Procedure to meet the requirements of *Gerstein*.[35] Florida's 1972 preliminary hearing rule was completely rewritten. The new rule, entitled "Pretrial Probable Cause Determinations and Adversary Preliminary Hearings,"[36] consists of two sections. The first provides for a nonadversary probable cause determination, and is the Florida Supreme Court's answer to *Gerstein*; the second provides for an adversary preliminary hearing, and seems to go beyond the mandate of *Gerstein*.

Paragraph (a)(1)[37] of the new rule relates to defendants in custody, the subject of concern in *Gerstein*. The rule provides that *all* persons in custody must receive a nonadversary probable cause determination before a magistrate within 72 hours of arrest, unless the determination is continued for up to 24 hours by the magistrate "for good cause." This proceeding, however, is not required when a probable cause determination has been previously made by a magistrate and an arrest warrant has been issued for the specific offense with which the defendant is charged.[38] The rule also provides that the probable cause determina-

34. FLA. CONST. art. V, § 2(a).

35. *In re* Florida Rules of Criminal Procedure, 309 So. 2d 544 (Fla. 1975). The amendments consist of a complete rewrite of the preliminary hearing rule (rule 3.131) as well as minor amendments to rules concerning computation of time (rule 3.040) and indictments and informations (rule 3.140). The court stated that the rules were temporary in nature since they were promulgated under emergency conditions. *Id.* The amended rules became effective on March 31, 1975. *Id.*

36. *Id.*

37. FLA. R. CRIM. P. 3.131(a)(1) states:

> In all cases where the defendant is in custody, a nonadversary probable cause determination shall be held before a magistrate within 72 hours from the time of the defendant's arrest; provided, however, that this proceeding shall not be required when a probable cause determination has been previously made by a magistrate and an arrest warrant issued for the specific offense for which the defendant is charged. The magistrate for good cause may continue the proceeding for not more than 24 hours beyond the above 72-hour period. This determination shall be made if the necessary proof is available at the time of the first appearance as required under Rule 3.130, but the holding of this determination at said time shall not affect the fact that it is a nonadversary proceeding.

38. Nonadversary probable cause determinations are required for persons arrested and held pursuant to a grand jury indictment. *See* note 37 *supra*; *cf.* notes 46-48 and accompanying text *infra*. The *Gerstein* Court pointed out, however, that a grand jury indictment conclusively determines probable cause:

> 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. . . . 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.

420 U.S. at 117 n.19 (citations omitted).

tion *shall* be made at first appearance if the necessary proof is available.[39]

Paragraph (a)(1) effectively responds to the mandate of *Gerstein*: the probable cause determination is now made by a magistrate rather than a prosecuting attorney, and the filing of an information no longer bars a probable cause proceeding. In addition, the probable cause determination is a nonadversary proceeding. The new rule makes no distinction between misdemeanants and felony offenders.[40]

In *Gerstein,* the Court noted that "pretrial release may be accompanied by burdensome conditions that effect a significant restraint of liberty,"[41] and indicated that a probable cause determination should be accorded persons released under those circumstances.[42] The Florida Supreme Court responded to this concern by providing, in paragraph (a)(2) of the new rule, that persons released on bail or recognizance prior to a probable cause determination may file a written motion for a nonadversary probable cause determination if they can establish that the pretrial release conditions are a significant restraint on their liberty.[43]

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39. In Florida, first appearance must be held within 24 hours of arrest. FLA. R. CRIM. P. 3.130(b)(1). Therefore, the probable cause determination *must* be made within 24 hours if the necessary proof is available. It is conceivable that such a determination could be made very shortly after arrest, since the standard for probable cause to detain is the same as that for an arrest. *See* text accompanying note 31 *supra.* One commentator has argued that the first appearance probable cause determination should be made "within a few hours after arrest." Rogow, *Gerstein v. Pugh—The Supreme Court Speaks,* 49 FLA. B.J. 205, 206 (1975). Rogow implies that a first appearance probable cause determination would be too late if made 24 hours after arrest. *Id.* at 205. He feels "that even the bail decision should be preceded by a probable cause determination." *Id.* The new rules had not been published when Rogow's article went to press.

40. *See* note 22 and accompanying text *supra.*

41. 420 U.S. at 114.

42. *Id.*

43. FLA. R. CRIM. P. 3.131(a)(2) states:

> A defendant who has been released from custody before a probable cause determination is made and who is able to establish that his pretrial release conditions are a significant restraint on his liberty may file a written motion for a nonadversary probable cause determination setting forth with specificity the items of significant restraint that a finding of no probable cause would eliminate. The motion shall be filed within 21 days from the date of arrest, and notice shall be given to the State. The magistrate shall, if he finds significant restraints on the defendant's liberty, make a probable cause determination within 7 days from the filing of the motion.

In Florida, conditions of pretrial release include release on bond or release on personal recognizance. FLA. R. CRIM. P. 3.130(b)(4). In the federal system, pretrial release in noncapital cases is governed by the Bail Reform Act of 1966, 18 U.S.C. § 3146 (1970), which permits a judicial officer to impose certain conditions of release to assure the appearance of the person for trial. Section 3146(a) states:

> Any person charged with an offense, other than an offense punishable by death, shall, at his appearance before a judicial officer, be ordered released pending

The standard of proof required at the probable cause proceeding is outlined in paragraph (a)(3).[44] In determining whether there is probable cause to detain the defendant, the magistrate must apply the standard for issuance of an arrest warrant. This provision complies with *Gerstein*.[45]

Paragraph (a)(4)[46] responds to the *Gerstein* Court's concern with

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trial on his personal recognizance or upon the execution of an unsecured appearance bond in an amount specified by the judicial officer, unless the officer determines in the exercise of his discretion, that such a release will not reasonably assure the appearance of the person as required. When such a determination is made, the judicial officer shall, either in lieu of or in addition to the above methods of release, impose the first of the following conditions of release which will reasonably assure the appearance of the person for trial or, if no single condition gives that assurance, any combination of the following conditions:

(1) place the person in the custody of a designated person or organization agreeing to supervise him;

(2) place restrictions on the travel, association, or place of abode of the person during the period of release;

(3) require the execution of an appearance bond in a specified amount and the deposit in the registry of the court, in cash or other security as directed, of a sum not to exceed 10 per centum of the amount of the bond, such deposit to be returned upon the performance of the conditions of release;

(4) require the execution of a bail bond with sufficient solvent sureties, or the deposit of cash in lieu thereof; or

(5) impose any other condition deemed reasonably necessary to assure appearance as required, including a condition requiring that the person return to custody after specified hours.

Pretrial release conditions may be extreme even under the Bail Reform Act. *See* United States v. Melville, 309 F. Supp. 824 (S.D.N.Y. 1970). In *Melville,* the defendant was required on each day to return to a place of detention at 6 p.m. and remain until 9 a.m. of the succeeding morning, he was not permitted to travel outside Manhattan, and he was not permitted even to *enter* railway stations and airports. *Id.* at 826.

44. FLA. R. CRIM. P. 3.131(a)(3) states:

Upon presentation of proof, the magistrate shall determine whether there is probable cause for detaining the arrested person pending further proceedings. The defendant need not be present. In determining probable cause to detain the defendant, the magistrate shall apply the standard for issuance of an arrest warrant, and his finding may be based upon sworn complaint, affidavit, deposition under oath, or, if necessary, upon testimony under oath properly recorded.

45. *See* text accompanying notes 27-31 *supra*. In *Gerstein,* the Court stated that "[t]he 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.' " 420 U.S. at 111 (citation omitted).

46. FLA. R. CRIM. P. 3.131(a)(4) states:

If probable cause is found, the defendant shall be held to answer the charges. If probable cause is not found or the specified time periods are not complied with, the defendant shall be released from custody unless an information or indictment has been filed, in which event the defendant shall be released on his or her own recognizance subject to the condition that he or she appear at all court proceedings, or shall be released under a summons to appear before the appropriate court at a time certain. Such release does not, however, void further prosecution by information or indictment but does prohibit any restraint on liberty other

the unfortunate side effects of pretrial detention.[47] If probable cause is not found or the specified time periods are not observed, the defendant is either to be released from custody, or in the event an information *or indictment* is filed, released on recognizance or under a summons to appear.[48] The rule goes on to state that "[s]uch release does not, however, void further prosecution by information or indictment but does prohibit any restraint on liberty other than appearing for trial."[49] This also accords with *Gerstein*; the Court had indicated that a finding of no probable cause would not bar prosecution by an information.[50]

After providing for nonadversary probable cause determinations, the court went beyond *Gerstein* and provided for adversary preliminary hearings under certain circumstances. Rule 3.131(b) gives those felony suspects not charged in an information or indictment within 21 days from the date of arrest or service of a capias the right to an adversary probable cause proceeding.[51] Therefore, a person arrested without a warrant for the commission of a felony, and held 21 days without being charged, will be eligible for both a nonadversary probable cause determination and an adversary preliminary hearing.

The *Gerstein* Court stated that the standard for the nonadversary probable cause determination was the same as that for arrest—"probable cause to believe the suspect has committed a crime."[52] The standard

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than appearing for trial. A finding that probable cause does or does not exist shall be made in writing, signed by the magistrate, and filed, together with the evidence of such probable cause, with the clerk of the court having jurisdiction of the offense for which the defendant is charged.

47. *See* note 16 and accompanying text *supra.*

48. The *Gerstein* Court stated that a grand jury indictment conclusively determines the existence of probable cause. *See* note 38 *supra.* The Florida Supreme Court, however, has apparently decided that a grand jury indictment is no substitute for a *judicial* determination of probable cause.

49. *See* note 46 *supra.*

50. 420 U.S. at 118-19.

51. FLA. R. CRIM. P. 3.131(b)(1) states:

A defendant who is not charged in an information or indictment within 21 days from the date of his arrest or service of the capias upon him shall have a right to an adversary preliminary hearing on any felony charge then pending against him. The subsequent filing of an information or indictment shall not eliminate a defendant's entitlement to this proceeding.

52. 420 U.S. at 120. This arrest standard is delineated in two Florida statutes. FLA. STAT. § 901.02 (1973) states:

A warrant may be issued for the arrest of the person complained against if the magistrate, from the examination of the complainant and other witnesses, reasonably believes that the person complained against has committed an offense within his jurisdiction.

FLA. STAT. § 901.15 (1973) states in part:

for the adversary preliminary hearing is contained in paragraph (b)(5) of the new rule.[53] A comparison of the language in paragraph (b)(5) with the standards for arrest indicates that an identical standard is utilized in both proceedings. The only distinguishing feature appears to be the increased procedural safeguards available at the adversary preliminary hearing. However, the increased procedural safeguards are somewhat offset by the rule's limited applicability—only persons charged with a felony are eligible for the adversary proceeding. This limitation may result in a denial of equal protection to misdemeants.[54]

In the final analysis, the Florida Supreme Court's amended rules appear to comply with *Gerstein*. The nonadversary probable cause determination should prevent abuses such as those seen in *Gerstein,* and defendants not satisfied with the outcome can now seek review in a higher court on a writ of habeas corpus.[55] But the usefulness of the adversary preliminary hearing remains to be seen. It could prove to be an effective way for a timid prosecutor to shift the decision to prosecute from the executive to the judicial branch in a sensitive case—at the defendant's expense.

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A peace officer may arrest a person without a warrant when:

. . . .

(2) A felony has been committed and he reasonably believes that the person committed it.

(3) He reasonably believes that a felony has been or is being committed and reasonably believes that the person to be arrested has committed or is committing it.

See Pegueno v. State, 85 So. 2d 600, 602 (Fla. 1956); Melton v. State, 75 So. 2d 291, 293-94 (Fla. 1954); FLA. R. CRIM. P. 3.120.

53. FLA. R. CRIM. P. 3.131(b)(5) states in part:

If from the evidence it appears to the magistrate that there is probable cause to believe that an offense has been committed and that the defendant has committed it, the magistrate shall cause the defendant to be held to answer to the circuit court . . . .

54. *See* notes 21-22 and accompanying text *supra.*

55. The *Gerstein* Court recognized that at common law the "initial determination of probable cause . . . could be reviewed by higher courts on a writ of habeas corpus." 420 U.S. at 115. *See* Rogow, *Gerstein v. Pugh—The Supreme Court Speaks,* 49 FLA. B.J. 205 (1975). Prior to *Gerstein,* the Florida Supreme Court had held that the "use of the writ of habeas corpus to test the sufficiency of the evidence upon which a charge may have been based is not sanctioned . . . ." Sullivan v. State *ex rel.* McCrory, 49 So. 2d 794, 797 (Fla. 1951). This rule, however, did not apply "where a person is held solely under process issuing from a committing magistrate." *Id.* The rationale for allowing habeas corpus review of a magistrate's probable cause determination was that "the existence of 'probable cause' is a *sine qua non* to the validity of the magistrate's commitment—it is essential to the magistrate's *jurisdiction* to make the commitment." *Id.* Under the new Florida rule, all determinations of probable cause to detain must be made by a magistrate. Therefore, habeas corpus review will be available under *Sullivan.*