No. _____

In The

Supreme Court of the United States

October Term, 1990

COUNTY OF RIVERSIDE and COIS BYRD, SHERIFF OF RIVERSIDE COUNTY,

Petitioners,

v.

DONALD LEE McLAUGHLIN, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

FERGUSON, PRAET & SHERMAN
PETER J. FERGUSON
333 South Anita, Suite 630
Orange, California 92668

FIDLER & BELL
MICHAEL A. BELL
3666 University Ave., Suite 308
Riverside, California 92501-1665

GREINES, MARTIN, STEIN & RICHLAND
MARTIN STEIN*
TIMOTHY T. COATES
9601 Wilshire Boulevard, Suite 544
Beverly Hills, California 90210
(213) 859-7811

*Counsel of Record

Attorneys for Petitioners County of Riverside and Cois Byrd, Sheriff of Riverside County

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Where a state, pursuant to this Court's invitation in *Gerstein v. Pugh*, 420 U.S. 103, 95 S.Ct. 859 (1975) incorporates probable cause determinations for warrantless arrestees into existing pre-trial procedures such as arraignment that afford the arrestee additional constitutional protections, must the additional time necessary to provide these more extensive proceedings be factored into any determination as to whether the probable cause hearing is sufficiently "prompt" under *Gerstein*?

2. May a state, consistent with the requirements of the Fourth Amendment as interpreted by this Court in *Gerstein v. Pugh*, set a uniform outside period of two days, exclusive of Saturdays, Sundays and holidays, in which to provide warrantless arrestees with probable cause determinations, or must the constitutional "promptness" of probable cause hearings depend upon the circumstances of each case and preclude the setting of any uniform outside time period in which to provide such determinations?

3. Does a plaintiff arrested without a warrant and allegedly held without receiving a constitutionally prompt probable cause determination possess Article III standing for purposes of obtaining an injunction requiring a public entity to provide warrantless arrestees with constitutionally prompt probable cause hearings when (a) the time in which to provide plaintiff with a constitutionally prompt hearing has passed and (b) there is no allegation that the plaintiff will again be subjected to the allegedly unconstitutional practices of the public entity?

LIST OF PARTIES AND RULE 29.4(C) LIST

The parties to the proceeding below were the petitioners County of Riverside and Riverside County Sheriff Cois Byrd and respondents Donald Lee McLaughlin, John E. Jones, Diane Simon, Michael Scott Hyde, Brett Hale, David Keiser, Sharon Sweeney and Lavonne Hinds, on behalf of themselves and as representatives of a similarly situated class.

Because the constitutionality of two provisions of the California Penal Code has been drawn into question in the instant action, 28 U.S.C. section 2403(b) may be applicable in this case, and hence, petitioners have served the Attorney General for the State of California with this petition. Neither any of the parties, nor the lower federal courts in this case have certified to the Attorney General for the State of California the fact that the constitutionality of California statutes has been drawn into question by the instant litigation pursuant to 28 U.S.C. section 2403(b).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

STATUTES

CONSTITUTION

No. _____

In The

Supreme Court of the United States

October Term, 1990

COUNTY OF RIVERSIDE and COIS BYRD,
SHERIFF OF RIVERSIDE COUNTY,

Petitioners,

v.

DONALD LEE McLAUGHLIN, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners County of Riverside and Cois Byrd, Sheriff of Riverside County, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above proceeding on November 8, 1989.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 888 F.2d 1276 and is reprinted in the Appendix hereto, pp. 1-10, *infra.*

The memorandum order of the United States District Court for the Central District of California granting a preliminary injunction in the case has not been reported. It is reprinted in the Appendix hereto, p. 11-13, *infra.*

JURISDICTION

Invoking federal jurisdiction under 42 U.S.C. section 1983, respondents brought suit against petitioners in the United States District Court for the Central District of California. On April 19, 1989, the district court granted the respondents' motion for preliminary injunction. See Appendix hereto, pp. 11-13, *infra.* Petitioners appealed the district court's order to the United States Court of Appeals for the Ninth Circuit, pursuant to 28 U.S.C. section 1292(a)(1).

Petitioners then sought a request for stay of the preliminary injunction in the district court pending resolution of the appeal. The district court declined to grant a stay and petitioners then filed a request for stay of the preliminary injunction pending disposition of the appeal in the Ninth Circuit. On June 20, 1989, the Ninth Circuit granted a stay pending resolution of the appeal and ordered the appeal expedited. See Appendix hereto, p. 14, *infra.*

On November 9, 1989, the Ninth Circuit issued its opinion and judgment affirming the district court's order granting respondents a preliminary injunction. Petitioners timely filed a petition for rehearing and suggestion for rehearing en banc in the Ninth Circuit. The

petition and suggestion for rehearing en banc were denied by the Ninth Circuit on April 10, 1990. See Appendix hereto, p. 15, *infra*. On April 18, 1990, petitioners filed an emergency motion for stay of mandate for 30 days to permit the filing of a petition for certiorari. On April 30, 1990, the Ninth Circuit issued its order granting the emergency motion for stay of mandate for 30 days pending the filing of a petition for writ of certiorari. See Appendix hereto, p. 16, *infra*.

The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. section 1254(1).

STATUTES INVOLVED

California Penal code sections 825 and 991

§ 825. Appearance before magistrate; unnecessary delay; maximum time; right of attorney to visit prisoner; officer refusing to permit visit, offense, forfeiture

The defendant must in all cases be taken before the magistrate without unnecessary delay, and, in any event, within two days after his arrest, excluding Sundays and holidays; provided, however, that when the two days prescribed herein expire at a time when the court in which the magistrate is sitting is not in session, such time shall be extended to include the duration of the next regular court session on the judicial day immediately following.

After such arrest, any attorney at law entitled to practice in the courts of record of California, may, at the request of the prisoner or any relative of such prisoner, visit the person so arrested. Any officer having charge of the prisoner so arrested who willfully refuses or neglects to allow such attorney to visit a prisoner is guilty of a misdemeanor. Any officer having a prisoner in charge, who refuses to allow any attorney to visit the prisoner when proper application is made therefor, shall forfeit and pay to the party aggrieved the sum of five hundred dollars ($500), to be recovered by action in any court of competent jurisdiction.

(Enacted 1872. Amended by Code Am.1880, c. 48, p. 30, § 1; Stats. 1907, c. 484, p. 888, § 1; Stats.1927, c. 616, p. 1044, § 1; Stats.1961, c. 2209, p. 4554, § 1.)

§ 991. Probable cause determination; misdemeanor to which defendant has pleaded not guilty; motion by defendant; setting for trial or dismissal and discharge; refiling complaint

(a) If the defendant is in custody at the time he appears before the magistrate for arraignment and, if the public offense is a misdemeanor to which the defendant has pleaded not guilty, the magistrate, on motion of counsel for the defendant or the defendant, shall determine whether there is probable cause to believe that a public offense has been committed and that the defendant is guilty thereof.

(b) The determination of probable cause shall be made immediately unless the court grants a continuance for good cause not to exceed three court days.

(c) In determining the existence of probable cause, the magistrate shall consider any warrant of arrest with supporting affidavits, and the sworn complaint together with any documents or reports incorporated by reference thereto, which, if based on information and belief, state the basis for such information, or any other documents of similar reliability.

(d) If, after examining these documents, the court determines that there exists probable cause to believe that the defendant has committed the offense charged in the complaint, it shall set the matter for trial. If the court determines that no such probable cause exists, it shall dismiss the complaint and discharge the defendant.

(e) Within 15 days of the dismissal of a complaint pursuant to this section the prosecution may refile the complaint.

A second dismissal pursuant to this section is a bar to any other prosecution for the same offense.

(Added by Stats.1980, c. 1379, p. 5003, § 1.)

Fourth Amendment to the United States Constitution

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

A. The Initial Proceedings

On August 24, 1987, plaintiff Donald Lee McLaughlin filed a Complaint for declaratory and injunctive relief on behalf of himself and "all others similarly situated" in the United States District Court for the Central District of California. Named as defendants were the County of Riverside and Cois Byrd, as Sheriff of the County of Riverside and individually. The Complaint purported to state a claim under 42 U.S.C. section 1983 for violation of civil rights, predicated upon the County of Riverside's alleged failure to provide "prompt probable cause" determinations for arrestees. The Complaint requested "an order and judgment requiring that the defendants and the County of Riverside provide in-custody arrestees, arrested without warrants, prompt probable cause, bail and arraignment hearings." The Complaint asserted that Mr. McLaughlin could properly represent the interest of the class members in that he was currently incarcerated in the Riverside County Jail and had not received a probable cause determination.

On October 13, 1987, plaintiffs moved to certify the class. On October 16, 1987, plaintiffs filed a First Amended Complaint. On November 20, 1987, the County of Riverside and Sheriff Byrd moved to dismiss the First Amended Complaint on the grounds that the named plaintiff lacked standing to prosecute the lawsuit in that there were no allegations that the named plaintiff would again be subject to the allegedly unconstitutional conduct, i.e., detention without a probable cause hearing, at any time in the future, citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 103 S.Ct. 1660 (1983). In light of the pending

motion to dismiss, the district court continued the hearing on the motion to certify the class. On December 4, 1987, plaintiff filed his opposition to the motion to dismiss the First Amended Complaint. The motion to dismiss was taken under submission on December 21, 1987.

The district court did not rule on the motion to dismiss the First Amended Complaint. Rather, on July 25, 1988, pursuant to plaintiffs' request, the court accepted for filing a Second Amended Complaint. The Second Amended Complaint added as plaintiffs, Johnny E. Jones, Diana Rae Simon, and Michael Scott Hyde, asserting that they had been arrested without warrants, taken to Riverside County Jail, and "did not receive and have not received prompt probable cause and bail hearings and are still in custody." The Second Amended Complaint also added as plaintiffs Brett Hale, David Keiser, who were "pre-trial detainees in Riverside County Jail," and Sharon Sweeney and Lavonne Hinds, who were alleged to be "pregnant women prisoners of the Riverside County Jail," in an attempt to assert new causes of action under the Civil Rights Act predicated upon alleged poor conditions for such prisoners in the Riverside County Jail. In light of the filing of the Second Amended Complaint, the motion to dismiss the First Amended Complaint was taken off calendar. On August 23, 1988, defendants filed an answer to the Second Amended Complaint.

On November 14, 1988, the court granted plaintiffs' motion to certify the class.[1]

---

[1] The class was certified only with respect to those prisoners purportedly held without receiving a prompt probable

(Continued on following page)

B. The Motion For Preliminary Injunction.

On March 3, 1989, plaintiffs filed a motion for preliminary injunction. Based upon data collected almost a year and one-half earlier, in 1987, plaintiffs asserted that persons arrested without warrants in the Central Riverside County Jail were not receiving a prompt probable cause determination upon completion of the administrative steps necessary to complete an arrest as required by *Gerstein v. Pugh*, 420 U.S. 103, 95 S.Ct. 859 (1975). Plaintiffs requested the court to issue a preliminary injunction requiring inmates in the Central Riverside County Jail to receive a probable cause determination within 36 hours of arrest, to be conducted by an appropriate judicial officer.

On April 7, 1989, defendants filed their opposition to the motion for preliminary injunction. Defendants noted that plaintiffs lacked standing in the lawsuit because there was no evidence that any of the named class members would again be subject to the allegedly unconstitutional policy and practice of the County of Riverside which formed the basis of their complaint. Specifically, there was no evidence to indicate that these individuals would again be arrested and subjected to detention without a prompt probable cause hearing. Defendants further argued that, based upon data collected in March 1989, prisoners detained in the Central Riverside County Jail were receiving a prompt probable cause determination

---

(Continued from previous page)

cause determination. The court did not certify the action for purposes of pursuing either the jail overcrowding or treatment of pregnant prisoner issues.

consistent with *Gerstein v. Pugh*. Pursuant to the California Supreme Court's interpretation of *Gerstein*, as well as consistent with California Penal Code sections 825 and 991, inmates were receiving at the time of arraignment within two days of arrest, the option of having a probable cause determination made by a judicial officer. In support of the contention, defendants offered documentary evidence demonstrating that the majority of arrestees were released within 24 hours of arrest and that individuals held beyond the maximum two-day statutory period were the exception and not the rule.

On April 13, 1989, plaintiffs filed their reply to the opposition to the motion for preliminary injunction.

On April 17, 1989, the motion for preliminary injunction came on for hearing before the Honorable Richard Gadbois. The motion was taken under submission. *Id.* On April 19, 1989, the court issued a preliminary injunction directing inmates at the Central Riverside County Jail to be taken before a "Judge, Magistrate, Court Commissioner, or other authorized judicial officer" for a probable cause determination within 36 hours of arrest. Defendants were given 60 days in which to comply with the order. The order further stated that the court would retain jurisdiction to review procedures adopted by the County pursuant to the order, and to monitor implementation of the procedures in the Riverside County branch jails "as soon as practicable."

C. The Appeal.

On May 11, 1989, defendants filed a notice of appeal from the district court's order granting the preliminary

injunction. Defendants then moved for a stay pending appeal in the district court, which was denied. Defendants then requested the Ninth Circuit to grant a stay pending appeal, and on June 20, 1989, the Ninth Circuit granted the request for stay and expedited the appeal. *Infra*, App., p. 14.

On appeal, the parties largely reiterated their position from the district court. Petitioners contended that the policy of the County of Riverside whereby warrantless arrestees were provided with the opportunity for probable cause determinations within two days of arrest as required by California Penal Code sections 825 and 991 complied with this Court's decision in *Gerstein*. Petitioners also noted that the 36 hour time period imposed by the district court was not derived from data concerning the actual time consumed by completing the paperwork attending a warrantless arrest, or by arranging for arraignment of a prisoner. Rather, the 36 hour time period was taken part and parcel from a stipulated order and judgment in another case that was before the district court involving Orange County pretrial proceedings, *Scott v. Gates*, CV 84-8647-RG (C.D. Cal. Oct. 3, 1988). Petitioners additionally asserted that the named class representatives lacked standing to prosecute the instant action under this Court's decision in *Lyons v. City of Los Angeles*.

The Ninth Circuit consolidated the instant case with a similar action, *McGregor, et al. v. County of San Bernardino*, Ninth Circuit Case No. 89-55542, arising from a district court's order granting a preliminary injunction requiring the County of San Bernardino to provide warrantless arrestees with probable cause determinations within 36 consecutive hours of arrest. In the latter action,

the defendant, County of San Bernardino, did not challenge the 36-hour time requirement but, rather, simply challenged the need for the arrestees to personally appear before a magistrate in order to receive a probable cause determination.

On November 8, 1989, the Ninth Circuit issued its opinion affirming the district court's order granting a preliminary injunction with respect to the County of Riverside in the case. The Court found that the named class representatives had standing under *Lyons* and further found that providing probable cause determinations within the arraignment timeframe of 48 hours under California Penal Code sections 825 and 991 were not in accord with *Gerstein*'s requirement that a determination of probable cause must be made promptly after arrest. See App., pp. 5-7, *infra*.

Petitioners then timely filed a petition for rehearing and suggestion for rehearing en banc, which was denied by the Ninth Circuit on April 10, 1990. *Infra*, App., p. 15. In order to preserve the stay pending the filing of a petition for writ of certiorari, petitioners then filed an emergency motion in the Ninth Circuit to stay issuance of mandate for 30 days in order to permit the filing of a petition for a writ of certiorari. On April 30, 1990, the Ninth Circuit granted the emergency motion and ordered the issuance of mandate stayed for 30 days to permit the filing of a petition for a writ of certiorari. See p. 16, *infra*.

REASONS WHY CERTIORARI SHOULD BE GRANTED

I.

REVIEW IS WARRANTED BECAUSE THE NINTH CIRCUIT'S NOVEMBER 8, 1989, OPINION IS IN CONFLICT WITH OPINIONS OF THIS COURT, THE SECOND CIRCUIT, AND CALIFORNIA SUPREME COURT, CONCERNING INCORPORATION OF THE PROBABLE CAUSE HEARINGS REQUIRED BY GERSTEIN V. PUGH INTO EXISTING PRE-TRIAL PROCEEDINGS.

In its November 8, 1989, opinion, the Ninth Circuit expressly held that providing probable cause determinations at arraignment within the time frames provided by California Penal Code sections 825 and 991 "is not in accord with *Gerstein*'s requirement of a determination 'promptly after arrest.' " App., p. 7. In so holding, the Court stated that *Gerstein* required a probable cause determination to be made "as soon as the administrative steps incident to arrest were completed, and that such steps should require only a 'brief period' " – in this case, 36 consecutive hours after arrest. *Id.* In determining the constitutional "promptness" of the probable cause determination, the Ninth Circuit looked *solely* to completion of arrest reports and the like, and ignored the time necessary to provide the warrantless arrestee with a full-blown adversarial hearing at arraignment in compliance with California state law. As we discuss, the Ninth Circuit's conclusion in this regard is directly contrary to the decisions of this Court, as well as the Second Circuit and California Supreme Court.

Gerstein involved a constitutional challenge to Florida procedures under which criminal defendants charged

by a prosecutor's information could be detained for extended periods. This Court held that "the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest." 420 U.S. at 114. However, the Court did not attempt to "mandate a specific timetable" for probable cause determinations. *Schall v. Martin*, 467 U.S. 253, 275, 104 S.Ct. 2403, 81 L.Ed.2d 207 (1984). Rather, the Court emphasized that states were to be provided flexibility in incorporating the probable cause determination into their own existing pretrial procedures:

> "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* [citation], or the determination may be incorporated into the procedure for setting bail or fixing other conditions of pretrial release. . . ." *Gerstein v. Pugh*, 420 U.S. at 123-125; emphasis added.

In *Schall v. Martin*, 467 U.S. 253, this Court applied *Gerstein* in rejecting a due process attack on a state statute which allowed juveniles to be detained for a delinquency determination for three, and sometimes as much as six days prior to receiving a probable cause determination. The Court noted that in light of *Gerstein* this delay was permissible, emphasizing that in *Gerstein* "we did not mandate a specific time table" and recognized " 'the desirability of flexibility and experimentation by the

states.' " 467 U.S. at 275. Thus, in *Schall*, the Court found that since the state statute in question required probable cause determinations to be made at hearings which offered procedural protections far greater than those required by *Gerstein*, i.e., an adversarial proceeding with the presence of counsel, that the provision amply met the requirements of the Constitution. Indeed, in *Schall*, the Court observed that "*Gerstein* indicated approval of pretrial detention procedures that supplied a probable cause hearing within five days of the initial detention." 467 U.S. at 277, n. 28.

This Court's invitation to the states in *Gerstein* to incorporate probable cause determinations into existing pre-trial proceedings did not go unheeded by the states. In *In re Walters*, 15 Cal.3d 738, 126 Cal.Rptr. 239, 543 P.2d 607 (1975), the California Supreme Court held that the constitutional requirements articulated in *Gerstein* would be met if persons arrested for a misdemeanor without a warrant received a probable cause determination at the time of arraignment, i.e., within two days after a suspect's arrest. *Id.* at 15 Cal.3d 750 ["(W)e consider *arraignment to be the most appropriate stage of the proceedings at which to make a judicial determination of probable cause . . .*"; emphasis added]. At the arraignment, the defendant was entitled to ask a judicial officer to review any documents pertinent to the arrest, including a sworn complaint, or the police or other report which forms the basis of the complaint and arrest and was entitled to be represented by counsel and to present his own evidence to the judicial officer. 15 Cal.3d at 750.

Consistent with the California Supreme Court's determination in *In re Walters* that *Gerstein* required a probable cause determination at the time of arraignment, the California Legislature enacted Penal Code section 991 requiring such determinations to be made at arraignment. See *People v. Ward*, 188 Cal.App.3d 459, 233 Cal.Rptr. 477 (1986). Under Penal Code section 825, a detainee is required to be taken before a magistrate for arraignment within "two days" of arrest, excluding Saturdays, Sundays and holidays.[2] Thus, the California Legislature, under the guidance of the California Supreme Court, has accepted this Court's invitation in *Gerstein* to incorporate probable cause determinations into existing pretrial proceedings.

In *Williams v. Ward*, 845 F.2d 374 (2d Cir. 1988), the Second Circuit upheld a similar state procedure for providing a probable cause determination at arraignment within 72 hours of arrest as constitutionally permissible under *Gerstein*. The Court rejected the argument that

---

[2] There is currently a conflict among the California Courts of Appeal as to whether the term "two days" as used in section 825 means 48 hours from the time of arrest, excluding Sundays and holidays (*People v. Chambers*, 276 Cal.App.2d 89, 80 Cal.Rptr. 672 (1969); *People v. Lee*, 3 Cal.App.3d 514, 521, 83 Cal.Rptr. 715 (1970), cert. denied, 402 U.S. 999, 91 S.Ct. 2175 (1971); *People v. Ross*, 236 Cal.App.2d 364, 368, 46 Cal.Rptr. 41 (1963); *Youngblood v. Gates*, 200 Cal.App.3d 1302, 1335-1337, 246 Cal.Rptr. 775 (1988) [George, J. dissenting]) or two "calendar" days from the time of arrest (*Youngblood v. Gates*, 200 Cal.App.3d 1302, 246 Cal.Rptr. 775). This conflict is irrelevant in the instant case as the 36 hour outside period set by the Ninth Circuit would be violated by the County's compliance with either interpretation of section 825.

"promptness" of a probable cause hearing was determined solely by the time needed to complete booking and processing of prisoners:

> "The case law simply does not support this rule. *Gerstein* itself stressed the need for flexibility and expressly stated that a probable-cause determination might be made at the first appearance before a judicial officer *or* incorporated into procedures for pretrial release. [Citations.] That alone is a dispositive statement that completion of the 'administrative steps incident to arrest' does not trigger a right to an immediate probable-cause hearing in light of the fact that *numerous other steps are necessary to complete the pretrial release procedures into which the probable-cause determination may be merged." Id.* at 386; emphasis added.

The Court continued (also at 386):

> "The Court . . . recognized that states might employ procedures that are more complex than the minimum ex parte hearing described in *Gerstein,* and that states may wish to combine probable-cause hearings with procedures for fixing the terms of pretrial release [citation]. In addition, by endorsing the procedures of the ALI Model Code, the court recognized that states could constitutionally choose to employ adversarial procedures albeit two 'court days' after arrest, to determine probable cause. [Citation.] Similarly, in *Schall,* the Supreme Court expressly upheld procedures that entitled an accused juvenile 'to a formal adversarial probable cause hearing within 3 days of his initial appearance.' [Para.] The Supreme Court's endorsement of such a vast array of procedures, along with its recognition that *additional procedures require additional time, indicate that the constitutional 'promptness' of a probable cause hearing must be determined*

in light of the totality of the processes afforded the defendant." Emphasis added.

In *Williams*, the Second Circuit correctly determined that *Gerstein* and *Schall* require a court to take into account the *totality* of the processes afforded to an arrestee by the particular criminal justice system in determining the permissible amount of delay between the time of arrest and providing a probable cause determination in the context of such procedures. This aspect of *Gerstein* is not addressed in the Ninth Circuit's decision, nor is there any discussion of *Schall* or of *Williams* notwithstanding an extended discussion of these cases in the briefs filed by the parties. Rather, the Ninth Circuit looked solely at the mechanics of processing prisoners after arrest, i.e., booking and the like, in determining the promptness of any probable cause determination, without regard for delays necessitated by providing prisoners with greater constitutional protections at arraignment. This was consistent with the Ninth Circuit's established policy of reviewing such time periods on a case-by-case basis, without regard to uniform procedures. *Bernard v. City of Palo Alto*, 699 F.2d 1023 (9th Cir. 1983); *Kanekoa v. City and County of Honolulu*, 879 F.2d 607, 610 (9th Cir. 1989). In failing to take into account the totality of protections accorded warrantless arrestees under the County of Riverside's compliance with California Penal Code sections 825 and 991 in determining the constitutional promptness of probable cause determinations, the Ninth Circuit has misapprehended the law as stated by this Court and, at minimum, created a conflict between the Ninth Circuit and the Second Circuit, as well as between the Ninth Circuit and the California Supreme Court.

The Ninth Circuit's decision in this case has a profound impact on virtually every state criminal justice system within its jurisdiction, as well as throughout the country. By interpreting the term "administrative steps incident to arrest" narrowly to include only that paperwork and processing attending the actual arrest and booking procedures without regard to delays attributable to providing the warrantless arrestee with greater constitutional protections at a more extensive proceeding, such as arraignment, the Ninth Circuit has effectively precluded states from accepting this Court's invitation in *Gerstein* to incorporate probable cause hearings into existing pre-trial proceedings. Since, under the Ninth Circuit's decision in this case, delays related to providing a prisoner with a more extensive hearing do not provide an adequate basis to delay a probable cause hearing, states are virtually required to create a new tier of proceedings in which probable cause determinations are made.

Moreover, the Ninth Circuit's decision in this case virtually eliminates the ability of a state to set any uniform outside time period for providing warrantless arrestees with probable cause determinations. By reaffirming its previous holding that "the time period required by the Fourth Amendment depends on the circumstances of each case," (*Kanekoa v. City and County of Honolulu*, 829 F.2d 610) the Ninth Circuit has virtually guaranteed that separate suits will be brought within each jurisdiction in order to determine whether the probable cause period used in that jurisdiction meets the requirements of the Fourth Amendment as set forth in *Gerstein*. As the California District Attorney's Association noted in an amicus brief filed in the Ninth Circuit in this

action, the elimination of the uniform 48-hour outside time period of California Penal Code sections 825 and 991 will likely result in different time periods being applied in each of the 58 counties of the State of California – time periods set only after extensive litigation in federal and state trial courts within each county.

Indeed, this sort of piecemeal creation of standards has already commenced in California, as evidenced by the instant lawsuit involving the Counties of San Bernardino and Riverside, the Orange County litigation from which the 36-hour time period imposed by the district court in this case was drawn, as well as the Ninth Circuit's recent decisions in *Bernard v. City of Palo Alto,* 699 F.2d 1023 [probable cause determination must be made less than 24 hours after arrest] and *Kanekoa v. City and County of Honolulu,* 879 F.2d 607 [rejecting fixed 24-hour time period as constitutionally required]. Nor is the problem limited to the State of California. As even a cursory review of the law in the area reveals, federal courts at all levels are resolving these matters on an ad hoc basis. See *Lively v. Cullinane,* 451 U.S. F.Supp. 1000, 1003 (D.D.C. 1978) [delay of more than one and one-half hours in providing probable cause determination requires some reasonable explanation for delay]; *Gramenos v. Jewel Companies, Inc.,* 797 F.2d 432, 437 (7th Cir. 1986), cert. denied, 481 U.S. 1028, 107 S.Ct. 1952, 95 L.Ed.2d 525 (1987) [four-hour delay prior to probable cause determination requires explanation]; *Doulin v. City of Chicago,* 662 F.Sup. 318, 332 (N.D.Ill. 1986) [same]; *Sanders v. City of Houston,* 543 F.Supp. 694, 702 (S.D.Tex. 1982), aff'd. 741 F.2d 1379 (5th Cir. 1984) [24-hour outside time period for providing warrantless arrestees with probable cause determination];

Williams v. Ward, 845 F.2d 374, 388-389 [72-hour delay in providing probable cause determination permissible].

Quite simply, it is a matter of great significance whether a) states may set a uniform outside time period for providing warrantless arrestees with probable cause determinations as suggested by *Gerstein* and reaffirmed in *Schall* and b) whether delays occasioned by providing arrestees with additional constitutional protections at more extensive proceedings, such as arraignment, will be factored in for purposes of determining whether the probable cause determination is "constitutionally prompt" under *Gerstein*. As it now stands, the Ninth Circuit has declared unconstitutional two critical portions of the California Penal Code and essentially mandated an entirely new tier of criminal proceedings be created in the State of California. In light of the plain conflict between the decision of the Ninth Circuit in this case and the decisions of this Court, the Second Circuit and the California Supreme Court with respect to virtually identical issues, review is amply warranted. Thus, petitioner respectfully submits that the petition for writ of certiorari should be granted.

II.

REVIEW IS WARRANTED BECAUSE THE NINTH CIRCUIT'S OPINION CONFLICTS WITH THE DECISIONS OF THIS COURT AND SEVENTH CIRCUIT COURT OF APPEALS REGARDING THE STANDING OF INDIVIDUALS WHO HAVE ALLEGEDLY SUFFERED INJURY AS A RESULT OF MISCONDUCT BY LAW ENFORCEMENT PERSONNEL TO OBTAIN INJUNCTIVE RELIEF IN THE ABSENCE OF ALLEGATIONS THAT THEY WILL AGAIN BE SUBJECT TO THE MISCONDUCT IN THE FUTURE.

The Second Amended Complaint in this action alleges that the named plaintiffs were "arrested without

warrants, were taken to Riverside Jail, did not receive and have not received prompt probable cause and bail hearings and are still in custody." The prayer of the Second Amended Complaint then requests an "order and judgment requiring that the defendant's and the County of Riverside provide in-custody arrestees, arrested without warrants, prompt probable cause bail and arraignment hearings. . . ." In short, the Second Amended Complaint alleges that the named plaintiffs *did not* receive prompt probable cause determinations and asks the court to issue an order requiring the County of Riverside to provide prompt probable cause hearings. The problem with plaintiffs' position is, however, that once they did not receive a *prompt* probable cause hearing, their rights had already been violated, i.e., no prompt determination had allegedly taken place. Because plaintiffs had already allegedly been held without a prompt probable cause determination, the equitable relief sought would in no way be able to redress *their* injuries – the alleged transgression had already taken place.

The named plaintiffs had no "personal stake" in the action for purposes of the equitable relief sought. Once they had been denied a "prompt" probable cause hearing, their rights had already been violated and to the extent they sought injunctive relief to prevent *future* violations, they would have to allege that they would again be subject to warrantless arrest without receiving a prompt probable cause determination. In its opinion, however, the Ninth Circuit determined that it was simply enough that the named plaintiffs were all suffering an injury at the time the complaint was filed even if injunctive relief could not cure that injury. Yet, in *City of Los Angeles v.*

Lyons, this Court rejected precisely that theory for purposes of asserting a claim of standing to assert entitlement to equitable relief:

> "The Court of Appeal . . . asserted that Lyons had a 'live and active claim' against the City 'if only for a period of a few seconds' while the stranglehold was being applied to him and that for two reasons the claim had not become moot so as to disentitle Lyons to injunctive relief. . . . We agree that Lyons *had* a live controversy with the City. Indeed, he still has a claim for damages against the City that appears to meet all Art. III requirements. Nevertheless, the issue here is not whether that claim has become moot but whether Lyons meets the preconditions for asserting an injunctive claim in a federal forum. The equitable doctrine that cessation of the challenged conduct does not bar any injunction is of little help in this respect, for *Lyons' lack of standing does not rest on the termination of the police practice but on the speculative nature of his claim that he will again experience injury as the result of that practice even if continued." City of Los Angeles v. Lyons*, 461 U.S. at 109, 103 S.Ct. at 1669; emphasis added.

Here, as in *Lyons*, the constitutional violation asserted as the basis for the plaintiffs' equitable complaint was, as to the named plaintiffs, concluded at the time the complaint was filed and any relief sought was solely *prospective* in nature. If the named plaintiffs had not yet received a prompt probable cause determination, the County of Riverside could not give them one because, under plaintiffs' theory of the case, the time in which to do so had *already* expired. Even if the plaintiffs were still in custody, the mere fact that the injury continues does not provide a basis for injunctive relief if the relief sought does not cure the injury. If that were so, then the plaintiff

in *Lyons* would have had standing to assert a claim for equitable relief simply by alleging that he suffered personal injuries by reason of application of the chokehold.

Here, as in *Lyons*, the individual plaintiffs might have a proper basis for asserting a *damage* claim against the County of Riverside based upon their allegedly not receiving prompt probable cause determinations. See *Robinson v. City of Chicago*, 868 F.2d 959, 968 (7th Cir. 1989). However, under *Lyons*, they cannot bring a claim for injunctive relief in the absence of allegations suggesting that they again would be subject to any unconstitutional conduct that could be redressed by issuance of the injunction. Significantly, this is precisely the conclusion rendered by the Seventh Circuit under virtually identical facts in *Robinson v. City of Chicago*, 868 F.2d 959. In *Robinson*, the Court of Appeals reversed an order granting injunctive and declaratory relief in a class action suit seeking to prevent the Chicago City Police Department from holding warrantless arrestees in excess of 72 hours without a probable cause determination. The named plaintiffs in the class action asserted that the police department's policy of holding arrestees without a probable cause determination beyond 72 hours violated this Court's decision in *Gerstein*. None of the named plaintiffs, however, had or could establish that he would in the future again be arrested and hence suffer the purported constitutional violation so as to provide standing under *Lyons* to assert a claim for injunctive relief. Thus, the Court held:

> "[A]s with the *Lyons* plaintiff, neither Richardson nor the Doulin plaintiffs can allege that

> it is reasonable likely that they will again encounter the police. [Citation.] Because the various plaintiffs' future conduct presumably will give the police no probable cause to arrest them, they cannot expect that they will encounter the police or, if they did, that the police would again detain them pending investigation or fingerprint clearance. Thus, even if the police were to continue to detain others for investigation . . . the possibility that Richardson would suffer any injury as a result of that practice is too speculative. Richardson has not alleged and has not shown that he is in immediate danger of being directly injured by the same official conduct challenged as unconstitutional – post-arrest detention for investigation prior to a probable cause hearing." 868 F.2d at 966.

Critically, the *Robinson* Court observed that by its very nature governmental conduct with respect to pretrial detention is necessarily "limited temporally" and thus provides "no significant possibility that a putative plaintiff would have enough time while detained to file suit" in order to obtain standing for purposes of seeking injunctive relief. 868 F.2d at 968. In short, where, as here, the plaintiffs are alleging that they have not received a prompt probable cause determination, once the time for providing them with such a determination has passed, they necessarily lack a direct personal interest in any claim for injunctive relief attempting to obtain a "prompt" probable cause determination.

The Ninth Circuit's decision in this case is clearly inconsistent with this Court's decision in *Lyons*, and, at minimum, directly conflicts with the Seventh Circuit's opinion in *Robinson v. City of Chicago*. It throws open the courthouse doors to an entire class of lawsuits that this

Court found to be foreclosed by the plain terms of Article III in *Lyons*. Thus, in order to prevent an unconstitutional expansion of the jurisdiction of the federal courts, the petition for writ of certiorari should be granted.

CONCLUSION

For the foregoing reasons, petitioners respectfully submit that the petition for writ of certiorari should be granted.

Dated: May 17, 1990.

Respectfully submitted,

FERGUSON, PRAET & SHERMAN
FIDLER & BELL
GREINES, MARTIN, STEIN & RICHLAND
MARTIN STEIN
TIMOTHY T. COATES

Attorneys for Petitioners County of Riverside and Cois Byrd, Sheriff of Riverside County

SPECIAL EARTHQUAKE NOTICE

This opinion is being filed while the Clerk's office in San Francisco is closed due to sever earthquake damage. Once the Clerk's office is operational, notices will be placed in legal newspapers throughout the Circuit. At that time parties may seek additional time to file a petition for rehearing if they desire to file one.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DONALD LEE MCLAUGHLIN, and all others similarly situated, *Plaintiffs-Appellees,* v. COUNTY OF RIVERSIDE and COIS BYRD as Sheriff and individually, *Defendants-Appellants.*	No. 89-55534 D.C. No. CV-87-5597-RG
IAN MCGREGOR, MARGINE BONNER, and all other similarly situated, *Plaintiffs-Appellees,* v. THE COUNTY OF SAN BERNARDINO and FLOYD TIDWELL as Sheriff and individually, *Defendants-Appellants*	No. 89-55542 D.C. No. CV-87-5596-RG OPINION

Appeal from the United States District Court
for the Central District of California
Richard A. Gadbois, Jr., District Judge, Presiding

Argued and Submitted
September 11, 1989 – Pasadena, California

Filed November 8, 1989

Before: Mary M. Schroeder and Robert R. Beezer, Circuit Judges, and Samuel P. King,* District Judge.

Opinion by Judge Schroeder

SUMMARY

Criminal Procedure/Constitutional Law

Affirming in part and reversing in part the district court's entry of preliminary injunctions, the court held that the requirement of providing warrantless arrestees in urban jail facilities with a probable cause determination within thirty-six hours is reasonable.

Two California counties, Riverside and San Bernardino, appealed identical district court preliminary injunctions entered in two class actions. Both injunctions require the counties to institute certain policies directed at prompt conduct of probable cause determinations for persons arrested without a warrant. The injunctions apply only to those detained in the counties' urban jail

---

* Honorable Samuel P. King, Senior U.S. District Judge for the District of Hawaii, sitting by designation.

facilities. San Bernardino challenges the requirement that a probable cause determination for warrantless arrestees be made within thirty-six hours of arrest. San Bernardino challenges the requirement that the detainees be present for such determinations unless the detainees choose not to attend. In addition, San Bernardino challenges the standing of the plaintiffs. [1] The named plaintiffs in this suit against Riverside County were jail inmates arrested without warrants who had not yet received probable cause determinations and were still in custody at the time they filed the complaint, actually suffering the harm for which they sought relief. They have standing.

[2] Riverside argued that the thirty-six hour requirement exceeds that of *Gerstein v. Pugh,* 420 U.S. 103, 95 S. Ct. 854, 43 L.Ed.2d 54 (1975), in which the Supreme Court held that the fourth amendment requires the state to provide a fair and reliable determination of probable cause promptly after arrest. [3] Riverside contended that its compliance with California Penal Code §§ 825 and 991, permitting a probable cause determination at arraignment, fulfills its *Gerstein* obligations. [4] Providing probable cause determinations within such an arraignment time permits as much as forty-eight hours plus a Sunday or holiday to elapse before the determination is made. This is not in accord with *Gerstein's* requirement of a determination promptly after arrest. [5] The judge, in issuing the injunction, concluded that thirty-six hours provided the County with ample time to complete its administrative procedures, and Riverside has not presented any facts to the contrary.

[6] The Supreme Court in *Gerstein* did not hold that the fourth amendment affords arrestees the right to attend a probable cause determination. Those arrested with a warrant have not attended the probable cause determination made before issuance of the warrant, and there is no basis for holding that the fourth amendment grants warrantless arrestees such a right.

COUNSEL

Timothy T. Coates, Beverly Hills, California, and Susan A. Hopkins, San Bernardino, California, for the defendants-appellants.

Dan Stormer, Los Angeles, California, and Richard P. Herman, Balboa Island, California, for the plaintiffs-appellees.

OPINION

SCHROEDER, Circuit Judge:

These appeals are consolidated for the purpose of this disposition.

Two California counties, Riverside and San Bernardino, appeal identical district court preliminary injunctions entered in two class actions. Both injunctions require the counties to institute certain policies directed at prompt conduct of probable cause determinations for persons arrested without a warrant. The injunctions apply only to those detained in the counties' urban jail facilities.

The two key requirements of the injunctions are, first, that such probable cause determinations be made by a judge (or a magistrate or other judicial officer) within thirty-six hours of arrest and, second, that the detainees be present for such determinations unless the detainees choose not to attend or circumstances such as hospitalization, make attendance impracticable. The County of Riverside challenges the first requirement, namely that the probable cause determination be made within thirty-six hours of arrest. The County of San Bernardino challenges the second requirement, that of physical presence. In addition, the County of Riverside challenges the standing of the plaintiffs named as class representatives in its case.

We deal first with the standing issue. In order to invoke the jurisdiction of the federal courts, plaintiffs must allege an actual case or controversy by demonstrating a "personal stake in the outcome." *Baker v. Carr,* 369 U.S. 186, 204, 82 S. Ct. 691, 7 L.Ed.2d 663 (1962). "The plaintiff must show that he 'has sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged official conduct and the injury or threat of injury must be both 'real and immediate.' " *City of Los Angeles v. Lyons,* 461 U.S. 95, 101-102, 103 S. Ct. 1660, 75 L.Ed.2d 675 (1983).

At the time they filed their complaint, the named plaintiffs in the Riverside action were jail inmates arrested without warrants who did not receive within thirty-six hours, and had not yet received, probable cause determinations. They alleged that they, and those similarly situated, were entitled as matter of due process to a hearing within thirty-six hours of the time of their arrest.

[1] In challenging their standing, Riverside County relies upon *City of Los Angeles v. Lyons*, 461 U.S. 95. In *Lyons*, the Supreme Court held that a plaintiff who had been the victim of a police chokehold lacked standing to obtain an injunction barring the City of Los Angeles Police Force's future use of chokeholds because the plaintiff could not establish a real threat that an officer would choke him again. In *Lyons*, the constitutionally objectionable practice, namely the choking of the plaintiff by the policeman, had ceased by the time the plaintiff sought an injunction. In contrast, named plaintiffs in this suit against Riverside County were jail inmates arrested without warrants who had not yet received prompt probable cause determinations, and were still in custody at the time they filed their complaint. Rather than complaining of a past constitutional violation, plaintiffs in *McLaughlin* were actually suffering the harm for which they sought injunctive relief. They have standing.

[2] We therefore turn to Riverside County's contention on the merits. The County argues that the injunction's requirement of providing warrantless arrestees with a probable cause determination within thirty-six hours of arrest exceeds the requirements of the leading Supreme Court decision in this area, *Gerstein v. Pugh*, 420 U.S. 103, 95 S. Ct. 854, 43 L.Ed.2d 54 (1975). *Gerstein* held that the fourth amendment requires the state to provide "a fair and reliable determination of probable cause as a condition for any significant restraint of liberty." *Id.* at 125. It further held that "this determination must be made by a judicial officer either *before or promptly after arrest.*" *Id.* (Emphasis added). This court followed *Gerstein* in *Bernard v. City of Palo Alto*, 699 F.2d 1023, 1025 (9th Cir.

1983). We there held that *Gerstein* required a probable cause determination to be made as soon as the administrative steps incident to arrest were completed, and that such steps should require only a "brief period." *See Kanekoa v. City and County of Honolulu*, 879 F.2d 607 (9th Cir. 1989).

[3] Riverside County contends that its compliance with California Penal Code §§ 825 and 991, permitting a probable cause determination at arraignment, fulfills its *Gerstein* obligations. Section 825 states: "The defendant must in all cases be taken before the magistrate (for arraignment) without unnecessary delay, and, in any event within two days after his arrest excluding Sundays and holidays. . . ." Section 991 provides in relevant part that if a "defendant is in custody at the time he appears before the magistrate for arraignment . . . the magistrate . . . shall determine whether there is probable cause to believe that a public offense has been committed. . . ."

[4] Providing probable cause determinations within such an arraignment time frame permits as much as forty-eight hours plus an intervening Sunday or holiday to elapse before the determination is made. This is not in accord with *Gerstein's* requirement of a determination "promptly after arrest." Indeed, in *Bernard*, 699 F.2d at 1025, we upheld an injunction requiring a probable cause determination within 24 hours after arrest, emphasizing that under the circumstances of that case, more time was not required to complete the administrative procedures incident to the arrest. Other circuits are in accord. *See, e.g., Llaguno v. Mingey*, 763 F.2d 1560, 1567-1568 (7th Cir. 1985) (en banc) (detention for 42 hours without probable cause determination violated warrantless detainees' due

process rights where officers did not require 42 hours to complete the administrative steps incident to arrest such as booking and completing paperwork), *United States v. Garza*, 754 F.2d 1202, 1211 (5th Cir. 1985); *Fisher v. Washington Metro. Area Transit Authority*, 690 F.2d 1133, 1139-1141 (4th Cir. 1982) (probable cause determination must be held as soon as police complete the administrative steps incident to arrest; such steps will vary with geographical factors, local police and court system practices and other factual exigencies).

Our recent decision, *Thompson v. City of Los Angeles and County of Los Angeles*, No. 88-5943, slip op. (9th Cir., Sept. 18, 1989), is inapposite. In that case, we held that petitioner's detention for five days without a probable cause determination did not give rise to a cause of action against the County because he failed to allege that his deprivation occurred pursuant to any county policy or custom. *Thompson*, No. 88-5943, slip op. at 11583-85. Riverside County, by contrast has adopted a policy whereby conducts probable cause determinations at an arrestee's arraignment, and not earlier. It is this specific county policy which violates plaintiff's due process rights in this case.

[5] Riverside County does not claim that it needs more than thirty-six hours to complete the administrative steps incident to arrest. The judge in issuing this injunction considered the size of the county and the location of the detainees. He concluded that thirty-six hours provided the County with ample time to complete its administrative procedures and the County has not presented any facts to the contrary. Moreover, the judge specifically limited the scope of the preliminary injunction to inmates

at the Riverside County Central Jail. The County can easily arrange for probable cause determinations within thirty-six hours for prisoners housed as such a central urban center, particularly since the county magistrates' offices are just across the street from the jail. Furthermore, the judge purposefully did not set any fixed time limit for Riverside's implementation of satisfactory determination procedures in other parts of the County. Therefore, there is no reason to overturn the thirty-six hour provision of the injunction.

[6] We now turn to the district court's requirement that the Counties provide for arrestees' attendance at the probable cause determination, a requirement challenged by San Bernardino County. The Supreme Court in *Gerstein* did not hold that the fourth amendment affords arrestees the right to attend a probable cause determination. The Supreme Court based its holding that warrantless arrestees must receive a prompt probable cause determination upon the premise that warrantless arrestees should be treated on par with those arrested with a warrant. *Gerstein*, 420 U.S. at 120. The fourth amendment, therefore, affords those arrested without a warrant the same right to have the evidence against them reviewed by a neutral and detached magistrate as that enjoyed by those arrested with a warrant. *Gerstein*, 420 U.S. at 112. Those arrested with a warrant have not attended the probable cause determination made before issuance of the warrant. We perceive no basis for holding that the fourth amendment grants warrantless arrestees such a right. Furthermore, since the Supreme Court has expressly held that the probable cause determination is not a "critical stage" of the prosecution, the arrestee has

no right to counsel or to any other of the adversarial safeguards provided at such a stage. *Gerstein*, 420 U.S. at 119, 122. While physical presence of the arrestee may frequently serve the useful purpose of ascertaining the identity of the person arrested, presence is not constitutionally mandated. Our decision in the case at bar complies with our decision in *Bernard*, 699 F.2d at 1024, where we upheld a probable cause determination for warrantless arrestees by ex parte affidavit.

The preliminary injunction entered in *McLaughlin v. County of Riverside* is AFFIRMED. The injunction in *McGregor v. County of San Bernardino* is AFFIRMED IN PART and REVERSED IN PART. That case is REMANDED with instructions that the provision requiring presence be vacated.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DONALD LEE McLAUGHLIN, et al, Plaintiff, v. THE COUNTY OF RIVERSIDE, et al, Defendants.	CASE NO. CV87-5597 RG PRELIMINARY INJUNCTION Filed Apr 19 1989

This matter having come on for hearing, the court issues this preliminary injunction. As the court has made clear from the commencement of this case, *Gerstein v. Pugh*, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975) is the law of the land (in the Ninth Circuit by *Bernard v. City of Palo Alto*, 699 F.2d 1023 (9th Cir. 1983)). *Gerstein* requires a prompt judicial determination of probable cause for the continued detention of prisoners arrested without warrants. This has generally been held to mean within 24 hours (cf. *Bernard*). In Riverside County the first judicial appearance of a prisoner arrested on a Thursday or Friday occurs the following week. If there is an intervening holiday and a weekend as much as five (5) days of delay after arrest occurs. Such delay before a judicial review of probable cause for continued detention violates *Gerstein*. This court declines to adopt the 24 hour standard, but adopts a 36 hour limit, except in exigent circumstances. This limit was adopted by this court in addressing the same issue in Orange County, *Scott v. Gates*, CV84-8647 RG. Orange County, pursuant to this court's substantially

identical order, has adopted procedures which comply in practice with the mandate of *Gerstein* and *Bernard.*

This preliminary injunction applies to the County of Riverside, its Sheriff, Cois Byrd, and all of their officers, agents, and employees:

1. The County of Riverside, by and through Cois Byrd, its Sheriff, shall initiate and implement the following policy:

> All persons arrested without a warrant and detained in custody *in the Riverside County Main Jail,* located in the City of Riverside, County of Riverside, California, shall, within thirty six (36) hours of the time of the arrest, be taken before a Judge, Magistrate, Court Commissioner, or other authorized judicial officer, for a hearing on determination of probable cause for detention. In the event a prisoner chooses not to attend the proceeding or if circumstances (e.g. hospitalization) render attendance impracticable the hearing may proceed in the absence of the prisoner.

(See *Gerstein v. Pugh,* 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed. 54 (1975); *Bernard v. City of Palo Alto,* 699 F.2d 1023 (9th Cir. 1983)).

2. The court will retain jurisdiction indefinitely to review the procedures adopted and implemented hereunder, with a view to their compliance in practice with the mandate of *Gerstein* and *Bernard.* This includes the implementation of satisfactory procedures in the Riverside County branch jails as soon as practicable.

3. The above policy shall be effective sixty (60) days after entry of this order.

/s/ Richard A. Gadbois, Jr.
RICHARD A. GADBOIS, JR.
United States District Judge

DATED: 4/19/89

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DONALD LEE McLAUGHLIN, and all others similarly situation [sic], Plaintiffs-Appellees, vs. COUNTY OF RIVERSIDE and COIS BYRD, as Sheriff and individually, Defendants-Appellants.	No. 89-55534 DC# CV 87-5597-RAG Central California ORDER FILED JUN 20 1989

Before: SCHROEDER and TROTT, Circuit Judges

Appellees' request for an extension of time until June 13, 1989 in which to file their response to appellants' motion for a stay pending appeal is granted. The response received on June 13, 1989 is ordered filed.

Appellants' motion for a stay pending appeal of the preliminary injunction entered by the district court on April 19, 1989 is granted. *See Artukovic v. Rison*, 784 F.2d 1354, 1355 (9th Cir. 1986).

The court, on its own motion, orders that the appeal be expedited. The reporter's transcript is due by July 7, 1989. Appellant's opening brief and excerpts of record are due July 14, 1989; appellee's brief is due August 4, 1989; the reply brief, if any, is due August 11, 1989. The case will be calendared for argument in September.

CR CAL 6/20/89

NOT FOR PUBLICATION
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DONALD LEE McLAUGHLIN, and all others similarly situated, Plaintiffs-Appellees, vs. COUNTY OF RIVERSIDE and COIS BYRD, as Sheriff and individually, Defendants-Appellants.	No. 89-55534 DC# CV 87-5597-RAG (Central District of California) ORDER FILED APR 10 1990

Before: SCHROEDER and BEEZER, Circuit Judges, and KING,* District Judge.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

---

*Honorable Samuel P. Kin, Senior U.S. District Judge for the District of Hawaii, sitting by designation.

NOT FOR PUBLICATION
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DONALD LEE McLAUGHLIN, et al.,	)	No. 89-55534
	)	(Central
Plaintiffs-Appellees,	)	California)
	)	
v.	)	ORDER
	)	
COUNTY OF RIVERSIDE, et al.,	)	FILED
	)	
Defendants-Appellants.	)	APR 30 1990
	)	

Before: SCHROEDER, Circuit Judge.

The emergency motion filed April 18, 1990, for stay of mandate for 30 days is granted. The stay will be dissolved and the mandate shall issue at the expiration of this time unless a petition for writ of certiorari has been filed.