COUNTY OF RIVERSIDE and COIS BYRD, SHERIFF OF RIVERSIDE COUNTY, Petitioners, v. DONALD McLAUGHLIN, et al., Respondents.

No. 89-1817

SUPREME COURT OF THE UNITED STATES

1989 U.S. Briefs 1817; 1990 U.S. S. Ct. Briefs LEXIS 213

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[*1]

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR THE PETITIONERS

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INTRODUCTION

Plaintiffs have now filed their Respondents' Brief. Two points remain clear. First, despite plaintiffs' repeated references to the status of this case as a class action, the question of standing turns upon the named plaintiffs' ability to allege that they have suffered a deprivation of rights that may be remedied by the injunctive relief sought. The constitutional violation alleged - failure to receive a "prompt" probable cause hearing - is necessarily temporal in nature, and the allegations of the complaint make it clear that, as to the named plaintiffs, the violations complained of had [*3]

already occurred at the time the complaint was filed and hence they could not benefit from the injunctive relief sought. Under article III, plaintiffs therefore lack standing to obtain the injunctive relief sought.

Second, even assuming, arguendo, that plaintiffs possess standing in this case, they have failed to come to grips with the central issue in the lawsuit - whether a public entity may delay providing warrantless arrestees with probable cause determinations in order to incorporate them into pre-trial procedures which afford greater constitutional protections, but inevitably require additional time. The Ninth Circuit has essentially held that once the administrative steps incident to arrest, such as completion of the immediate paper work are completed, there can be no delay in providing probable cause hearings. Petitioners submit that the Ninth Circuit's ruling in this regard is expressly contrary to this Court's decisions in *Gerstein v. Pugh, 420 U.S. 103, 95 S.Ct. 854 (1975)* and *Schall v. Martin, 467 U.S. 253, 104 S.Ct. 2403 (1984),* which by their plain terms did not foreclose a public entity from incorporating probable cause determinations into [*4] existing pre-trial procedures which may afford arrestees greater protections at the expense of some delay. In accordance with California law, the County of Riverside affords warrantless arrestees with the opportunity to receive a probable cause determination at the time of arraignment which, under California law, must be held within two court days of arrest. While the County of Riverside submits that the record before the district court establishes the constitutional propriety of providing such hearings at arraignment, even if the specific procedures utilized by the County of Riverside are found to be less than ideal, finetuning of existing procedures under state law is warranted, not a wholesale evisceration of state procedures by mandating an entirely separate tier of pre-trial ex parte proceedings devoted solely to determining probable cause. Thus, for these reasons, petitioners respectfully submit that the judgment should be reversed.

TITLE: REPLY BRIEF FOR THE PETITIONERS

I.

THE NAMED PLAINTIFFS LACK ARTICLE III STANDING TO SEEK INJUNCTIVE RELIEF.

While the balance of the plaintiffs' argument on standing is found under the headings "Plaintiffs' Action Was Certified As A Class Action; The Focus Of Inquiry [*5] Re Standing Shifts To The Standing Of The Class" and "The Duly Certified Class Meets All Prerequisites For Injunctive Relief," plaintiffs grudgingly concede, as they must, that the question of standing has nothing to do with the class action status of this case. (Brief of Resps., pp. 13-17.) Rather, the Court must look solely to the question of whether the named plaintiffs had standing at the time the operative complaint was filed. As this Court noted in *Sosna v. Iowa, 419 U.S. 393, 402, 95 S.Ct. 553, 559, 42 L.Ed.2d 532 (1975):* "There must . . . be a named plaintiff who has such a case or controversy at the time the complaint is filed. . . ." Plaintiffs similarly concede that in determining whether the named plaintiffs possessed standing at the time the complaint was filed the inquiry focuses on whether """the plaintiff has shown an injury to himself that is likely to be redressed by a favorable decision."" (Brief of Resps., p. 17, quoting Brief for Pets., p. 15, citing *Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 38, 96 S.Ct. 1917, 1924, 48 L.Ed.2d 450 (1976).)*

Plaintiffs, however, are hard-pressed to explain how the alleged constitutional [*6] deprivation they suffered - failure to receive a prompt probable cause hearing - could ever be redressed once the time for providing a constitutionally "prompt" hearing has passed. It is important to note that the plain allegations of the Second Amended Complaint make it clear that plaintiffs are not asserting that no probable cause hearing will be provided to them at all or even that the majority of them have not yet received a probable cause hearing. n1 Rather, the complaint simply states they "did not receive and have not received prompt probable cause" hearings. (1 JA 3; emphasis added.) Thus, in contrast to the situation in *Gerstein v. Pugh, 420 U.S. 103, 95 S.Ct. 859 (1975),* this is not a case where the alleged constitutional violation is the failure to provide any probable cause hearing; instead, the issues as framed by the complaint involve the purported failure to provide plaintiffs such hearings in a sufficiently "prompt" manner - a transgression that is necessarily defined by temporal limitations. Once the time passes for providing a constitutionally "prompt" hearing, by definition, the constitutional deprivation asserted - failure to have a prompt hearing [*7] - cannot

be corrected.

n1 The allegations of the Second Amended Complaint make it clear that at least one named plaintiff, Donald Lee McLaughlin, was arrested in August 1987 and held in jail five days without seeing a judge and, upon no charges being filed, was no longer in custody. (1 JA 3.) The Second Amended Complaint alleges only that named defendants Johnnie E. Jones, Diana Ray Simon, and Michael Scott Hyde, are "still in custody." (1 JA 3.) Thus, named plaintiff Donald Lee McLaughlin clearly possesses no standing himself to assert any claim for injunctive relief with respect to receipt of a probable cause hearing.

Moreover, contrary to plaintiffs' assertion, their lack of standing is not necessarily tied to an ex post facto application of the 36-hour time period imposed by the district court as defining a "prompt" probable cause hearing. (Brief for Resps., pp. 15-16.) As noted above, the term "prompt" itself establishes temporal limitations, though the exact nature of the limitations, i.e., what time period is or is not prompt, may not yet be specifically known. Plaintiffs in their complaint define the constitutional violation at issue as the failure to provide "prompt" [*8] probable cause determinations and state that it has already occurred as to them, i.e., they did not and have not received prompt probable cause determinations. Thus, regardless of what time period is eventually used to define "prompt," according to the allegations of the complaint, that time as to the named plaintiffs has already passed. To allege that you did not receive a constitutionally prompt probable cause determination is to assert that you did not receive one in whatever time frame is eventually used to define "prompt." Of course, application of a concrete figure such as the 36-hour period urged by plaintiffs and eventually imposed by the district court and upheld by the Ninth Circuit, simply makes the lack of standing more apparent. For, as noted in Petitioners' Brief, if a plaintiff asserts that he or she has not received a probable cause determination within the constitutionally prompt 36-hour time period and prays for an injunction directing that defendant provide a probable cause determination within the 36-hour time period, it becomes manifest that the relief sought will in no way redress the injury asserted - once 36 hours has come and gone, no timely probable cause [*9] determination can be provided.

In a fall-back position, plaintiffs acknowledge that the expiration of the "prompt" period for receiving a probable cause determination indeed prevents them from obtaining any benefits from an injunction requiring the County to provide "prompt" probable cause hearings (Brief for Resps., p. 17). Nonetheless, they argue that "even a belated determination of plaintiffs' right to a probable cause determination would remedy, in part at least, the injuries suffered by plaintiffs. . . ." (Brief for Resps., p. 17.) Not surprisingly, plaintiffs are somewhat evasive in describing precisely how the injunctive relief sought would, or even could, redress any present injury they were suffering. For example, plaintiffs say nothing more than: "Even if the 36-hour period has expired, the court can specify that a probable cause determination should be made within 36 hours after arrest without a warrant (which potentially will benefit both the individuals and the class). After the 36-hour period has lapsed, the court can still redress the subsequent continuing daily and hourly violations of plaintiffs' right to such determination." (Brief of Resps., p. 16.) Charitably [*10] construing plaintiffs' argument, it appears to be nothing more than the assertion that once the constitutionally "prompt" time period for providing them with a probable cause determination has passed, the district court may, nonetheless, make certain that they receive a probable cause determination in the first place, or at least faster than they would ordinarily receive such a determination. Yet, plaintiffs' argument ignores the allegations of the Second Amended Complaint, the prayer for injunctive relief contained therein and the nature of the injunction eventually sought in this case.

First, as noted above, the complaint does not allege that the named plaintiffs still in custody have not received a probable cause hearing, only that they have not received a prompt hearing. Since the complaint does not establish that no hearings were provided, it is difficult to discern how a plaintiff who has already received a hearing, albeit a purportedly belated one, could in any way benefit from an order that he or she receive a "prompt" hearing. Second, the Second Amended Complaint prays only for an injunction requiring the County to provide warrantless arrestees with "prompt" probable [*11] cause determinations. It does not direct the County to immediately provide warrantless arrestees presently in custody with such hearings, or that such hearings not be delayed any further. It only directs that

"prompt" hearings be provided, though, once again, according to plaintiffs' allegations, the time in which to provide such hearings had, as to them, already passed. Finally, the nature of the injunctive relief sought and obtained makes it clear in concrete terms that plaintiffs could not benefit from injunctive relief. As noted above, if plaintiffs' allegations concerning prompt probable cause determinations are interpreted as essentially requiring hearings to be conducted within 36 hours, then per se, an injunction requiring such hearings to be provided within 36 hours will not benefit those individuals who have already been in custody without receiving such hearings.

Quite simply, the named plaintiffs in the instant case stand in a position virtually identical to that of the plaintiff in *City of Los Angeles v. Lyons, 461 U.S. 95, 103 S.Ct. 1660 (1983).* At the time the complaint was filed, the alleged constitutional violation had already occurred and no allegation [*12] establishes any present on-going controversy and/or injury involving the named plaintiffs that would in any way be redressed by the injunctive relief requested in the complaint, much less the injunction that was eventually sought by plaintiffs and issued by the district court. Under this Court's decision in Lyons, plaintiffs clearly lacked standing under article III to prosecute an action for injunctive relief with respect to their receipt of constitutionally prompt probable cause hearings. As in Lyons, the plaintiffs may indeed have suffered injury sufficient to form the basis of a damage claim - perhaps even a class action damage claim. Yet, this in no way confers upon them a separate right to obtain injunctive relief which, if granted, will in no way provide them with any concrete benefit.

Nor, contrary to the assertions of plaintiffs and amici, will application of Lyons to the instant case result in wholesale erosion of constitutional rights or limit the role of the federal courts in enforcing such rights. That the named plaintiffs in this lawsuit do not, according to allegations of their own complaint, possess standing to prosecute a claim for injunctive relief to redress [*13] the wrong which forms the basis of the action, does not mean that such alleged violations would never be subject to meaningful review by a federal court. With respect to injunctive relief, there may be other plaintiffs who may more prudently draft their complaint and establish that they in fact do have a present case or controversy with respect to the promptness of any probable cause determination. n2 Moreover, as this Court noted in Lyons, even assuming, arguendo, that no plaintiff could ever establish standing for purposes of asserting a claim for injunctive relief, this does not run contrary to constitutional principles, since one of the plain implications of article III is that federal courts are courts of limited jurisdiction - they may not adjudicate all controversies, regardless of whether it might be expedient or desirable to do so.

n2 As noted in Petitioners' Brief, there may be some instances where an action for injunctive relief may be asserted by a plaintiff with respect to a state criminal justice practice where, at the time the complaint is filed, the individual in fact is no longer in custody, nor subject to the alleged constitutional violation; but, rather, may "credibly allege" that he will again be subject to the alleged unconstitutional conduct. (*Kolendar v. Lawson, 461 U.S. 352, 355, fn. 3, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983).)* That plaintiffs are apparently unable to, or at the very least have elected not to present similar allegations, does not necessarily foreclose other plaintiffs from pursuing this means of establishing standing.

[*14]

In addition, as the Court emphasized in Lyons, the mere absence of an injunctive remedy does not render a particular constitutional violation and resulting injury incapable of correction or redress. An individual who has been wronged may always bring a damage action. Moreover, if, as plaintiffs assert here, the constitutional violation is allegedly widespread, such a damage action may be brought as a class action with the attendant increase in damages spread among the plaintiff class to act as a deterrent to future constitutional violations. The availability of punitive damages against individual public employees would provide a strong deterrent to future allegedly improper conduct. Plaintiffs nowhere explain why these remedies are insufficient to redress the injury suffered, nor deter the purportedly unconstitutional conduct of which they complain.

With respect to receipt of probable cause hearings, the Second Amended Complaint alleges nothing more than that the named plaintiffs did not receive and have not received prompt probable cause determinations. It does not state that

they have not received any probable cause determination, nor that they would not receive one in the [*15] future. The constitutional violation is tied solely to the temporal limitation that a probable cause determination must be given "promptly" following arrest. Because, according to the plain allegations of the complaint, the alleged constitutional violation had already occurred, i.e., plaintiffs had been denied a prompt probable cause determination, the named plaintiffs lacked standing to assert a claim for injunctive relief to obtain "prompt" probable cause determinations. In sum, because the named plaintiffs in no way would benefit from the injunctive relief sought, they lacked standing to prosecute the instant action. For this reason, the motion for preliminary injunction should have been denied.

II.

THE COUNTY OF RIVERSIDE'S COMPLIANCE WITH CALIFORNIA LAW IN PROVIDING PROBABLE CAUSE DETERMINATIONS AT THE TIME OF ARRAIGNMENT CONSTITUTES A CONSTITUTIONALLY PROMPT HEARING UNDER THE FOURTH AMENDMENT.

A. The Fourth Amendment Does Not Prohibit Delays In Providing Probable Cause Hearings To Warrantless Arrestees Resulting From The Incorporation Of Such Hearings Into Existing Proceedings That Afford The Arrestees Greater Constitutional Protections.

As discussed at length in [*16] Petitioners' Brief, in Gerstein this Court expressly invited states to incorporate probable cause determinations into existing pre-trial criminal procedures. At the same time, the Court acknowledged that providing arrestees with additional constitutional protections might consume additional time. Nonetheless, the Court cited favorably by way of example various pre-trial criminal proceedings in which probable cause determinations could be made that occurred anywhere from 72 hours to 5 days after arrest. Similarly, in *Schall v. Martin, 467 U.S. 253, 104 S.Ct. 2403, 81 L.Ed.2d 207 (1984)*, this Court approved pre-trial detention procedure for juveniles, which delayed a probable cause hearing for as much as 6 days after arrest.

As Gerstein and Schall make plain, this Court has recognized that the Fourth Amendment does not prohibit a state from delaying probable cause determinations for a short time period in order to incorporate them into existing pre-trial proceedings with additional procedural protections that may require additional time. In the instant case, however, the Ninth Circuit, consistent with its prior case law, essentially applied a "per se" rule with respect [*17] to determining whether a probable cause determination is provided to arrestees in Riverside County within a constitutionally permissible time frame - finding that a probable cause determination must be made shortly after the purely administrative steps incident to arrest are completed, such as preparation of arrest reports and the like. In sum, the Ninth Circuit measures the period in which a probable cause determination must be given solely by the time necessary to provide essentially an ex parte hearing on the question of probable cause - regardless of whether additional time might be necessary to incorporate the probable cause hearing into an existing procedure, such as arraignment.

Application of the standard utilized by the Ninth Circuit for evaluating the promptness of probable cause determinations under the Fourth Amendment, essentially prevents any state or local public entity from ever incorporating a probable cause determination into an existing pre-trial procedure, since, as this Court recognized in Gerstein, these more extensive proceedings necessarily involve an additional consumption of time over and above that required to provide an ex parte probable cause hearing. [*18] For example, for an arraignment, a district attorney must review the evidence, sometimes more than arrest reports and the like, make a decision as to whether a complaint should be filed or not, and then prepare and file a criminal complaint. A judge must be available to review the complaint in open court and require the plaintiff to enter a plea. Counsel must be made available for the defendant. All of these steps take time. Yet, under the standard imposed by the Ninth Circuit and applied by the district court here, any such delay is per se unreasonable. n3 The plaintiffs have argued throughout, and the district court and Ninth Circuit essentially agreed, that since the County of Riverside did not demonstrate that it could not provide ex parte review of arrest reports by a quasi-judicial officer within 36 hours of arrest, that this necessarily compelled the County to hold such hearings and prevented the County from incorporating such determinations into far more extensive and more protective proceedings, such as arraignment. This simply does not comport with the interpretation of the Fourth Amendment pronounced by this Court in Gerstein and reaffirmed by the Court in Schall. [*19]

n3 We again note that at no point have plaintiffs attempted to argue, much less establish, that the County of Riverside is unnecessarily delaying arraignments. Indeed, as noted in Petitioners' Brief, the majority of arrestees who are not outright released are arraigned within two court days of arrest, and the vast majority arraigned within the period specified by *California Penal Code section 825*, i.e., two days with an extension to the third court day if the two-day period expires when court is not in session. (See Brief for the Pets., App. 8a-10a.)

Tellingly, plaintiffs do address this issue in their brief. Rather, plaintiffs again simply repeat their contention that Gerstein requires a probable cause determination to be made by a judicial officer once the paperwork accompanying arrest has been completed. They urge only a completely separate tier of proceedings to be imposed upon the states and do not explain how any existing pretrial proceeding, such as arraignment, could be conducted in the time frame they argue must govern the probable cause determination. n4

n4 The brief of amicus curiae American Civil Liberties Union pays lip-service to this Court's invitation in Gerstein that states incorporate probable cause determinations into existing pre-trial proceedings by noting that this Court had observed that some states would have to speed-up existing proceedings in order to meet Fourth Amendment standards. (Id., p. 33, n. 12, citing *Gerstein, 420 U.S. at 120.)* Conspicuously, neither the ACLU nor plaintiffs offer any explanation as to how an arraignment, involving a judge, a prosecutor, and defense counsel, could in an urban area be expedited beyond the two-court day time period set forth in *California Penal Code section 825*. Indeed, in light of the strict standards of the Ninth Circuit and other circuit courts which have held that the probable cause determination cannot be delayed beyond completion of booking - thus requiring a probable cause hearing in some cases, in as short a time as 4 hours after arrest (*Gramenos v. Jewel Companies, Inc., 797 F.2d 432, 437 (7th Cir. 1986))* - it is doubtful that any existing pre-trial proceeding could be conducted within that time frame.

[*20]

The decisions of the district court and the Ninth Circuit are based on an erroneous premise - that a probable cause hearing held beyond the time necessary to complete the most basic of paperwork following arrest is per se unreasonable and neither a state nor local public entity may delay the hearing solely in order to incorporate it into existing pre-trial procedures that may require additional time and provide additional protections to an arrestee. This is squarely contrary to this Court's decisions in Gerstein and Schall. Having applied this incorrect standard, the district court apparently neither considered, much less rejected, the contentions the County has made with respect to the sufficiently of the probable cause hearing made pursuant to *California Penal Code sections 825* and 991. Certainly plaintiffs provided no evidence to suggest that such hearings are not provided at arraignment or are somehow insufficient, though in moving for a preliminary injunction, it would be their duty to do so. In affirming the order, the Ninth Circuit itself simply declared that the two-day time period of Penal Code section 825 was beyond the time necessary to complete the administrative steps [*21] incident to arrest and hence constituted a per se violation of Gerstein. Clearly, the district court's and subsequently the Ninth Circuit's application of an incorrect legal standard, in and of itself, mandates reversal of the order granting the preliminary injunction.

B. The Probable Cause Determinations Provided Pursuant To California Law Are Consistent With The Requirements Of The Fourth Amendment As Articulated By This Court In Gerstein v. Pugh.

In responding to petitioners' argument that the County complies with Gerstein by providing probable cause determinations at the time of arraignment, within two days of arrest as required by California law, plaintiffs essentially raise two points. First, plaintiffs argue that California law, in and of itself, does not require a probable cause determination of the sort purportedly required by Gerstein, i.e., a determination of whether there was probable cause for the arrest itself as opposed to probable cause for pre-trial "detention." At the same time, plaintiffs assert that regardless of what California law may require with respect to providing a probable cause determination, that the County of Riverside, in the context of arraignment, [*22] does not provide such determinations. Plaintiffs contentions, however, are meritless.

Plaintiffs argue that in *In re Walters, 15 Cal.3d 738, 126 Cal.Rptr. 239, 543 P.2d 607 (1975),* the California Supreme Court did not incorporate into California law this Court's decision in Gerstein that warrantless arrestees be provided with a probable cause determination promptly after arrest. Specifically, plaintiffs assert that in In re Walters, the California Supreme Court simply decreed that warrantless arrestees would receive a hearing on probable cause for pre-trial detention, not a hearing as to whether there was probable cause for arrest. Plaintiffs, in turn, then argue that Penal Code section 991 itself simply requires the hearings set forth in Walters, i.e., a hearing on probable cause for detention, not a hearing on probable cause for the initial arrest. Plaintiffs' interpretation of both In re Walters and this Court's decision in Gerstein does not bear scrutiny. As review of Gerstein reveals, the very issue decided in Gerstein was that which was before the California Supreme Court in In re Walters - the time frame in which hearings must be provided to individuals to [*23] determine whether there is probable cause for detention.

In Gerstein, this Court expressly stated the chief issue before the Court to be "whether a person arrested and held for trial on an information is entitled to a judicial determination of probable cause for detention." *420 U.S. at 111, 95 S.Ct. at 861;* emphasis added; see also, *420 U.S. at 127,* Stewart, J. concurring ["this case does not involve an initial arrest, but rather the continuing incarceration of a presumptively innocent person"]. The legality or illegality of the initial taking into custody, i.e., the arrest, were not at issue. Noting that under Florida law an individual charged by information would not receive a determination of probable cause for detention short of trial, the Court expressly held that "the prosecutor's assessment of probable cause is not sufficient alone to justify restraint of liberty pending trial." *420 U.S. at 118-119, 95 S.Ct. at 865;* emphasis added. Indeed, in describing the standard to be applied by a judicial officer in making this probable cause determination, the Court noted that it was "the same as that for arrest. That standard [is] . . . [*24] probable cause to believe the suspect has committed a crime. . . ." *420 U.S. at 120, 95 S.Ct. at 866.* The Court therefore drew a distinction between the determination contemplated and a determination of whether there was probable cause to initially arrest, although the Court noted that the legal standard was the same. The Court then observed in a footnote that "because the standards are identical, ordinarily there is no need for further investigation before the probable cause determination can be made." *420 U.S. at 120, fn. 21, 95 S.Ct. at 866, fn. 21;* emphasis added. In sum, the Court noted that since it is presumed that arresting officers have probable cause to arrest, a subsequent determination as to whether there is probable cause to continue detention in custody ordinarily would not need additional facts, since the facts presented by the officers would ordinarily serve the purpose. In most cases involving warrantless arrests, arrest reports prepared by arresting officers are in fact the chief source of information. The Court, however, did not rule out the possibility that additional factual investigation other than that available to arresting officers [*25] at the time the warrantless arrest took place, might be used in the context of a probable cause hearing. For example, the ALI Model Code of Pre-Arraignment Procedure cited with approval by the Court as a proper way of "testing probable cause for detention," allows the issue to be determined at a hearing within two "court days" of arrest, at a proceeding in which both the arrestee and "the state may present additional written and testimonial evidence," including live testimony if the court believes it necessary. *420 U.S. at 124, fn. 25, 95 S.Ct. at 868, fn. 25.* The Court also contemplated that accelerated preliminary hearing procedures that necessarily involve additional factual material would similarly meet the requirements of the Fourth Amendment. *420 U.S. at 124, 95 S.Ct. at 868.*

This is not to say, however, that the legality of the initial arrest itself is necessarily irrelevant to information used for the subsequent judicial determination of probable cause for detention pending trial. If the initial arrest is without probable cause, evidence obtained solely by reasons of the illegal detention, i.e., through improper interrogation, would not be admissible [*26] and hence would not provide a basis for detention for criminal charges - a fact illustrated by this Court's footnote reference to *Mallory v. United States, 354 U.S. 449, 456, 77 S.Ct. 1356, 1360, 1 L.Ed.2d 1479 (1957)* in *Gerstein. See 420 U.S. at 120, n. 21, 95 S.Ct. 866, n. 21.* California law would similarly prohibit use of improperly obtained information. See *People v. Powell, 67 Cal.2d 32, 59 Cal.Rptr. 817, 429 P.2d 137 (1967)* [confession obtained by improper delay in allowing access to counsel and arraignment inadmissible]. On the other hand, if untainted evidence supports a finding of probable cause, a magistrate would, in any event, have a basis for issuing a warrant for arrest, i.e., retaining a defendant in custody regardless of the illegality of the initial arrest. n5

n5 Significantly, while plaintiffs attempt to characterize information contained in the amicus curiae brief of

Riverside County District Attorney Grover Trask as suggesting that County law enforcement officials somehow have a policy of arresting individuals without probable cause and then using the illegal arrest to obtain information to support a subsequent finding of probable cause for arrest (Brief for Resps., p. 34, citing Amicus Brief at pp. 16-17), review of the material submitted by amicus in context belies this contention. The District Attorney notes there may be many instances in which additional facts are produced after arrest, that may be pertinent to the question of probable cause. Brief of Amicus Curiae Grover Trask, District Attorney, County of Riverside, p. 17. The passage does not suggest that under such circumstances there was not pre-existing probable cause for arrest. We note that plaintiffs themselves have submitted no evidence whatsoever that the County of Riverside routinely arrests individuals without probable cause. Indeed, while plaintiffs repeatedly suggest that individuals for whom no criminal complaint is filed must necessarily have been arrested without probable cause, this obviously is not the case. There well may be probable cause for arrest, but notwithstanding that fact, a prosecutor, after review of additional factual investigation, may determine there is not sufficient evidence to establish guilt beyond reasonable doubt and hence decline to file a formal complaint.

[*27]

It is therefore clear that the California Supreme Court's decision in In re Walters specifically addressed the very concerns resolved by this Court in Gerstein and indeed imposed a hearing requirement that amply met the requirements articulated by this Court in Gerstein. n6 The County of Riverside, in turn, provides hearings to warrantless arrestees in accordance with California law and this Court's decision in Gerstein.

n6 Moreover, even assuming, arguendo, that it is probable cause for the initial arrest per se that must be subject to a prompt judicial determination, California plainly provides that such determination may be requested and made at arraignment for either felonies or misdemeanors. See *People v. Powell, 67 Cal.2d 32, 60, 59 Cal.Rptr. 817, 834, 429 P.2d 137* [first appearance at arraignment provides opportunity "to place the issue of probable cause for the arrest before a judicial officer . . .]; see also, *Youngblood v. Gates, 200 Cal.App.3d 1302, 1311, 246 Cal.Rptr. 775 (1988).* In re Walters itself illustrates this principle, for there the defendant requested and received a determination of probable cause for arrest at the time of arraignment. *15 Cal.3d at 753-754.* In addition, although the California Supreme Court in In re Walters noted that the preliminary hearing system for felony arrestees in California would suffice to meet this Court's direction in Gerstein that warrantless arrestees receive a judicial probable cause determination for continued detention, this certainly does not obviate an arrestee's right to request a probable cause determination as to the initial arrest at arraignment as set forth in People v. Powell. As this Court observed by footnote in Gerstein, however, it may well be that an initial determination that probable cause existed for arrest would necessarily result in a finding of probable cause for continued detention. See *420 U.S. at 120, fn. 21, 95 S.Ct. at 866, fn. 21*. Here, of course, the County of Riverside specifically advises arrestees that they have a right to a determination of probable cause for arrest at the time of arraignment. 1 JA 123, 124.

[*28]

In this regard, it is important to note that plaintiffs' brief contains factual errors concerning the nature of arraignment proceedings in Riverside County. For example, plaintiffs suggest that arraignment is a "one-way" proceeding, occurring in a noisy jail environment in which arrestees are given no meaningful explanation of their rights, nor any meaningful opportunity to speak to a judge or receive representation of counsel. Brief of Resps., p. 47. Review of the record in the case, however, belies plaintiffs' characterization of these hearings.

As set forth in the evidence submitted to the district court, each day in which California courts are in session, i.e., Monday through Friday, prisoners are arraigned via a two-way video system in the jail chapel. 1 JA 121 ["The person being arraigned is able to communicate verbally with the Court"]. In order to provide the arrestees with an understanding of what takes place at arraignment, they are shown a video which explains the process and clearly explains their rights. They are admonished that if they have any questions they may ask their attorneys when they appear in court following the video tape, i.e., at the arraignment [*29] itself. 1 JA 123. The video shown to individuals

arrested for misdemeanors specifically advises them of their right to receive a probable cause determination during the hearing if they request one. It also advises them of the right to counsel. Id. Plaintiffs attempt to suggest that there is no public defender available for misdemeanor hearings and indeed that individuals arraigned for misdemeanors do not and cannot have counsel present for arraignment. Not surprisingly, plaintiffs provide no evidence to support this contention. While the declarations submitted by the County do not, as they do with felony arraignments, specify that a public defender is present at misdemeanor arraignments, there is no evidence that a public defender is not there. n7 More significantly, of course, as noted in Petitioners' Brief, California law expressly provides the right to counsel at arraignment and there is no evidence to suggest that County of Riverside prevents individuals from exercising this right, whether they can afford to or not. Penal Code § 987(a). Indeed, many individuals may well have counsel prior to the time of arraignment and counsel may be present if he or she so desires. Thus, [*30] at arraignment, individuals arrested for misdemeanors are entitled to have counsel, who may himself participate in the probable cause determination and, in fact, even negotiate an ultimate plea as to the charges. n8

n7 In his amicus brief, the District Attorney for the County of Riverside notes that in fact public defenders are supplied at arraignment.

n8 Plaintiffs attempt to suggest that attorneys at arraignment cannot meaningfully participate in the probable cause determination by citing a passage from In re Walters limiting defense cross-examination of witnesses at such hearings. Brief of Resps., p. 29, citing *15 Cal.3d at 753.* However, the cited passage does not suggest that counsel may not present argument to the court on probable cause based upon the statements of the witness or on the arrest report, complaint and other documents that are before the court.

Similarly, felony arrestees are shown a video tape in which they are advised of all their rights, including specifically the right to receive a determination of probable cause for arrest. Plaintiffs argue that the County does not provide felony arrestees with a probable cause determination at the time [*31] of arraignment, but rather simply advises them that they are to receive such determinations within a "reasonable" time which plaintiffs interpret to be at the time of preliminary hearing. As noted in Petitioners' Brief, even if the advisement of rights to felony arrestees is ambiguous in this regard, it does not alter the fact that the intention of the County of Riverside is to provide such hearings at arraignment and in fact such hearings are provided if requested. n9 However, an order requiring the County to more clearly advise arrestees of these rights is altogether different from a mandate that the County foresake California procedures entirely and provide ex parte hearings within 36 hours of arrest. Plainly, the standard applied by both the district court and Ninth Circuit would essentially prohibit a public entity from providing probable cause determinations to felony arrestees within the time frame of arraignment.

n9 Petitioners again note, however, that this is not to say that a probable cause for detention at that time of preliminary hearing, no later than ten days after arraignment, would not meet the requirements of Gerstein and Schall in light of the strict time limitation on such hearings and the significant procedural protections afforded arrestees at these hearings. See Brief of Pets., pp. 41-42, n. 12.

[*32]

In sum, having probable cause determined at the time of arraignment, as required by California law, in and of itself provides an arrestee with concrete benefits, notably the presence of counsel, that far outweigh the minimal protections offered by the ex parte proceedings urged by plaintiffs here. At the same time, these additional protections justify the minimal delay that is necessary in order to provide them.

In Gerstein, this Court expressly invited the states to incorporate probable cause determinations into existing pre-trial proceedings. Accordingly, California has done so, requiring such determinations to be made at the time of arraignment, by no later than two court days after arrest. This is the policy followed by the County of Riverside, yet at the same time it is the policy declared unconstitutional by the district court and by the Ninth Circuit. Petitioners

therefore respectfully request the Court to reverse the district court order granting a preliminary injunction.

CONCLUSION

For the foregoing reasons, petitioners respectfully submit that the judgment should be reversed.

Respectfully submitted,

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