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Pretrial Determinations of Probable Cause to Detain Defendants Charged with the Commission of Misdemeanors

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PRETRIAL DETERMINATIONS OF PROBABLE CAUSE TO DETAIN DEFENDANTS CHARGED WITH THE COMMISSION OF MISDEMEANORS

INTRODUCTION

In all criminal cases in California, both felony and misdemeanor, the defendant must be arraigned within two days of his arrest.[1] At the arraignment the defendant is informed of the crime with which he has been charged, his right to counsel, and he is asked to enter a plea.[2] From this point the procedure in felony and misdemeanor cases diverges.

A major difference between felony and misdemeanor procedure is that by statute a defendant in a felony case is entitled to a preliminary hearing and the misdemeanor defendant is not.[3] California's statutory preliminary hearing is an adversary proceeding in which the defendant is entitled to counsel and during which both the prosecution and the defense may present evidence.[4] After the evidence is presented the magistrate must determine if there is sufficient evidence to "lead a man of ordinary caution and prudence to believe, and conscientiously entertain a strong suspicion of the guilt of the accused."[5] If the magistrate finds that there is probable cause to believe that the defendant committed the crime with which he is charged the defendant is held for trial in the superior court.[6] If the magistrate finds that the evidence is not sufficient to establish probable cause to believe that the defendant committed the crime with which he has been charged the defendant must be discharged[7] and his bail must be exonerated.[8] Thus, it is possible

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1. CAL. PENAL CODE §§ 825, 829 (West 1970).
2. *Id.* § 859 (West Supp. 1976); *id.* § 988 (West 1970).
3. *Id.* § 859b (West Supp. 1976) reads in the pertinent part:
   At the time the defendant appears before the magistrate for arraignment, if the public offense is a felony to which the defendant has not pleaded guilty in accordance with Section 859a, the magistrate, . . . must set a time for the examination of the case and must allow not less than two days, excluding Sundays and holidays, for the district attorney and the defendant to prepare for the examination. . . . Unless the defendant waives the right, the defendant if he is in custody shall have the right to a preliminary examination within 10 court days of the date he is arraigned or pleads, whichever occurs later.
4. *See* CAL. CONST. art. 1, § 15; CAL. PENAL CODE §§ 859b, 860, 865, 866 (West 1970); Coleman v. Alabama, 399 U.S. 1, 7-10 (1970).
5. People v. Nagle, 25 Cal. 2d 216, 222, 153 P.2d 344, 347 (1944).
6. CAL. PENAL CODE § 872 (West 1970).
7. *Id.* § 871 (West 1970).
8. *Id.* § 1303 (West Supp. 1976). This assumes that the charges are not refiled

for a felony defendant to gain his release from all restraints upon his liberty without going to trial.

Until recently, however, there has been no procedure by which a defendant charged with the commission of a misdemeanor could challenge the power of the court to impose restraints upon his liberty prior to trial. If a defendant was not released on his own recognizance and if he was not able to raise bail, he was entitled to a bail reduction hearing within five days of arraignment, but that hearing could only be used to challenge the amount of bail which he must post, not the legal power of the court to require him to post it.[9] *Gerstein v. Pugh*[10] and *In re Walters*[11] have altered this situation.

This comment explores the rationale and the scope of *Gerstein* and *Walters*. It also explores the procedural requirements of a *Gerstein* hearing,[12] the determinations made there, the standards applied, and the strengths and weaknesses of the procedure.

THE GERSTEIN DECISION

The United States Supreme Court held in *Gerstein v. Pugh* that Florida's failure to grant defendants a preliminary hearing deprived them of a significant right under the fourth amendment.[13]

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as is possible under the decisions in People v. Uhlemann, 9 Cal. 3d 662, 664, 511 P.2d 609, 610, 108 Cal. Rptr. 657, 658 (1973); People v. Prewitt, 52 Cal. 2d 330, 340, 341 P.2d 1, 6 (1959); *Ex parte* Fenton, 77 Cal. 183, 184, 19 P. 267, 267-68 (1888).

9. CAL. PENAL CODE § 1320 (West Supp. 1976). Under CAL. PENAL CODE § 1275 (West 1970), the grounds for deciding the amount of bail, if any, which the defendant should be required to post relate to the gravity of the crime, the defendant's criminal history and the likelihood that the defendant will make the required appearances. None of these factors considers the question of the existence of probable cause to believe that the defendant has committed a crime.

10. 420 U.S. 103 (1975).

11. 15 Cal. 3d 738, 543 P.2d 607, 126 Cal. Rptr. 239 (1975).

12. In this comment a request for the hearing required by this case is called a *Gerstein* motion and the hearing itself a *Gerstein* hearing.

13. Respondents Pugh and Henderson were being held in custody prior to trial. Mr. Pugh was not eligible for bail because he was charged with an offense, robbery, which carried a life sentence. FLA. STATS. ANN. §§ 812.13, 903.03 (West 1976). Mr. Henderson was unable to raise enough money to post bail. They requested a preliminary hearing, but were denied one under the existing Florida case law. *See, e.g.*, Hardy v. Blount, 261 So. 2d 172 (Fla. 1972). Respondents then filed a class action suit in federal district court claiming a constitutional right to a judicial determination of probable cause. 420 U.S. at 105-07.

For the decisions of the lower courts *see* Pugh v. Rainwater, 332 F. Supp. 1107 (S.D. Fla. 1971), *enforced*, 355 F. Supp. 1286 (S.D. Fla. 1973), *aff'd*, 483 F.2d 778 (5th Cir. 1973), *cert. granted sub nom.* Gerstein v. Pugh, 414 U.S. 1062 (1973).

The Court found that the case raised two important issues: "[W]hether a person arrested and held for trial on an information is entitled to a judicial determination of probable cause for detention, and if so, whether the adversary hearing ordered by the District Court and approved by the Court of Appeals is required by the Constitution."[14]

Three factors were considered important in determining whether there was a constitutional right to a pretrial judicial determination of probable cause to detain. First, since the defendant is in custody at the time of the hearing, allowing him a pretrial determination of probable cause can in no way endanger society.[15] Second, the Court noted that a person charged with the commission of a crime can be held in custody prior to trial or can be subjected to onerous limits on an own recognizance release.[16] The Court believed that either restriction can affect a person's liberty. The loss of a job, the loss of income, and deterioration in the suspect's familial relationships can flow from both detention and limited OR release.[17] Third, *Gerstein* found the history of English and American criminal procedure persuasive.[18] It noted that at common law in England the suspect was customarily brought before a justice of the peace shortly after arrest for a determination of probable cause to believe that the defendant had committed a crime.[19] It also

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For commentaries on the decisions of the district court and the Fifth Circuit, *see* 60 VA. L. REV. 540 (1974); 25 VAND. L. REV. 434 (1972).

14. 420 U.S. at 111.

15. *Id.* at 114.

16. *Id.* As examples of what the *Gerstein* Court felt were onerous limits upon a defendant's liberty it cited 18 U.S.C. §§ 3146(a)(2), (5) (1970). Under section 3146(a)(2), a federal court can "place restrictions on the travel, association, or place of abode" of a person who is released on his own recognizance. Under section 3146 (a)(5), a federal district court can require a person who is released on his own recognizance to return to custody each day at certain hours.

17. 420 U.S. at 114. For the adverse effect of pretrial detention on plea bargaining, *see, e.g.*, NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS: CORRECTIONS 168-69 (1973); Rankin, *The Effect of Pretrial Detention*, 39 N.Y.U.L. REV. 641 (1964); Wald, *Pretrial Detention and Ultimate Freedom: A Statistical Study*, 39 N.Y.U.L. REV. 631 (1964).

For a description of the conditions under which a defendant is detained in the county jail prior to trial *see, e.g.*, BOARD OF CORRECTIONS, CALIFORNIA CORRECTIONAL SYSTEM STUDY, JAIL TASK FORCE REPORT 39-40, 72 (1971); THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS 24-25 (1967); *Pre-Trial Detention in the New York City Jails*, 7 COLUM. J.L. & SOC. PROB. 350 (1971); Note, *Constitutional Limitations on the Conditions of Pretrial Detention*, 79 YALE L.J. 941, 941-47 (1970).

18. 420 U.S. at 114-16.

19. *Id.* at 114-15. In support, the Court cited 1 M. HALE, PLEAS OF THE CROWN 583-86(1736); 2 M. HALE, PLEAS OF THE CROWN 77, 81, 95, 121 (1736); 2 W. HAWKINS,

noted that in the United States, after the adoption of the fourth amendment, probable cause decisions were subject to review on a petition for a writ of habeas corpus.[20] From these observations the Court concluded that a defendant who is subject to pretrial detention is suffering a restraint upon his liberty, and, thus, under the fourth amendment he has a right to a judicial determination of probable cause to believe that he committed the crime with which he has been charged.

The *Gerstein* Court next considered the appropriate scope of the hearing to determine probable cause.[21] While the Court realized that an adversary hearing would result in a more reliable determination of probable cause than would a nonadversary hearing,[22] it listed four factors which militated against requiring a full adversary hearing. First, the Court noted that the question for decision at the hearing will be limited to a determination of the existence of probable cause to detain the defendant prior to trial.[23] Second, it noted that the determination to be made at the hearing does not require a fine balancing of the evidence.[24] Third, the suspect's defense on the merits would not be jeopardized by a nonadversarial hearing. Since the defendant need not be given an opportunity to cross-examine prosecution witnesses, the testimony presented would not be admissible at trial as an exception to the hearsay rule for former testimony.[25] Fourth, the Court saw an adversary hearing as a further burden on already overcrowded courts.[26] The *Gerstein* Court therefore concluded that it is not necessary under the fourth amendment to provide the defendant with a full adversary hearing.[27]

PLEAS OF THE CROWN 112-19 (4th ed. 1762); J. STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 233 (1833).

20. 420 U.S. at 115-16. In support, the Court cited Draper v. United States, 358 U.S. 307, 317-20 (1959) (Douglas, J., dissenting); Kurtz v. Moffitt, 115 U.S. 487, 498-99 (1885); *Ex parte* Bollman 8 U.S. (4 Cranch) 75, 97-101 (1807); *Ex parte* Burford, 7 U.S. (3 Cranch) 448 (1806); United States v. Hamilton, 3 U.S. (3 Dall.) 17 (1795).

21. The decisions of the district court and the Fifth Circuit Court of Appeals required that the suspect be given an adversary hearing. Pugh v. Rainwater, 483 F.2d 778, 788-89 (5th Cir. 1973); Pugh v. Rainwater, 332 F. Supp. 1107, 1112-15 (S.D. Fla. 1971).

22. 420 U.S. at 121-22.

23. *Id.* at 120-21.

24. *Id.* at 121, 123. *See* text accompanying notes 67-69 *infra*, for an explanation of the scope of the decision to be made at a *Gerstein* hearing.

25. 420 U.S. at 122-23. Under California v. Green, 399 U.S. 49 (1970), for former testimony to be admissible in a later criminal trial the defendant must be afforded an opportunity to cross-examine the witness.

26. 420 U.S. at 122 n.23.

27. *Id.* at 123. For criticism of these arguments *see* Winter, *Probable Cause for*

Thus *Gerstein* established that defendants who are subjected to pretrial restraints upon their liberty have a right to a nonadversary determination of probable cause by a neutral and detached magistrate.[28] In so holding the Court did not attempt to establish a precise procedure for the hearing. Instead, it established a set of minimum requirements which it felt were constitutionally compelled, but left to the states the determination of the form that the hearing would actually take.[29]

PROBABLE CAUSE HEARINGS FOR MISDEMEANANTS

In *In re Walters* the California Supreme Court considered the impact of *Gerstein* on California criminal procedure. It held that, under the rationale of *Gerstein,* misdemeanor defendants are constitutionally entitled to a judicial determination of probable cause to detain.[30]

Walters was arraigned on misdemeanor charges and his attorney demanded a *Gerstein* hearing.[31] On the basis of the

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Pretrial Detention: Does Gerstein v. Pugh Adequately Insure Its Existence, 6 GOLDEN GATE L. REV. 139 (1975); Note, *A Constitutional Right to A Preliminary Hearing for All Pretrial Detainees,* 48 S. CAL. L. REV. 158 (1974); Case Comment, *Pretrial Detainees Have a Fourth Amendment Right to a Judicial Determination of Probable Cause,* 10 VAL. L. REV. 199 (1975); 37 OHIO ST. L.J. 170 (1976); 51 WASH. L. REV. 425 (1976).

While the *Gerstein* Court noted that pretrial custody could impair the ability of the suspect to aid in the preparation of his defense, it did not give enough weight to this factor. 420 U.S. at 123. The Court should have given more weight to this factor due to the gravity of the results of a felony conviction.

28. 420 U.S. at 124-25. An analogous procedure has been available to prisoners who are being held on federal charges under FED. R. CRIM. P. 5, 5.1 and the United States Supreme Court decisions in the cases of Jaben v. United States, 381 U.S. 214, 218 (1965); Mallory v. United States, 354 U.S. 449, 453-54 (1957); McNabb v. United States, 318 U.S. 332, 342-44 (1943).

29. 420 U.S. at 123-25. Justices Stewart, Douglas, Brennan, and Marshall objected to specifying procedural protections which are not required by the fourth amendment. *Id.* at 126-27 (Stewart, Douglas, Brennan, and Marshall J.J., concurring).

It should be noted that the *Gerstein* Court left it to the states to decide the type of hearing which would be given to a person who makes a *Gerstein* motion. *Id.* at 123-25. This follows a trend which the United States Supreme Court has established in recent years. The Court has been expanding the scope of the due process clause to cover areas in which due process rights did not previously exist. In doing so the Court has established general guidelines as to the content of the hearings to be provided, but it has left it to the states to establish procedures for the hearing. *See, e.g.,* Goss v. Lopez, 419 U.S. 565 (1975) (suspension from school); Gagnon v. Scarpelli, 411 U.S. 778 (1973) (revocation of probation); Morrissey v. Brewer, 408 U.S. 471 (1972) (revocation of parole).

30. 15 Cal. 3d 738, 747, 543 P.2d 607, 614, 126 Cal. Rptr. 239, 246 (1975).

31. *Id.* at 743, 543 P.2d at 611, 126 Cal. Rptr. at 243. Mr. Walters was arrested for possession of marijuana in violation of CAL. HEALTH & SAFETY CODE § 11357 (West 1975) and being intoxicated in public in violation of CAL. PENAL CODE § 647(f) (West 1970).

police reports, the magistrate held that there was probable cause to detain Walters prior to trial.[32] Walters filed a petition for a writ of habeas corpus in order to challenge the magistrate's determination of probable cause.[33] He claimed that his rights under the fourth amendment to the United States Constitution, and under Article I, sections 7 and 13, of the California Constitution, had been violated because the hearing was inadequate.[34] Despite the fact that Walters was no longer in pretrial custody and that the issue, therefore, was technically moot, the court ruled on the merits of the issues presented by the petition, because the case raised an issue "of general public concern . . . in the area of the supervision of the administration of criminal justice."[35]

The *Walters* court noted that while the United States Supreme Court in *Gerstein* did not address the issue,[36] the rationale of the *Gerstein* decision applied equally to misdemeanor defendants and felony defendants, and held that *Gerstein* hearings must be made available both to defendants charged with the commission of a felony and to defendants charged with the commission of a misdemeanor.[37]

The court noted that current procedure in felony cases is in compliance with the requirements of *Gerstein.*[38] If a defendant charged by information with the commission of a felony makes a *Gerstein* motion in superior court, the magistrate need only establish that the defendant was given a preliminary hearing and that at that hearing the defendant was held to answer

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32. *Id.* at 743, 543 P.2d at 611, 126 Cal. Rptr. at 243.

33. *Id.* at 742, 543 P.2d at 611, 126 Cal. Rptr. at 243.

34. *Id.*

35. *Id.* at 744, 543 P.2d at 612, 126 Cal. Rptr. at 244. Only one other court has taken this position. State *ex rel.* Joshua, 327 So. 2d 429 (La. Ct. App. 1976). In that case it was held that a juvenile had a right to a preliminary hearing. No other state court has ignored the issue of mootness. *See, e.g.*, Brown v. State, ___ Ark. ___, 534 S.W.2d 213, 217 (1976); McClure v. Hooper, 234 Ga. 45, 47, 214 S.E.2d 503, 505 (1975); State v. Lass, 228 N.W.2d 758, 762 (Iowa 1975); People v. Shing, 83 Misc. 2d 213, ___, 371 N.Y.S.2d 322, 328 (1975).

36. The decisions of the district court and the Fifth Circuit held that preliminary hearings must be provided for suspects charged with the commission of felonies or misdemeanors. Pugh v. Rainwater, 483 F.2d 778, 788-89 (5th Cir. 1973); Pugh v. Rainwater, 332 F. Supp. 1107, 1112-15 (S.D. Fla. 1971).

37. 15 Cal. 3d at 748-49, 543 P.2d at 615, 126 Cal. Rptr. at 247. The court stated: "These circumstances present precisely that situation with which *Gerstein* was concerned: a significant pretrial restraint of liberty without procedures for a reliable determination of probable cause for that restraint. Clearly petitioner was entitled to demand such determination when he first appeared before the magistrate." *Id.*

38. *Id.* at 752 n.8, 543 P.2d 617-18 n.8, 126 Cal. Rptr. at 249-50 n.8.

by the magistrate.[39]

Defendants held pursuant to an indictment issued by a grand jury presented a more difficult problem. *Walters* noted that a defendant who is indicted is not given a judicial determination of probable cause.[40] However, the grand jury's determination of probable cause, combined with the defendant's opportunity to bring a motion to set aside the indictment pursuant to Penal Code § 995, provides an adequate opportunity to litigate the question of the existence of probable cause to detain prior to trial.[41] The *Walters* court added that if a defendant who is indicted by the grand jury fails to avail himself of this procedure, it will be assumed that he has waived his right to a *Gerstein* hearing.[42] Thus, *Gerstein* and *Walters* will have no effect on the California procedure in felony cases.

The major impact in California of *Gerstein* and *Walters* will be on misdemeanor procedures. The *Walters* court noted that the *Gerstein* determination of probable cause to detain could be made either before or after the defendant's arrest[43] and that the standard to be applied in determining the existence of probable cause to detain is identical to the standard which is used in determining probable cause to issue an arrest warrant.[44] Thus, *Gerstein* does not require a post-arrest determination of probable cause to detain if the defendant was arrested pursuant to an arrest warrant.

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39. *Id.* For the standard to be applied in determining whether there is probable cause to hold the defendant to answer *see* Garabedian v. Superior Court, 59 Cal. 2d 124, 378 P.2d 590, 28 Cal. Rptr. 318 (1963).

The *Walters* court did not specify the proper procedure if the defendant waived the preliminary hearing as is allowed by CAL. PENAL CODE § 860 (West 1970).

40. 15 Cal. 3d at 752 n.8, 543 P.2d at 617-18 n.8, 126 Cal. Rptr. at 249-50 n.8.

41. *Id.* CAL. PENAL CODE § 995 (West 1970) reads in pertinent part:

> The indictment or information must be set aside by the court in which the defendant is arraigned, upon his motion, in either of the following cases:
>
> If it be an indictment:
>
> 1. Where it is not found, endorsed, and presented as prescribed in this code.
>
> 2. That the defendant has been indicted without reasonable or probable cause.

For a discussion of the related problem of a right to a post-indictment preliminary hearing *see* Johnson v. Superior Court, 15 Cal. 3d 248, 539 P.2d 742, 124 Cal. Rptr. 32 (1975); Comment, *Post-Indictment Preliminary Hearings?*, 9 JOHN MARSHALL J. PRAC. & PRO. 499 (1975-76).

42. 15 Cal. 3d at 752 n.8, 543 P.2d at 617-18 n.8, 126 Cal. Rptr. at 249-50 n.8.

43. *Id.* at 749, 543 P.2d at 615, 126 Cal. Rptr. at 247, *citing* Gerstein v. Pugh, 420 U.S. 103, 124-25 (1975).

44. *Id.*

The California Supreme Court in *Walters,* however, held that a post-arrest judicial determination of probable cause was necessary regardless of whether the arrest was made pursuant to a warrant. The court relied on two factors. First, without a post-arrest hearing a conclusive presumption of validity would be given to an arrest warrant, even if the warrant was issued on the basis of an affidavit which is factually or technically deficient.[45] If the defendant is given a post-arrest hearing his attorney can bring to the Court's attention any deficiency in the arrest warrant. If it is deficient, and if the prosecution cannot present other evidence sufficient to establish probable cause to detain, the defendant will be entitled to be released from detention. Second, the only other way in which probable cause to detain could be challenged is by filing a petition for a writ of habeas corpus, which imposes a large burden on both the defendant and the prosecution.[46] Thus, the *Walters* court concluded that *Gerstein* hearings should be available to defendants charged with the commission of misdemeanors whether or not an arrest warrant has been issued.[47]

In *Gerstein* the United States Supreme Court held that before a person is entitled to a determination of probable cause to detain he must be subject to a "significant restraint" upon his liberty.[48] The *Walters* court interpreted that language to mean that if the defendant is released on his own recognizance or after posting bail he would not be entitled to a *Gerstein* hearing.[49] The effect of *Walters* is that a defendant charged with committing a misdemeanor will be entitled to a *Gerstein* hearing only if he is in custody due to an inability to post bail.

Gerstein and *Walters* attempt to protect interests in liberty that are less compelling if the defendant has been released

45. *Id.* at 748-49, 543 P.2d at 615-16, 126 Cal. Rptr. at 247-48.

46. *Id.* at 749 n.5, 543 P.2d at 615-16 n.5, 126 Cal. Rptr. at 247-48 n.5.

47. *Id.* at 750, 543 P.2d at 616, 126 Cal. Rptr. at 248.

48. 420 U.S. at 125. The *Gerstein* Court did not define what was meant by this requirement. The only guidance which the Court gave was to state that a promise to appear is *not* a significant restraint upon the defendant's liberty and that the requirements of 18 U.S.C. §§ 3146(a)(2), (5) (1970) were significant restraints. 420 U.S. at 114.

49. 15 Cal. 3d at 743 & n.1, 543 P.2d at 611 & n.1, 126 Cal. Rptr. at 243 & n.1. To date only one other court has considered the merits of this issue. In *In re* Florida Rules of Criminal Procedure, 309 So. 2d 544 (Fla. 1975) the Florida Supreme Court held that all defendants who are detained prior to trial and those defendants who are released on conditions which they can show to be significant restraints upon their liberty are entitled to determinations of probable cause to detain. *Id.* at 544-45. *See* 3 FLA. ST. U.L. REV. 650 (1975).

on his own recognizance or after posting bail. The adverse effects of an arrest will be minimized if the defendant is released soon after arrest because it is less likely that he will lose his job or income or that his familial relationships will be seriously impaired.

The *Walters* court held that *Gerstein* was applicable to misdemeanor defendants as well as felony defendants and whether or not he has been arrested pursuant to a warrant. The result is that all misdemeanor defendants in California who are subject to pretrial detention will receive pretrial determinations of probable cause.

THE SCOPE OF THE HEARING

Walters established that a person who is charged with the commission of a misdemeanor and who is subject to a "significant restraint" upon his liberty is entitled to a *Gerstein* hearing, but the hearing that he is entitled to is less than a full adversarial hearing. It is subject to a number of rigid limitations.

The initial burden is on the defendant in that he must make a *Gerstein* motion at the time of his arraignment or he, in effect, will waive his right to a pretrial determination of probable cause to detain him, unless he can prove that he did not have notice of his right.[50]

Once the defendant makes a *Gerstein* motion he must be granted a hearing to determine whether there is sufficient evidence to establish probable cause to believe that the defendant committed the crime with which he has been charged.[51] This standard is identical to the standard which is applied at the preliminary hearing to determine if a felony defendant should be held to answer in the superior court.[52] However, the structure of a *Gerstein* hearing and the preliminary hearing received by a felony defendant will differ radically due to the nonadversary nature of a *Gerstein* hearing and the nature of the evidence

50. 15 Cal. 3d at 750, 573 P.2d at 616, 126 Cal. Rptr. at 248.

51. 420 U.S. at 111; 15 Cal. 3d at 753, 543 P.2d at 618, 126 Cal. Rptr. at 250. This standard is identical to the standard which a magistrate applies in determining whether there is probable cause to issue an arrest warrant. *See, e.g.*, Jaben v. United States, 381 U.S. 214 (1965); Aguilar v. Texas, 378 U.S. 108 (1964); Giordenello v. United States, 357 U.S. 480 (1958); Brinegar v. United States, 338 U.S. 160 (1949); People v. Cressey, 2 Cal. 3d 836, 471 P.2d 19, 87 Cal. Rptr. 699 (1970); People v. Sesslin, 68 Cal. 2d 418, 439 P.2d 321, 67 Cal. Rptr. 409 (1968).

52. *See* text accompanying note 5 *supra*.

which the magistrate can consider at that hearing. Unlike the statutory preliminary hearing the defendant has no right to present evidence at a *Gerstein* hearing and he need not be given an opportunity to cross-examine witnesses presented by the prosecution.[53] The *Walters* court stated: "[A]s the defendant is not entitled to challenge such factual statements by confronting and cross-examining the declarer [*sic*], he likewise has no right to confront and cross-examine the witnesses who testify on the issue of probable cause to detain."[54] All of the evidence will be presented by the prosecution, and except for the defendant's presence with his attorney, the hearing has all of the attributes of an ex parte hearing.

The nature of the evidence upon which the magistrate will make a determination as to the existence of probable cause to detain will also have a large effect upon the type of hearing which will be provided to a person who has made a *Gerstein* motion. Under *Walters* the magistrate is to consider the same type of evidence as he would in a hearing to determine the existence of probable cause to issue an arrest warrant.[55] The magistrate can consider an arrest warrant and its supporting complaint and affidavit,[56] police reports of the incident,[57] or a sworn complaint which fully explains the facts of the case and establishes all of the elements of the offense.[58] If none of these documents is sufficient to establish probable cause, the prosecution may present and the magistrate can consider testimonial evidence.[59]

The court recognized that some evidence would be hearsay[60] and in order to insure that the evidence which is received is reliable, it held that the information must be part of a sworn document which is based upon the personal knowledge of the affiant[61] or "[u]pon the belief of such person who further states the basis for his information and belief and other facts

53. 15 Cal. 3d at 752-53, 543 P.2d at 618, 126 Cal. Rptr. at 250.

54. *Id.*

55. For the types of information which are used in determinations of probable cause to issue an arrest warrant *See generally* Spinelli v. United States, 393 U.S. 410, 412-19 (1969); Jaben v. United States, 381 U.S. 214, 221-25 (1965); Draper v. United States, 358 U.S. 307 (1959); Giordenello v. United States, 357 U.S. 480, 484-87 (1958); Brinegar v. United States, 338 U.S. 160, 172-78 (1949).

56. 15 Cal. 3d at 751, 543 P.2d at 616, 126 Cal. Rptr. at 248.

57. *Id.* at 751, 543 P.2d at 617, 126 Cal. Rptr. at 249.

58. *Id.* at 752, 543 P.2d at 617, 126 Cal. Rptr. at 249.

59. *Id.* at 752-53, 543 P.2d at 618, 126 Cal. Rptr. at 250.

60. *Id.* at 751, 543 P.2d at 617, 126 Cal. Rptr. at 249.

61. *Id.*

which demonstrate the trustworthiness of such information."[62] Thus, the main inquiry in a *Gerstein* hearing will be to determine whether the papers presented by the prosecution show the elements of the crime and whether the person who provided the information is credible. In most cases the determination of probable cause to detain will be made after the magistrate reads a copy of a sworn complaint and a police report or, if there is an arrest warrant, the complaint and the affidavit which were prepared to support the request for the issuance of the arrest warrant.

In order to give guidance to the lower courts, the California Supreme Court noted several situations which it felt did not establish probable cause to detain. The magistrate should rule that there is no probable cause to detain if the documents which the prosecutor submits merely recite the defendant's crime in the language of the statute;[63] or if there is no statement in the charging documents to show that the information contained therein is based upon the personal knowledge of the affiant;[64] or if there is not a sufficient basis to show that the information contained in the documents which are presented upon the information and belief, is trustworthy.[65]

After receiving the evidence, the magistrate will evaluate it in order to determine if there are "facts and circumstances 'sufficient to warrant a prudent man in believing that the [suspect] had committed . . . an offense.' "[66] If the magistrate finds that there is not probable cause to believe that the defendant committed the crime with which he has been charged, the defendant must be released from pretrial custody.[67] If, however, the prosecution can establish probable cause to believe that the defendant committed the crime with which he has been charged, the defendant can be subjected to continued pretrial detention if he is unable to post bail.[68]

Unlike the determination which is made in a preliminary hearing in a felony prosecution, the determination of the exist-

62. *Id.*
63. *Id.* at 748, 543 P.2d at 615, 126 Cal. Rptr. at 247.
64. *Id.*
65. *Id.* at 751, 543 P.2d at 617, 126 Cal. Rptr. at 249.
66. Gerstein v. Pugh, 420 U.S. at 111.
67. 15 Cal. 3d at 753, 543 P.2d at 618, 126 Cal. Rptr. at 250.
68. *Id.* Under California law all persons charged with the commission of misdemeanors have a right to bail. *See* CAL. CONST. art. 1, § 12; CAL. PENAL CODE §§ 1270, 1271 (West 1970); *In re* Underwood, 9 Cal. 3d 345, 508 P.2d 721, 107 Cal. Rptr. 401 (1973).

ence of probable cause to detain pursuant to a *Gerstein* hearing will have no effect on the power of the district attorney to prosecute the case, since the *Walters* court held that the hearing is solely concerned with the loss of liberty prior to trial.[69] Therefore, the real effect of *Gerstein* and *Walters* will be to allow defendants who could not afford bail to be released solely on their promise to appear if the prosecutor cannot convince the magistrate that there is probable cause to detain.

Deficiencies in the Hearing Procedures

There are two major deficiencies in the procedure established by *Walters*. First, the *Gerstein* hearing is too summary and too heavily weighted in favor of the prosecution. The evidence upon which the magistrate will make his determination of probable cause will be, in most cases, the police report of the incident. This report is likely to be one-sided and in some cases it will contain factual misstatements. The defendant does not have a right to present evidence in his own behalf or even to cross-examine live witnesses presented by the prosecution. Thus, the defendant will not have an opportunity to challenge even the most outrageous factual misstatements contained in the information presented by the prosecutor. Further, the evaluation which the magistrate is to make is very superficial. The magistrate will merely inspect the police report to see that it recites the elements of the defendant's crime and that there exist some indicium of the reliability of the information contained in the report. Thus, it is apparent that in the normal case the issue which will be litigated at a *Gerstein* hearing is whether the police officer who arrested the defendant wrote a report which satisfies the requirements of the *Walters* decision and not whether there is a sufficient suspicion of guilt so as to justify the imposition of restraints upon the defendant's liberty.

There are four factors to which the *Walters* court should have given more consideration and which militate toward giving the defendant a fuller hearing. First, until the defendant is convicted he is entitled to the benefits of the presumption of innocence and a fuller *Gerstein* hearing would insure that the defendant would not be subjected to any of the incidents of a conviction, such as imprisonment, until he is convicted.

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69. 15 Cal. 3d at 753, 543 P.2d at 618-19, 126 Cal. Rptr. at 250-51.

Second, decisions in the area of revocation of probation and parole indicate that due process requires more than such a minimal hearing. Both the United States and California Supreme Courts require that the defendant be afforded two hearings before parole or probation revocation.[70] The first hearing is analogous to a preliminary hearing. The issue to be decided at this hearing is whether there is probable cause to believe that the defendant has violated a condition of his probation or parole.[71] The defendant may appear on his own behalf at this hearing; he may present documents, letters, affidavits and witnesses; and he may cross-examine adverse witnesses.[72] At the second hearing, called a final revocation hearing, the defendant is entitled to a final determination of contested facts.[73] The procedure in probation and parole revocations is analogous to the procedure in misdemeanor cases where the defendant gets a *Gerstein* hearing and a trial. Despite the fact that the procedure is similar, the suspected probation or parole violator's rights are more fully protected than those of a defendant charged with the commission of a misdemeanor because the former is given an adversarial preliminary hearing. This result is anomalous because both the revocation procedures and the Gerstein hearing are attempting to ensure that the defendant is not subjected to restraints upon his liberty on the basis of unfounded charges and while the defendant charged with the commission of a misdemeanor may be deprived of all of his liberty, a person suspected of violating probation or parole is being deprived of what the United States Supreme Court called a conditional form of liberty.[74] By this the Court meant that a suspected probation or parole violator is already subject to restrictions which are placed upon his freedom by the probation or parole department.[75] There is no apparent justification for providing a suspected misdemeanant with less protection than is afforded a suspected probation or parole violator.

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70. Gagnon v. Scarpelli, 411 U.S. 778, 782 (1973); Morrissey v. Brewer, 408 U.S. 471, 485-89 (1972); People v. Vickers, 8 Cal. 3d 451, 458, 503 P.2d 1313, 1318-19, 105 Cal. Rptr. 305, 310-11 (1972).

71. Morrissey v. Brewer, 408 U.S. at 485; *accord* People v. Vickers, 8 Cal. 3d at 456-57, 503 P.2d at 1317-18, 105 Cal. Rptr. at 309-10.

72. Morrissey v. Brewer, 408 U.S. at 487; People v. Vickers, 8 Cal. 3d at 456-57, 503 P.2d at 1317, 105 Cal. Rptr. at 309. *See also* Goss v. Lopez, 419 U.S. 565, 581 (1975), where the Court held that a student who is suspended from school must be allowed to present his side before the suspension can become effective.

73. Morrissey v. Brewer, 408 U.S. at 488.

74. *Id.* at 482.

75. *Id.*

Third, if the magistrate determines that there is probable cause to detain the defendant and he cannot raise bail, he can be held in the county jail for up to thirty days before he must be brought to trial.[76] While the defendant is in custody he is deprived of his constitutionally protected interest in liberty. Liberty is a significant personal interest which is inadequately protected by a hearing which is a mere formality. Giving the defendant an opportunity to participate at the *Gerstein* hearing would further safeguard that liberty interest without significantly encroaching on any legitimate state interest.

Finally, since, as the *Walters* court noted, under California law the defendant is entitled to counsel at arraignment,[77] at which time the *Gerstein* hearing is to be held, his defense on the merits would not be jeopardized if he were allowed to participate in that hearing. The defendant's attorney would, as in the constitutionally permitted statutory preliminary hearing,[78] ensure that the defendant's case on the merits would not be jeopardized. Thus, under current California criminal procedure the defendant's rights would be fully protected if he were allowed to participate in his *Gerstein* hearing.

The most persuasive argument against a full adversarial *Gerstein* hearing is that it would result in an undue consumption of the magistrate's time. Although efficient administration of justice is an important state interest, it is outweighed in these circumstances by the defendant's interest in his liberty. Thus, the defendant should at least be offered the opportunity to present exculpatory evidence or to cross-examine witnesses presented by the prosecution.

The second deficiency in the procedure which was established by the *Walters* decision is that the defendant is not automatically provided with a *Gerstein* hearing. Given a *Gerstein* hearing which is cursory in nature, the protection of an automatic hearing is necessary to ensure that the defendant is not arbitrarily deprived of his liberty. The consumption of the magistrate's time would be minimal. Additionally, the determinations of probable cause which are provided for defendants who are charged with violating parole or probation are automatically provided to the defendant.[79] There is no mean-

76. CAL. PENAL CODE § 1382(3) (West 1970).

77. 15 Cal. 3d 738, 750, 543 P.2d 607, 616, 126 Cal. Rptr. 239, 248.

78. *See* Coleman v. Alabama, 399 U.S. 1, 7-10 (1970).

79. Morrissey v. Brewer, 408 U.S. 471, 486-87 (1972); People v. Vickers, 8 Cal. 3d 451, 460, 503 P.2d 1313, 1320, 105 Cal. Rptr. 305, 312 (1972).

ingful distinction between parole or probation revocations and misdemeanor prosecutions which would account for the lack of an automatic hearing in the latter situation.[80] This would be a small change, but it would ensure that the defendant's liberty would be protected from any unfounded restraints. The excess consumption of time which would result is a small price to pay in light of the benefits which the defendant could gain as a result of a favorable decision in a *Gerstein* hearing.

CONCLUSION

The right to a pretrial determination of probable cause to detain in misdemeanor cases which has been established in *Gerstein v. Pugh* and *In re Walters* has remedied a deficiency in pretrial procedure in California. In the past, a person accused of committing a misdemeanor who could not make bail, could be incarcerated prior to trial without the slightest showing of the defendant's involvement in criminal activity. As was noted by the *Gerstein* and *Walters* courts, such incarceration has serious effects on the defendant.

Gerstein and *Walters* have provided an important first step by recognizing that defendants who are detained prior to trial have rights which need protecting. Unless further steps are taken, however, the rights with which *Gerstein* and *Walters* were concerned will be destroyed by the very procedures which were established to protect them.

Steven J. Alpers

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80. The *Walters* court, citing *Gerstein* distinguished probation and parole revocations from *Gerstein* hearings in three ways. First, it noted that one of the purposes of a prerevocation hearing is to gather live testimony. Second, it noted that prosecutors are not supposed to file misdemeanor charges unless they believe that there is probable cause. Third, it noted that courts are overburdened. 15 Cal. 3d at 753 n.9, 543 P.2d 618 n.9, 126 Cal. Rptr. at 250 n.9.

None of these factors is persuasive. First, the *Walters* court could have required that any testimony be preserved. Second, the reason for a *Gerstein* hearing is to impose the judgment of a detached magistrate upon the process. Third, it would not consume a large amount of time to allow the defendant to cross-examine witnesses or to present the evidence which he has gathered by the time of the arraignment.