**Prompt Probable Cause Review:**

**A Dissent by Justice Scalia All Americans Want.**

by Shannon Challender[[1]](#footnote-1)

A crime has been committed. A law enforcement officer plans to make an arrest based on an investigation. The Constitution requires the officer to present a sworn statement before a detached magistrate in order to determine probable cause. That is, a magistrate, without any bias or attachment to the parties involved, must review the facts of the investigation to determine the suspected culprit more than likely committed the crime before an officer may Constitutionally arrest a suspect. This process results in an arrest warrant. However, sometimes circumstances arrive when an officer is called to the scene of an ongoing crime or witnesses a crime in which the officer must make an arrest to protect the peace. The officer must however only make the arrest if there is probable cause the arrestee committed the crime. An officer cannot arrest someone for less than probable cause, e. g. spite. However, because the officer is not a detached magistrate, the US Constitution still requires that a magistrate determine probable cause after an arrest made without a warrant. This is to prevent circumventing the arrest warrant protection afforded all Americans.

The Supreme Court in *County of Riverside v. McLaughlin[[2]](#footnote-2)*, lays out a rule whereby the government is presumed to have promptly brought an arrestee before a magistrate for a probable cause review when the arrestee receives a probable cause review within 48 hours of a warrantless arrest. The Supreme Court’s opinion was that a probable cause review held within 48 hours of a warrantless arrest places the burden on the arrestee to show a lack of promptness, i.e., the government violated its duty and your right to a prompt probable cause review. And, when an arrestee is brought before a magistrate after 48 hours the government is presumed to be in violation of its duty and your right to a prompt probable cause, which would then require the government to show that extraordinary circumstances prevented a more prompt probable cause review.

Here are four instances where government action is in disregard to the rule:

1. When a court resets the date of a probable cause review without the arrestee’s consent because the arresting officer is not present.
2. When, in a most peculiar circumstance, an arrestee is given a bond hearing in lieu of a probable cause review – one would not need a bond if one were not confined due to an illegal arrest.
3. When no effort is made at all to bring an arrestee before a magistrate for a probable cause review within 48 hours.
4. When an arrest warrant is taken out after the arrest, while the defendant sits in confinement, purposely not brought before the magistrate to contest the officer’s testimony –an officer who now has an interest in ensuring his actions are seen as Constitutional after the fact.

The prompt probable cause review required by Constitutional Due Process is explained by the U.S. Supreme Court in *Gerstein v. Pugh[[3]](#footnote-3)*,

at common law it was customary, if not obligatory, for an arrested person to be brought before a justice of the peace shortly after arrest. The justice of the peace would examine the prisoner and the witnesses to determine whether there was reason to believe the prisoner had committed a crime. If there was, the suspect would be committed to jail or bailed pending trial. If not, he would be discharged from custody. The initial determination of probable cause also could be reviewed by higher courts on a writ of habeas corpus. This practice furnished the model for criminal procedure in America immediately following the adoption of the Fourth Amendment and there are indications that the Framers of the Bill of Rights regarded it as a model for a ‘reasonable’ seizure.[[4]](#footnote-4)

Both the standards and procedures for arrest and detention have been derived from the Fourth Amendment and its common-law antecedents. The standard for arrest is probable cause, defined in terms of facts and circumstances ‘sufficient to warrant a prudent man in believing that the (suspect) had committed or was committing an offense. This standard, like those for searches and seizures, represents a necessary accommodation between the individual’s right to liberty and the State’s duty to control crime.[[5]](#footnote-5)

The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.[[6]](#footnote-6)

…[A] policeman’s on-the-scene assessment of probable cause provides legal justification for arresting a person suspected of crime, and for a brief period of detention to take the administrative steps incident to arrest. Once the suspect is in custody, however, the reasons that justify dispensing with the magistrate’s neutral judgment evaporate. There no longer is any danger that the suspect will escape or commit further crimes while the police submit their evidence to a magistrate. And, while the State’s reasons for taking summary action subside, the suspect’s need for a neutral determination of probable cause increases significantly. The consequences of prolonged detention may be more serious than the interference occasioned by arrest. Pretrial confinement may imperil the suspect’s job, interrupt his source of income, and impair his family relationships. Even pretrial release may be accompanied by burdensome conditions that effect a significant restraint of liberty. When the stakes are this high, the detached judgment of a neutral magistrate is essential if the Fourth Amendment is to furnish meaningful protection from unfounded interference with liberty.[[7]](#footnote-7)

One might think that this is all very straight forward. Don’t we do this? Don’t all Americans arrested without a warrant get a prompt probable cause review? No.

Perhaps it is because of a muddling of terms. Let us assume that within the culture of a jurisdiction’s legal community the phrase “probable cause review” is spoken of as a “probable cause hearing.” This might be the first sign that confusion exists about the correct issue to be addressed. A probable cause *hearing* takes place in an entirely different time and under entirely different circumstances than a probable cause review. A probable cause *hearing* would take place after a change in the status of an arrestee. A probable cause review by a detached magistrate is what changes the status of an arrestee. If probable cause is found the arrestee is “bound over” to the jurisdiction of a trial court under the status of a defendant, no longer just an arrestee. The defendant would then address the possibility of posting a bond immediately after the probable cause review in what is called a bond hearing.

While awaiting trial the trial court judge may schedule a “preliminary hearing” if dispositive evidence would result in an accusation being dismissed, including the possibility of newly discovered evidence that would show the arrest was made without probable cause. With preliminary hearings, a prosecutor is involved as the case in the process of being “bound over” requires prosecutorial action to formally charge or indict the defendant before the trial. Obviously a preliminary hearing happens after a prompt probable cause review. And while the preliminary hearing may address the issue of whether probable cause existed to arrest the defendant, inducing the lawyers to refer to it as a probable cause hearing, this hearing is distinct from a probable cause review which must be held promptly after a warrantless arrest.

During a probable cause hearing the prosecution or the defense may request a reset in the preliminary hearing date, and this may be appropriate regardless of which side requests it because a preliminary hearing is a matter under the jurisdiction of a trial court after a defendant has been “bound over,” (meaning he should have already received his prompt probable cause review). Lawyers should be smart enough to understand the difference between a probable cause review and a preliminary hearing regardless of whether they refer to a prompt probable cause review as a probable cause hearing.

Perhaps the state statutes that seek to codify the *Riverside* 48 hour rule do so haphazardly. Let’s say the statute gives the probable cause review a new name like “commitment hearing.” Here is an example of a statute that seems to be protective of your rights but ends up confusing the issues:

OCGA 17-7-24: Commitment Hearings

In no event shall the defendant be forced to attend the hearing without the aid of counsel if there is a reasonable probability of his securing counsel without too great delay. Where the hearing is postponed to a future day at the instance of *either party or the court*, [emphasis added] it shall not be necessary to commit the defendant to jail pending the hearing; but he shall have the right to give bail for appearance at the hearing before the court of inquiry if the offense is bailable under the authority of the court.

The act of postponing (resetting) the probable cause review (commitment hearing) at the instance of a party other than the defendant is a violation of the Constitutional promptness requirement. If an officer brings an arrestee before a magistrate for a prompt probable cause review, who in this situation would need to “reset” the review if not the arrestee? The officer is supposed to be present to swear testimony and no prosecutor should even be involved yet as this is an arrest without a warrant. What Constitutional right does anyone else there have to request a reset other than the arrestee, who might wish the assistance of counsel for the probable cause review? Lawyers should understand that regardless of what a prompt probable cause review is called, a prompt probable cause review cannot be reset as a matter of standard operating procedure because someone other than the arrestee requests it.

Perhaps, when arrestees are brought before a magistrate in what criminal lawyers call “first appearance” and a bond hearing takes place in lieu of a probable cause review coupled with the confusion that already exists because of haphazardly worded statutes and a culture of mislabeling the probable cause review, there is an even lesser interest in addressing the lost Constitutional right. The arrested individual bails out and is then wholly concerned with finding counsel to prepare for a trial. Counsel is immediately concerned with investigating the charge and hopefully getting the case dismissed in a preliminary hearing.

Perhaps in these circumstance one can see how the cart stays placed before the horse because of the inertia of the trial prep to make the best showing in a preliminary hearing. But the cart should have never been placed in front of the horse to begin with. Providing the defendant a bond hearing at first appearance without a probable cause review defies the very purpose of an arrestee’s right to be brought before a magistrate to determine whether the arrest was Constitutional. Certainly some enterprising lawyer can file a motion for habeas corpus and correctly apply the rights afforded by the Constitution in the judicial process, right? Perhaps not, if the manuals used by criminal lawyers are written in such a way that make judicial action too unpopular to change the status quo.

Georgia criminal law attorneys heavily rely on Daniel’s Criminal Trial Practice Handbook, and for good reason. It is an excellent narrative. However, in the sections on probable cause reviews, commitment hearings, and preliminary hearings, found in Chapter 11, Daniel’s interchanges at various times the terms commitment, preliminary and probable cause hearing, perhaps resulting in misleading expectations of criminal law attorneys as to what should happen to protect the Constitutional right to a prompt probable cause review.

Daniel’s Chapter 11 titled “Pre-Indictment Proceedings,” begins by accurately discussing the *Riverside* 48 hour rule and Rule 26.1 of the Uniform Rules for Georgia Superior Courts which is also followed by the Georgia State Courts where the very first sentence of the Uniform Rules for State Courts mandate that at first appearance a judge must determine whether probable cause existed, for an arrest made without a warrant, within 48 hours and also whether probable cause exists for continued restraint on liberty until trial (bond hearing). Daniel’s chapter on pre-indictment proceedings however discusses preliminary hearings (§§11-2 and 11-4) and interchanges preliminary hearings with commitment hearings. ((§§11-2, 11-4, and 11-5).

As discussed above, a commitment hearing is the statutory term used in OCGA Title 17 Chapter 7 Article 2 to identify the *Riverside* 48 hour rule. It is, and must be, different from a preliminary hearing involving a defendant, who, after probable cause is found and in preparation for the trial, discovers evidence that would presumably be dispositive to the case and might result in a dismissal of the accusation. Perhaps because of the unfortunate interchange of terms by criminal law manuals, criminal law attorneys have come to blur what otherwise should be an easy to understand promptness rule for warrantless arrests, which now allow for resets by people other than the arrestee, bond hearings in lieu of probable cause reviews, and perhaps as a result of these expected procedures, no effort to promptly provide a prompt probable cause review within 48hrs of a warrantless arrest.

Perhaps a tacit admission of the error of not providing a prompt probable cause review is when an arrest warrant is issued after an arrest has already been made. Warrantless arrests must involve a probable cause review promptly after arrest. And this includes the presence of the arrestee. To do otherwise violates the meaning of the term “prompt probable cause review” as identified in *Gerstein.*

As Americans, with an understanding of the protection afforded by the Constitution, let’s look at the 48 hour rule itself as a measure of promptness from an economic and ethical standpoint. Let’s measure the price paid by our society. Were officers to immediately bring an arrestee before a magistrate upon arrest, jurisdictions would save themselves the funding of jailing someone where no probable cause exists for their arrest. Many a case die in the magistrate court in the big cities, why not let the case die before funds are expended in housing the arrestee, not to mention booking and subjecting someone to the degrading experience for who probable cause does not exist. A society should not encourage the incarceration of innocent people by the overzealous.

Let’s restore the protection that Americans mistakenly believe they have now. A statutory rule enacted in a jurisdiction, providing for monetary damages if violated, mandating real prompt probable cause review for warrantless arrests prior to any arrestee being booked at a jail would end up saving the jurisdiction money. Magistrates are already on call for warrants 24 hours a day. Magistrate Court already operates Monday through Friday and magistrates are available over the weekend for first appearance. Therefore, providing for a proper probable cause review is easy. Prompt probable cause reviews as required by Due Process would allow near instantaneous settling of a situation where a person arrested without probable cause can and should be released without an arrest record. Isn’t that the rule you want as an American? Don’t you agree with Justice Scalia that an innocent person should not wait 48hrs in jail before being released? Isn’t an arrest record wrong when no probable cause existed for the arrest?

It is appropriate to conclude in Justice Scalia’s own words about the Riverside rule.

Justice Scalia, dissenting.

The story is told of the elderly judge who, looking back over a long career, observes with satisfaction that, “when I was young, I probably let stand some convictions that should have been overturned, and when I was old I probably set aside some that should have stood; so overall, justice was done.” I sometimes think that is an appropriate analog to this Court’s constitutional jurisprudence, which alternately creates rights that the Constitution does not contain and denies rights that it does. Compare *Roe v. Wade*, 410 U.S. 113 (1973) (right to abortion does exist) with *Maryland v. Craig*, 497 U.S. 836 (1990) (right to be confronted with witnesses, Amdt. 6, does not). Thinking that neither the one course nor the other is correct, nor the two combined, I dissent from today’s decision, which eliminates a very old right indeed.[[8]](#footnote-8)

Justice Story wrote that the Fourth Amendment "is little more than the affirmance of a great constitutional doctrine of the common law." 3 J. Story, Commentaries on the Constitution 748 (1833). It should not become less than that. One hears the complaint, nowadays, that the Fourth Amendment has become constitutional law for the guilty; that it benefits the career criminal (through the exclusionary rule) often and directly, but the ordinary citizen remotely if at all. By failing to protect the innocent arrestee, today's opinion reinforces that view. The common law rule of prompt hearing had as its primary beneficiaries the innocent -- not those whose fully justified convictions must be overturned to scold the police; nor those who avoid conviction because the evidence, while convincing, does not establish guilt beyond a reasonable doubt; but those so blameless that there was not even good reason to arrest them. While in recent years we have invented novel applications of the Fourth Amendment to release the unquestionably guilty, we today repudiate one of its core applications so that the presumptively innocent may be left in jail. Hereafter a law-abiding citizen wrongfully arrested may be compelled to await the grace of a Dickensian bureaucratic machine, as it churns its cycle for up to two days -- never once given the opportunity to show a judge that there is absolutely no reason to hold him, that a mistake has been made. In my view, this is the image of a system of justice that has lost its ancient sense of priority, a system that few Americans would recognize as our own.[[9]](#footnote-9)

1. February 16, 2016. I was one of those Law Students that Justice Scalia wrote his dissenting opinions to reach. And I am glad he did. This article is a result of my experiences as a Fulton County Solicitor under the Georgia 3rd year practice act and Georgia Assistant District Attorney. I hope this article will reach the minds of all Americans who seek justice… as hard as that is to achieve. [↑](#footnote-ref-1)
2. 500 U.S. 44 (1991) [↑](#footnote-ref-2)
3. 420 U.S. 103 (1975) [↑](#footnote-ref-3)
4. Id. at 114-116 (1975). [↑](#footnote-ref-4)
5. Id. at 112. [↑](#footnote-ref-5)
6. Id. at 113. [↑](#footnote-ref-6)
7. Id. at 114. [↑](#footnote-ref-7)
8. *County of Riverside v. McLaughlin* 500 U.S. 44, 59-60 (1991)

   Also see Jeffrey Van Detta, Compelling Governmental Interest Jurisprudence of the Burger Court: A New Perspective On Roe v. Wade, 50 Alb. L. Rev. 675 (1986). (When rights on the same Constitutional order are opposed - the life of the mom and the life of the baby, the liberty of the mom and the liberty of the baby – the policy making body under the Constitution is the legislative branch and when the federal legislative branch lacks the enumerated power to make a particular policy then that particular policy is set by the state legislative branch. [↑](#footnote-ref-8)
9. County of Riverside v. McLaughlin 500 U.S. 44, 71 (1991) [↑](#footnote-ref-9)