No. 37482-3 III

99696-2

COURT OF APPEALS, DIVISION 3

OF THE STATE OF WASHINGTON

GRANT COUNTY SUPERIOR COURT No. 19-1-00647-4

STATE OF WASHINGTON

V.

ADRIAN ADAME MADRID

MOTION FOR DISCRETIONARY REVIEW

Treated as a Petition for Review

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5. HAVE I BEEN DEPRIVED OF MY RIGHT TO DUE PROCESS DUE TO CONVICTION BEING BASED ON INSUFFICIENT EVIDENCE, & LACKED (2) TWO KEY ELEMENTS IN ORDER TO SECURE A CONVICTION INSTEAD OF RETURNING A CHARGE DISMISSING WITH PREJUDICE ON A NOT GUILTY VERDICT.

ISSUES PERTAINING TO ASSIGNMENT OF ERROR

II.

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2. MY RIGHT TO A SPEEDY TRIAL IS IN CLEAR VIOLATION IN ACCORDANCE WITH SUPERIOR COURT-CRIMINAL COURT RULES 3.3 "TIME FOR TRIAL"

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4. MY ATTORNEY FAILED TO OBJECT FOR ME AND DID NOT RAISE ANY ARGUEMENT AT THE DAY OF ARRAIGNMENT OR AT MY OBJECTIONS IN DISAGGREEMENT.

5. MY CONVICTION WAS BASED ON ASSUMPTION ON A TRIER OF FACT AT NO POINT IN TIME DID THE STATE PROVE OR ESTABLISH (2) TWO KEY ELEMENTS TO SUPPORT CONVICTION OF BURGLARY.

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IDENTITY OF PETITIONER

ADRIAN ADAME MADRID

D.O.B 09-21-1990

D.O.C #345615

PLACE OF INCARCERATION:

COYOTE RIDGE CORRECTIONS CENTER

P.O Box 769, CONNELL, WA 99326

COURT OF APPEALS DECISION

FILED APRIL 1, 2021;

I'M ASKING FOR REVIEW AND DISAGREE THROUGHOUT MY UNLAWFUL INCARCERATION.

DO BELIEVE THE COURT HAS OVERLOOKED OR MISAPPREHENDED.

LAST ALLOWABLE DAY FOR TRIAL SHOULD HAVE BEEN 23RD OF FEBRUARY.

AFTER THE LOSE OF RIGHT TO OBJECT.

D. (4)

STATEMENT OF CASE

ON THE DAY OF MY PRELIMINARY HEARING, NOVEMBER 8TH, 2019 PROBABLE CAUSE WAS NOT FULLY ESTABLISHED ON THE ALLEGED CHARGE BURGLARY 2ND.

ON THE 19TH OF NOVEMBER 2019 THE DAY OF MY ARRAIGNMENT & MY ADVISAL OF RIGHTS, MY ATTORNEY FAILED TO RAISE AN OBJECTION FOR ME, MY ATTORNEY IN DISAGREEMENT THROUGHOUT MY PRE-TRIAL PROCEEDINGS.

COURT OF APPEALS SUGGESTED ON A VERBAL DIRECTIVE BEING ENOUGH FOR CRIMINAL PROSECUTION; COURT OF APPEALS ALSO SUGGESTED I HAD LOST MY RIGHT TO OBJECT(D)4 AND CONVICTED ME ON A TRIER OF FACT.

ARGUEMENT

I WAS NOT GRANTED MY 4TH AMMENDMENT RIGHT ON A RESTRAINT OF LIBERTY OR MY RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL. INFORMATION WAS ILLEGALLY AMMENDED, BODY CAMS. UPON PRESENTATION SEEM TO INVITE ARBITRARY ENFORCEMENT. ARGUING A TRESSPASS ON A THEFT ACCUSATION I TRIED TO EXPLAIN TO THE OFFICER, HOW I COULD HAVE MADE THE MISTAKE ONTO TRESSPASSING & DISAGREED WITH BEING CHARGED WITH BURGLARY ON A FELONY CRIME. I WAS CONVICTED ON A TRIER OF FACT. MY ARGUEMENT IS THAT THE "INTENT" WAS AT NO POINT IN TIME ESTABLISHED.

THE STATE WOULD HAVE TO PROVE THE DEFENDANT "GAINED ENTRY WAY" THAT ANOTHER WOULD BE CONSIDERED ELEMENT FOR A BURGLARY ALLEGATION.

ARGUEMENT - CONTINUED

THE OFFICER FAILED TO RETRIEVE SURVELLIANCE FOOTAGE, (PG 64 CT NO. 2)

COURT OF APPEALS STATED IN IT'S OPINION I HAD LOST MY RIGHT TO OBJECT. JANUARY 23RD, 2020 SHOULD HAVE BEEN THE LAST ALLOWABLE DAY FOR TRIAL & MY CASE SHOULD HAVE BEEN DISMISSED WITH PREJUDICE.

ALTHOUGH THE RULE CRR, 3.3 (e) 2 "EXCLUDED PERIOD" ISSUE WAS RAISED ON APPEAL THIS DOES NOT APPLY IN MY CASE. ALSO IN C.R.R 3.3(f)1 IT STATES DEFENDANT WOULD NEED TO AGREE IN WRITING WHICH DID NOT ACCURE.

CONCLUSION

I'm SEEKING REVIEW BY THE SUPREME COURT, FOR THE ABOVE REASONS & ARGUEMENTS.

I BELIEVE THERE IS GOOD ARGUEMENT SUPPORTING A NOT GUILTY VERDICT

I BELIEVE THAT I HAVE BEEN UNLAWFULLY DETAINED SINCE NOVEMBER 8TH, 2019.

I BELIEVE I HAVE GROUNDS FOR A 6TH ANIMENDMENT VIOLATION ON A RIGHT TO A SPEEDY TRIAL." & ALSO I HAVE INEFFECTIVE ASSISTANCE OF COUNSEL.

I WOULD LIKE THIS CASE TO BE DISMISSED WITH PREJUDICE.

RESPECTFULLY SUBMITTED,

DATE: 04-19-2021

x Adda Ada

MOTION AND AFFIDAVIT TO PROCEED IN FORMA PAUPERIS

I, ADRIAN ADAME MADRID, am the petitioner in the above-entitled case; in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor and believe I am entitled to redress:

The responses, which I have made to questions and instructions below, are true.

1. Are you presently employed? Yes ( ) No (X)
   a. If the answer is yes, state the amount of your salary or wages per month, and give the name and address of your employer.

   N/A

   b. If the answer is no, state the date of last employment and the amount of the salary and wages per month, which you receive.

   INDIGENT & INCARCERATED SINCE 2019

2. Have you received within the past twelve months any money from any of the following sources?

   a. Business, profession or form of self-employment? Yes ( ) No (X)
   b. Rent payments, interest or dividends? Yes ( ) No (X)
   c. Pensions, annuities or life insurance payments? Yes ( ) No (X)
   d. Gifts or inheritances? Yes ( ) No (X)
   e. Any other sources? Yes ( ) No (X)

   If the answer to any of the above is yes, describe each source of money and state the amount received from each during the past twelve months.

   N/A

3. Do you own any cash, or do you have any money in a checking or savings account? Yes ( ) No (X)
   (Include any funds in prison accounts) If the answer is yes, state the total value of the accounts: N/A

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes ( ) No (X)
   If the answer is yes, describe the property and state its approximate value.

   N/A

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support.

   Ø

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury, and I declare under penalty of perjury that the foregoing is true and correct.

Signed this 14 day of APRIL, 2021.

X Adela Adame

Signature of Plaintiff

In re:	No. 19-1-00647-4
STATE OF WASHINGTON	Proof of Service (RTS)
V.	
ADRIAN ADAME MADRID	

Proof of Service

I declare:

I am age 18 or older and **not** a party to this case.

Served to *(name)*: COURT OF APPEALS DIVISION 3 ☐ directly

☐ in care of *(name)*: COYOTE RIDGE CORRECTIONS CENTER at: P.O BOX 769
CONNELL, WA. 99326

I declare under penalty of perjury under the laws of the state of Washington that the statements on this form are true.

Signed at CONNELL, WA Date: 04-18-2021

X Adrian Adame

Signature of server

ADRIAN ADAME MADRID

Print or type name of server

NOTICE FOR DISCRETIONARY REVIEW

SUPERIOR COURT OF WASHINGTON
FOR GRANT COUNTY

No. 19-1-00647-4

STATE OF WASHINGTON

V.

ADRIAN ADAME MADRID

SEEKS REVIEW, ADDITIONAL GROUNDS EXCEEDING TIME FOR TRIAL. UNDER CCR 3.3 STATEMENT OF ADDITIONAL GROUNDS Pg. 18 OF COURT DECISION PARAGRAPH 2.

DATE: 04-18-2021

x adrla ada

FILED
APRIL 1, 2021
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, Respondent, v. ADRIAN ADAME MADRID, Appellant.	)	No. 37482-3-III UNPUBLISHED OPINION

SIDDOWAY, J. — Adrian Adame Madrid appeals his conviction for second degree burglary. He contends that because the verbal notice that he was trespassed from a Moses Lake convenience store was unconstitutionally vague, the State failed to prove his entry was unlawful; it was error to admit, as evidence, police officer body camera video that was recorded in violation of Washington's privacy act; and he received ineffective assistance of counsel.

Finding no error and no merit to issues raised by Mr. Adame Madrid in a pro se statement of additional grounds, we affirm.

FACTS AND PROCEDURAL BACKGROUND

On October 14, 2019, Kimberly Andrews, an evening shift supervisor at Half Sun Travel Plaza in Moses Lake, told Adriane Adame Madrid that he was no longer welcome at the business. Police officers on a break happened to arrive at the plaza's convenience

store at that time, and Ms. Andrews asked if they would trespass Mr. Adame Madrid from the Travel Plaza. Mr. Adame Madrid was still outside, and one of the officers, Sergeant Kyle McCain, spoke to him, telling him he was not welcome at the business and if he came back, he could be arrested.

Less than a month later, Mr. Adame Madrid returned to the store. Rosa Arnold, a store employee, saw him take a $10.99 "air chuck"[1] from a shelf in the store's automotive aisle, put it in his left pants pocket and walk out without paying. Report of Proceedings (RP[2]) at 57-58. She and another employee followed Mr. Adame Madrid, stopped him, and asked him to turn out his pockets. He removed the air chuck from his pocket, placed it on the ground, and turned out his pockets as requested.

The police were called, and upon their arrival one of the officers, Colton Ayers, read Mr. Adame Madrid his *Miranda*[3] rights. Mr. Adame Madrid agreed to speak to the officers and told them he was not aware that he was not supposed to return to the property. He asked the officers to show him any written trespass notice issued against him. Evidently, no written notice was prepared on October 14.

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[1] The record does not reveal what an "air chuck" is. An Internet search revealed they are "valve fittings . . . typically sold as attachments for tire pressure gauges, inflators, or air compressor hoses." *Frequently Asked Questions: Lightning Air Chucks*, JACO, https://jacosuperiorproducts.com/pages/frequently-asked-questions-lightning-air-chucks (last visited Mar. 29, 2021).

[2] References to RP are to the report of trial proceedings taking place on March 4, 2020, unless otherwise indicated.

[3] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Mr. Adame Madrid was charged with second degree burglary.

A CrR 3.5 hearing was conducted, at which the State called Sergeant McCain, Officer Ayers, and a third officer to whom Mr. Adame Madrid had made statements, and each testified generally about the statements made by Mr. Adame Madrid and the circumstances under which the statements were made. The trial court found all the statements to be admissible, subject to any motions in limine about their substance. No body camera video was presented during the CrR 3.5 hearing, but at the conclusion of the hearing, the prosecutor mentioned that he intended to provide to defense counsel by the following week "the parts of the body cams that the State intends to display." RP (Nov. 8, 2019) at 42. Defense counsel voiced no objection.

At Mr. Adame Madrid's one-day jury trial, the State called as witnesses Ms. Andrews, Ms. Arnold, Sergeant McCain, and Officer Ayers. Without objection by the defense, the State played redacted sections of the video captured by Sergeant McCain's and Officer Ayers's body cameras during their contact with Mr. Adame Madrid.

In the video that was presented of Sergeant McCain's contact, the following exchange took place:

> [Sergeant McCain:] Make sure I can see your hands, okay? So they don't want you back here. What's your first name again?
>
> [Mr. Adame Madrid:] Um. . . Um. . . Adrian. But I—I'll make sure I never come here, but—but I—I feel harassed, you know?
>
> [Sergeant McCain:] Well they have a right not to—to allow whoever they want here to come here.

[Mr. Adame Madrid:] Yeah but—

[Sergeant McCain:] Is it Adame Madrid?

[Mr. Adame Madrid:] Yeah. You know what I mean?

[Sergeant McCain:] I understand. . . .

. . . .

[Sergeant McCain:] Okay. So you're not allowed back here. Kay? If you come back on the property you could be—you could be arrested. Okay?

[Mr. Adame Madrid:] [inaudible] I understand.[4]

[Sergeant McCain:] They don't want—they don't want you back here. Okay? So you need to leave now. Okay?

[Mr. Adame Madrid:] Yeah that's fine.

Ex. 5, 30 sec. to 1 min., 48 sec.

In the video that was played of Officer Ayers's contact, the following was said:

[Officer Ayers:] Adrian, I'm going to let you know what your rights are, alright? . . . [reads *Miranda* warning from card]. Do you understand the rights I've explained to you?

[Mr. Adame Madrid:] Yeah.

[Officer Ayers:] Having the rights in mind, do you wish to talk to us?

[Mr. Adame Madrid:] Huh?

[Officer Ayers:] Having your rights in mind, do you still want to talk to us?

[Mr. Adame Madrid:] Um. . . yes. [Mumbling.] I definitely didn't want to be on here . . . if I couldn't be here. You know, with that being said, like . . . I'm not sure.

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[4] Mr. Adame Madrid's complete statement may have been "I don't know about that. Alright cause—I understand." Ex. 5, 1 min., 9 sec. to 1 min., 17 sec.

[Officer Ayers:] So Officer Salazar just trespassed—I think it said Salazar—just trespassed you not even a month ago.[5] Told you you couldn't be here.

[Mr. Adame Madrid:] Did he?

[Officer Ayers:] Yep. It was October 14.

[Mr. Adame Madrid:] Oh okay, but I mean, as far as like a written waiver or anything—but there was nothing.

[Officer Ayers:] You might not have signed it, but if you were told that you can't come back here, then you can't be here.

[Mr. Adame Madrid:] I couldn't remember . . . but they never told me I couldn't come on the property like forever. . . . But I was actually looking for my beanie hat that . . . I had misplaced. . . . Just so we have that clear cause I would like to sign that, you know, so I can make sure that I have the reminder as to why I shouldn't be here next time.

[Officer Ayers:] Do you want a copy of that form?

[Mr. Adame Madrid:] Yeah or maybe I should sign it. That way. . . I could know, you know.

[Officer Ayers:] Okay I can go grab them and have them bring the form out and . . . make sure we have that signed.

[Officer Ayers:] Adrian are you still wanting to sign this?

[Mr. Adame Madrid:] No, but—

[Officer Ayers:] Or do you just want a copy of it.

[Mr. Adame Madrid:] But I want a copy of the one that's already signed.

[Officer Ayers:] I don't know if there was one signed or not. There's not always a form signed. But if you—or Officer Salazar told you you can't be back here, then that works. There doesn't always have to be a form.

[Mr. Adame Madrid:] But I don't agree . . . with being charged with any felony crime.

---

[5] Officer Ayers clarified at trial that he was mistaken about it being Officer Salazar who had trespassed Mr. Adame Madrid.

Ex. 6, 0.00 sec. to 2 min., 22 sec. Mr. Adame Madrid continued to protest that he was never given a written notice of trespass and insisted, "[S]ometimes they'll just kick you off somebody's property for a little bit." Ex. 6, 2 min., 58 sec. to 3 min., 3 sec.

The defense presented no evidence.

The jury found Mr. Adame Madrid guilty. He appeals.

ANALYSIS

Mr. Adame Madrid makes a dozen assignments of error on appeal that fall into four categories. He (1) argues that Ms. Andrews's and Sergeant McCain's statements that he was not allowed on the Travel Plaza premises did not afford him due process; (2) challenges the sufficiency of the evidence; (3) contends that the body camera video presented at trial was recorded in violation of the "Privacy Act," chapter 9.73 RCW; and (4) argues that his trial lawyer provided ineffective assistance by failing to object to admission of the video and failing to request a jury instruction on a lesser included charge of third degree theft.

I. A PROPERTY POSSESSOR'S COMMAND THAT A PERSON NOT ENTER HIS OR HER PREMISES IS NOT SUBJECT TO A CONSTITUTIONAL VAGUENESS CHALLENGE

The jury was properly instructed that to convict Mr. Adame Madrid of second degree burglary, the State was required to prove beyond a reasonable doubt

> (1) That on or about November 7, 2019, the defendant entered or remained unlawfully in a building;
>
> (2) That the entering or remaining was with intent to commit a crime against a person or property therein; and

(3) That this act occurred in the State of Washington.

Clerk's Papers (CP) at 27; RCW 9A.52.030. The jury was instructed that "[a] person enters or remains unlawfully in or upon premises when he or she is not then licensed, invited, or otherwise privileged to so enter or remain." CP at 26.

"A private property owner may restrict the use of its property . . . so long as the restrictions are not discriminatory." *State v. Kutch*, 90 Wn. App. 244, 247, 951 P.2d 1139 (1998) (citing *State v. Blair*, 65 Wn. App. 64, 67, 827 P.2d 356 (1992)). A person's presence may be rendered unlawful by a revocation of the privilege to be there. *Id.* at 249 (citing *State v. Collins*, 110 Wn.2d 253, 258, 751 P.2d 837 (1988)). "The right to exclude extends even if the property is otherwise open to the public." *Id.* at 247 (citing *State v. McDaniels*, 39 Wn. App. 236, 240, 692 P.2d 894 (1984)).

While it is a common practice for businesses and police to create a written record when notifying a person that his privilege to enter premises is revoked and to provide the person with a copy, neither is required. *Id* at 248. "A verbal notice might just as adequately inform [a person] that his invitation has been revoked." *Id.* In *McDaniels*, for instance, the juvenile defendant and two friends entered a church that was open for worship or prayer. 39 Wn. App. at 240. A church member who concluded the youths had not entered for evening services confronted them and implicitly told them to leave. They did, but McDaniels then surreptitiously reentered and stole a coat. McDaniels was charged with second degree burglary. Evidence of the church member's verbal directive

to leave was sufficient to prove that McDaniel was not licensed, invited, or privileged to re-enter the church.

Mr. Adame Madrid nonetheless argues that he was denied due process because Ms. Andrews's and Sergeant McCain's directives to leave the Travel Plaza and not come back were vague.

The due process vagueness doctrine under the Fourteenth Amendment to the United States Constitution and article I, section 3 of the Washington Constitution requires that citizens have fair warning of proscribed conduct. *State v. Bahl*, 164 Wn.2d 739, 752, 193 P.3d 678 (2008). It requires that a *statute* "define the criminal offense with sufficient definiteness so that ordinary people can understand what conduct is prohibited," and "'provide ascertainable standards of guilt to protect against arbitrary enforcement.'" *City of Bremerton v. Widell*, 146 Wn.2d 561, 581, 51 P.3d 733 (2002) (quoting *State v. Thorne*, 129 Wn.2d 736, 770, 921 P.2d 514 (1996)).

"Traditionally the overbreadth and vagueness doctrines have been applied to legislative enactments." *State v. Llamas-Villa*, 67 Wn. App. 448, 455, 836 P.2d 239 (1992). They have also been applied to protection or no-contact orders whose violation could result in criminal penalties, however, and to community custody conditions. *See, e.g., City of Seattle v. May*, 171 Wn.2d 847, 855-56, 256 P.3d 1161 (2011); *Bahl*, 164 Wn.2d at 752-53.

Mr. Adame Madrid cites no case from this or any other jurisdiction in which the doctrines have been applied to a property possessor's admonishment to an individual to stay away from its premises. The Washington Supreme Court explicitly refused to apply the vagueness doctrine to a housing authority's adopted policy for excluding persons from its common areas in *Widell*, holding that the exclusion criteria in its policy "do not define a criminal offense, but rather identify the bases upon which an individual may be denied future entry into [the housing authority's] property." 146 Wn.2d at 581. The court observed that the policy "is not a part of [the Bremerton municipal code provision] under which Petitioners were charged." *Id.*

Due process requires only that the statute under which Mr. Adame Madrid was prosecuted provide fair warning of proscribed conduct. It has no application to Ms. Andrews's and Sergeant McCain's directives.

II. THE EVIDENCE WAS SUFFICIENT

Mr. Adame Madrid challenges the sufficiency of the evidence to establish that on or about November 7, 2019, he entered or remained unlawfully in a building.

The test for sufficiency of the evidence is "whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence are drawn in favor of the State and are interpreted most strongly against the defendant. *Id.*

Unlike criminal trespass, for a defendant to be guilty of second degree burglary, he need not know that he is entering or remaining unlawfully. The mental state required to prove second degree burglary is the intent to commit a crime, not to knowingly enter premises unlawfully. *State v. Allen*, 101 Wn.2d 355, 361, 678 P.2d 798 (1984); *cf. State v. Moreno*, 14 Wn. App. 2d 143, 156, 470 P.3d 507 (2020) (knowledge of the unlawfulness of entry is not an element of first degree burglary), *review granted on this issue*, *State v. Moreno*, 2021 WL 818347 (2021). It was for the jury to decide whether Mr. Adame Madrid was "licensed, invited, or otherwise privileged" to enter the Travel Plaza.

In *State v. Finley*, a defendant was told to leave a bar, which was attached to a restaurant, after he confronted his girlfriend and accused her of cheating on him. 97 Wn. App. 129, 131, 982 P.2d 681 (1999). Both a bartender and police told the defendant to leave and that he could not come back. About 15 minutes later, the defendant reentered the building and stood in a doorway between the bar, restaurant, and restroom. The defendant was charged with trespass. He asserted the "public premises" defense to the trespass charge, under which the State had the burden of proving that his permission to enter or remain had been properly revoked. *Id.* On appeal, he argued he was only told he could not enter the bar area and did not understand that the order applied to the entire premises. The court held that what a defendant "'understood' or 'believed' is not relevant to whether his presence was unlawful under the public premises defense . . . .

The pertinent viewpoint is that of a 'rational trier of fact.'" *Id.* at 138 (quoting *State v. R.H.*, 86 Wn. App. 807, 812-13, 939 P.2d 217 (1997)).

Here, the question is whether rational jurors could have found that Mr. Adame Madrid was not licensed, invited, or otherwise privileged to enter the plaza's convenience store on November 7 in light of Ms. Andrews's and Sergeant McCain's directives three weeks earlier. Neither Ms. Andrews nor Sergeant McCain put a time frame on the ban. Mr. Adame Madrid argues that without one, the evidence was too speculative for the jurors to find guilt. Viewed in the light most favorable to the State, however, the inference can be drawn that there *was* no time frame: the ban was unrestricted. The evidence was sufficient.

III. MR. ADAME MADRID'S PRIVACY ACT CHALLENGE TO THE RECORDINGS WAS NOT PRESERVED

Mr. Adame Madrid next argues that the body camera recordings of his conversations with Sergeant McCain on October 14 and Officer Ayers on November 7 violated the Privacy Act and should not have been admitted. He relies on RCW 9.73.030(1)(b) for his contention that the recording of Sergeant McCain's October 14 admonishment was illegal. RCW 9.73.030(1)(b) provides, as relevant here, that it is unlawful for an individual to record any "[p]rivate conversation . . . without first obtaining the consent of all the persons engaged in the conversation."

He relies on a different provision, RCW 9.73.090(1)(b), for his contention that the recording of his statements to Officer Ayers and others on November 7 was illegal. RCW 9.73.090(1)(b), a custodial interrogation provision, addresses "[v]ideo and/or sound recordings . . . of arrested persons by police officers responsible for making arrests or holding persons in custody before their first appearance in court." It provides that such recordings are legal if the recording is made in strict conformity with certain requirements.[6] As far as one can tell from the redacted video of the November 7 contact, the requirements were not observed.

RCW 9.73.050 generally provides that information obtained in violation of RCW 9.73.030 is inadmissible in any civil or criminal case. But Mr. Adame Madrid did not object to the evidence in the trial court, so the issue is unpreserved. We will not consider his objection for the first time on appeal. RAP 2.5(a). A violation of the Privacy Act

---

[6] The requirements are that:

> (i) The arrested person shall be informed that such recording is being made and the statement so informing him or her shall be included in the recording;
> (ii) The recording shall commence with an indication of the time of the beginning thereof and terminate with an indication of the time thereof;
> (iii) At the commencement of the recording the arrested person shall be fully informed of his or her constitutional rights, and such statements informing him or her shall be included in the recording;
> (iv) The recordings shall only be used for valid police or court activities.

RCW 9.73.090(1)(b).

presents a statutory issue, not a constitutional one, so RAP 2.5(a)(3) does not apply. *State v. Sengxay*, 80 Wn. App. 11, 15, 906 P.2d 368 (1995).

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

A. Failure to object to body camera video

Mr. Adame Madrid recasts the alleged Privacy Act violations as the basis for his first ineffective assistance of counsel claim. To prevail on an ineffective assistance of counsel claim, Mr. Adame Madrid must demonstrate that defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances, and the deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). If a defendant fails to establish either prong, we need not consider the other. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

In order for the court to find deficient performance, the defendant must establish "'that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment.'" *State v. Grier*, 171 Wn.2d 17, 32-33, 246 P.3d 1260 (2011) (quoting *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)). "The threshold for the deficient performance prong is high" and there is "'a strong presumption that counsel's performance was reasonable.'" *Id.* at 33 (quoting

State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009)). Legitimate trial tactics cannot constitute deficient performance. *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994).

A defendant must also "affirmatively prove prejudice." *Strickland v. Washington*, 466 U.S. 668, 693, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Courts find prejudice where, but for an attorney's deficient performance, there was a reasonable probability of a different outcome that is "'sufficient to undermine confidence in the outcome.'" *Grier*, 171 Wn.2d at 34 (quoting *Strickland*, 466 U.S. at 694).

Looking first at the failure to object to the admission of the video of the October 14 conversation with Sergeant McCain, we find no deficient performance. RCW 9.73.030(1)(b) applies only to the unconsented-to recording of a "private conversation." It is well settled that a uniformed police officer's conversation with a person in a public place, in the course of the officer's law enforcement work, is not a private conversation within the meaning of the statute. *Lewis v. Dep't of Licensing*, 157 Wn.2d 446, 459, 139 P.3d 1078 (2006).

The failure to object to the admission of the statements made to Officer Ayers and others on November 7 is a different story, however. A recording that fails to strictly comply with the custodial interrogation conditions of RCW 9.73.090(1)(b) is inadmissible. *Lewis*, 157 Wn.2d at 472; *State v. Cunningham*, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980). The fact that there was a violation of the custodial interrogation

provision does not require the exclusion of other evidence acquired at the same time as the improper recording, however. *See Lewis*, 157 Wn.2d at 472.

Defense counsel was not ineffective in failing to object to the redacted video of the November 7 contact for two reasons. First, there was a clear tactical reason for choosing not to object. The body camera video presented the jury with Mr. Adame Madrid's defense—his protestation that he had not understood the scope of the banishment—without Mr. Adame Madrid having to testify. Deficient representation is not shown.

Second, Mr. Adame Madrid cannot affirmatively show prejudice where, had the recording been ruled inadmissible, Officer Ayers and the other officer present at the November 7 contact could have testified to Mr. Adame Madrid's statements to them.

B. Failure to request a third degree theft instruction

Mr. Adame Madrid's second basis for alleging ineffective assistance of counsel is his trial lawyer's failure to request instruction on what he contends is the lesser-included charge of third degree theft. A defendant is entitled by statute to an instruction on a lesser included offense if each of the elements of the lesser offense is a necessary element of the offense charged, and the evidence in the case supports an inference that the lesser crime was committed. RCW 10.61.006; *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978).

The State points out that this court has previously held in an unpublished decision that third degree theft, as a purported lesser included offense of second degree burglary,

fails the first, legal, prong of the *Workman* test. *See State v. Smith*, No. 67709-8-I, slip op. at 2-7 (Wash. Ct. App. Mar. 4, 2013) (unpublished), https://www.courts.wa.gov /opinions/pdf /677098.pdf.[7] The State encourages us to adopt *Smith*'s analysis. We review the legal prong of the *Workman* test de novo. *State v. LaPlant*, 157 Wn. App. 685, 687, 239 P.3d 366 (2010).

Smith observed that the elements of second degree burglary are entering or remaining unlawfully in a building, and doing so with intent to commit a crime against a person or property therein; the elements of third degree theft are the commission of a theft of property or services not exceeding $750 in value. It concluded that "none of the elements of third degree theft are necessary elements of second degree burglary." No. 67709-8-I, slip op. at 3. Appellant Smith had nonetheless directed this court's attention to the fact that the information and to-convict instructions in his case specified that the crime Smith intended to commit in the burglary was theft.[8] He cited *State v. Berlin*, 133 Wn.2d 541, 947 P.2d 700 (1997) as requiring that the court consider the facts as charged and prosecuted.

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[7] Unpublished decisions have no precedential value, are not binding on any court, and are cited only for such persuasive value as the court deems appropriate. *See* GR 14.1.

[8] As pointed out in *Smith*, the intent to commit a *specific* crime inside the burglarized premises is not an element of burglary. *Smith*, No. 67709-8-I, slip op. at 6. Unlike in *Smith*, the information and jury instructions in this case did not identify "theft" or any other specific crime as the intended crime.

This court held that *Smith* misanalysed *Berlin*. *Smith*, No. 67709-8-I, slip op. at 4-5. It pointed out that in *Berlin*, our Supreme Court was dealing with a greater offense that could be committed by alternative means, and it held only that in such a case, the legal prong is applied to the *statutory means* of the greater offense that is charged and prosecuted. *Id.* Since RCW 9A.52.030 does not provide alternative means of committing second degree burglary, *Berlin* did not apply. *Id.* at 5.

An equivalent holding appears in a published decision, *State v. Boswell*, 185 Wn. App. 321, 335, 340 P.3d 971 (2014). *Boswell* holds that "the rule under *Berlin* is that when a defendant is charged with an alternative means crime, the court determines whether a lesser included offense instruction is appropriate based on the alternative means charged, not the statute as a whole." *Id.* at 334 (citing *Berlin*, 133 Wn.2d at 550). Where the greater offense charged is not an alternative means crime, "the clarification articulated in *Berlin* does not apply." *Id.* at 335. "We do not examine the facts underlying the charge unless we reach the factual prong of the *Workman* test." *Id.*

Here, the fact that the evidence established a third degree theft is irrelevant to whether Mr. Adame Madrid was entitled to instruction on third degree theft as a lesser included offense. Its elements are not necessary elements of second degree burglary.

Because he was not entitled to the instruction, we need not address whether his trial lawyer could have had a tactical reason for not requesting it.

STATEMENT OF ADDITIONAL GROUNDS (SAG)

In a pro se statement of additional grounds, Mr. Adame Madrid raises four. We address only his third and fourth, unable to surmise when and how the error raised by his first and second grounds are alleged to have occurred. While Mr. Adame Madrid is not required to cite to the record or authorities in a SAG, he must inform the court of the "nature and occurrence of the alleged errors." RAP 10.10(c).

Additional ground 3: exceeding time for trial under CrR 3.3. Mr. Adame Madrid appears in his additional ground 3 to complain that his trial was delayed beyond the time for trial required by CrR 3.3. Mr. Adame Madrid was arraigned on November 19, 2019. His jury trial took place on March 4, 2020.

CrR 3.3 requires trial within 60 days of arraignment for defendants who are detained on the current charges, while requiring trial within 90 days for all others, including those held in custody on unrelated matters. CrR 3.3(a)(3)(v), (b)(1), (2). A trial date can be continued in accordance with CrR 3.3(f)(2); when it is, the effect of the continuance is to exclude the period of the continuance from the time for trial period. CrR 3.3(e)(3). The decision to grant or deny a continuance is reviewed for abuse of discretion. *State v. Ollivier*, 178 Wn.2d 813, 822-23, 312 P.3d 1 (2013).

A party that objects to a continuance under CrR 3.3(f) "must, within 10 days after the notice is mailed or otherwise given, move that the court set a trial within those time limits." CrR 3.3(d)(3). "A party who fails, for any reason, to make such a motion shall

lose the right to object that a trial commenced on such a date is not within the time limits prescribed by this rule." *Id.*; *accord State v. Farnsworth*, 133 Wn. App. 1, 12-13, 130 P.3d 389 (2006).

On the record provided, Mr. Adame Madrid's challenge fails. Appointed counsel arranged for transcription of the hearings at which Mr. Adame Madrid's trial date was changed, so we know that the trial date was continued on January 6, January 15, February 3, and February 10. The record on appeal contains no relevant clerk's papers, but it is clear from the reports of proceedings that at least some of the continuances were either requested or agreed to by defense counsel, even if Mr. Adame Madrid is on the record as objecting on some occasions. "The bringing of [a motion to continue] by or on behalf of any party waives that party's objection to the requested delay." CrR 3.3(f)(2). Most importantly, there is no record of any timely objection being filed in response to the continued trial dates, so Mr. Adame Madrid lost his right to object.

Unlawful incarceration; no probable cause. Mr. Adame Madrid's fourth ground complains of his "unlawful incarceration" and cites *Gerstein v. Pugh*, 420 U.S. 103, 95 S. Ct. 854, 43 L. Ed. 2d 54 (1975). SAG at 2. He appears to base this ground on the fact that at his preliminary appearance, the trial court found probable cause for a theft, but not for second degree burglary. The trial court explained that it lacked information on when and how Mr. Adame Madrid had been trespassed from the Travel Plaza. The trial court proceeded to set conditions of release on the basis of the probable cause it found.

The trial court's finding of probable cause to believe that a third degree theft had been committed provided the required support for Mr. Adame Madrid's warrantless arrest. Moreover, as *Pugh* itself holds, a suspect being detained may challenge the probable cause for that confinement, but a conviction will not be vacated on the ground that the defendant was improperly detained pending trial. *Id.* at 119.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Siddoway, J.

WE CONCUR:

Pennell, C.J.

Fearing, J.

95 S.Ct. 854
Supreme Court of the United States

Richard E. GERSTEIN, State Attorney for Eleventh Judicial Circuit of Florida, Petitioner,
v.
Robert PUGH et al.

No. 73—477.
|
Argued March 25, 1974.
|
Reargued Oct. 21, 1974.
|
Decided Feb. 18, 1975.

Synopsis

Florida prisoners brought class action, under the Civil Rights Act, against various Dade County judicial and prosecutorial officials claiming a constitutional right to a judicial hearing on the issue of probable cause for pretrial detention and requesting declaratory and injunctive relief. The United States District Court for the Southern District of Florida, 355 F.Supp. 1286, rendered judgment for plaintiffs, and defendants appealed. The Court of Appeals, 483 F.2d 778, affirmed in part and vacated in part. The State Attorney's petition for writ of certiorari was granted. The Supreme Court, Mr. Justice Powell, held that habeas corpus was not the exclusive remedy, that claim was not barred by the equitable restrictions on federal intervention in state prosecutions, that conviction of named plaintiffs did not moot the claims of the unnamed class members, that standards and procedures for arrest and detention are derived from the Fourth Amendment and its common-law antecedents, that such Amendment requires a judicial determination of probable cause as a prerequisite to an extended restraint of liberty following arrest, that prosecutor's assessment of probable cause does not alone meet the constitutional requirements, that Florida procedure whereby a person arrested without a warrant and charged by information may be jailed without an opportunity for probable cause determination is unconstitutional, that pretrial detention without an opportunity for such a hearing does not void a following conviction and that a probable cause determination is not a 'critical stage' in the proceedings requiring appointed counsel.

Affirmed in part, reversed in part, and remanded.

Mr. Justice Stewart filed an opinion concurring in Parts I and II of the opinion and in which Mr. Justice Douglas, Mr. Justice Brennan and Mr. Justice Marshall joined.

****858** Syllabus *

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

***103** 1. The Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest. Accordingly, the Florida procedures challenged here whereby a person arrested without a warrant and charged by information may be jailed or subjected to other restraints pending trial without any opportunity for a probable cause determination are unconstitutional. Pp. 861—866.

(a) The prosecutor's assessment of probable cause, standing alone, does not meet the requirements of the Fourth Amendment and is insufficient to justify restraint of liberty pending trial. Pp. 864—865.

(b) The Constitution does not require, however, judicial oversight of the decision to prosecute by information, and a conviction will not be vacated on the ground that the defendant was detained pending trial without a probable cause determination. Pp. 865—866.

2. The probable cause determination, as an initial step in the criminal justice process, may be made by a judicial officer without an adversary hearing. Pp. 866—869.

(a) The sole issue is whether there is probable cause for detaining the arrested person pending further proceedings, and this issue can be determined reliably by the use of informal procedures. Pp. 866—867.

(b) Because of its limited function and its nonadversary character, the probable cause determination is not a 'critical stage' in the prosecution that would require appointed counsel. Pp. 867—868.

483 F.2d 778, affirmed in part, reversed in part, and remanded.

Attorneys and Law Firms

*104 Leonard R. Mellon for petitioner.

Raymond L. Marky, Tallahassee, Fla., for the State of Florida, as amicus curiae, by special leave of Court.

Bruce S. Rogow, Coral Gables, for respondents.

Paul L. Friedman, Washington, D.C., for the United States, as amicus curiae, by special leave of Court.

Opinion

*105 Mr. Justice POWELL delivered the opinion of the Court.

The issue in this case is whether a person arrested and held for trial under a prosecutor's information is constitutionally entitled to a judicial determination of probable cause for pretrial restraint of liberty.

I

In March 1971 respondents Pugh and Henderson were arrested in Dade County, Fla. Each was charged with several offenses under a prosecutor's information.[1] Pugh was denied bail because one of the charges against him carried a potential life sentence, and Henderson remained in custody because he was unable to post a $4,500 bond.

1 Respondent Pugh was arrested on March 3, 1971. On March 16 an information was filed charging him with robbery, carrying a concealed weapon, and possession of a firearm during commission of a felony. Respondent Henderson was arrested on March 2, and charged by information on March 19 with the offenses of breaking and entering and assault and battery. The record does not indicate whether there was an arrest warrant in either case.

**859 In Florida, indictments are required only for prosecution of capital offenses. Prosecutors may charge all other crimes by information, without a prior preliminary hearing and without obtaining leave of court. Fla.Rule Crim.Proc. 3.140(a); State v. Hernandez, 217 So.2d 109 (Fla.1968); Di Bona v. State, 121 So.2d 192 (Fla.App.1960). At the time respondents were arrested, a Florida rule seemed to authorize adversary preliminary hearings to test probable cause for detention in all cases. Fla.Rule Crim.Proc. 1.122 (before amendment in 1972). *106 But the Florida courts had held that the filling of an information foreclosed the suspect's right to a preliminary hearing. See State ex rel. Hardy v. Blount, 261 So.2d 172 (Fla.1972).[2] They had also held that habeas corpus could not be used, except perhaps in exceptional circumstances, to test the probable cause for detention under an information. See Sullivan v. State ex rel. McCrory, 49 So.2d 794, 797 (Fla.1951). The only possible methods for obtaining a judicial determination of probable cause were a special statute allowing a preliminary hearing after 30 days, Fla.Stat.Ann. s 907.045 (1973),[3] and arraignment, which the District Court found was often delayed a month or more after arrest. Pugh v. Rainwater, 332 F.Supp. 1107, 1110 (S.D.Fla.1971).[4] As a result, a person charged by information could be detained for a substantial period solely on the decision of a prosecutor.

2 Florida law also denies preliminary hearings to persons confined under indictment, see Sangaree v. Hamlin, 235 So.2d 729 (Fla.1970); Fla.Rule Crim.Proc. 3.131(a) but that procedure is not challenged in this case. See infra, at 117 n. 19.

3 This statute may have been construed to make the hearing permissive instead of mandatory. See Evans v. State, 197 So.2d 323 (Fla.App.1967); Fla.Op.Atty.Gen. 067—29 (1967). But cf. Karz v. Overton, 249 So.2d 763 (Fla.App.1971). It may also have been superseded by the subsequent amendments to the Rules of Criminal Procedure. In re Florida Rules of Criminal Procedure, 272 So.2d 65 (Fla.1972).

4 The Florida rules do not suggest that the issue of probable cause can be raised at arraignment, Fla.Rule Crim.Proc. 3,160, but counsel for petitioner represented at oral argument that arraignment affords the suspect an opportunity to 'attack the sufficiency of the evidence to hold him.' Tr. of Oral Arg. (Mar. 25, 1974) at 17. The Court of Appeals assumed, without deciding, that this was true. 483 F.2d 778, 781 n. 8 (C.A.5 1973).

Respondents Pugh and Henderson filed a class action against Dade County officials in the Federal District *107 Court,[5] claiming a constitutional right to a judicial hearing on the issue of probable cause and requesting declaratory and injunctive relief.[6] Respondents Turner and Faulk, also in custody under informations, subsequently intervened.[7] Petitioner Gerstein, the State Attorney for Dade County, was one of several defendants.[8]

5 The complaint was framed under 42 U.S.C. s 1983, and jurisdiction in the District Court was based on 28 U.S.C. s 1343(3).

6 Respondents did not ask for release from state custody, even as an alternative remedy. They asked only that the state authorities be ordered to give them a probable cause determination. This was also the only relief that the District Court ordered for the named respondents. 332 F.Supp. 1107, at 1115—1116 (S.D.Fla.1971). Because release was neither asked nor ordered, the lawsuit did not come within the class of cases for which habeas corpus is the exclusive remedy. Preiser v. Rodriguez, 411 U.S. 475, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973); see Wolff v. McDonnell, 418 U.S. 539, 554, 555, 94 S.Ct. 2963, 2973, 41 L.Ed.2d 935 (1974).

7 Turner was being held on a charge of auto theft, following arrest on March 11, 1971. Faulk was arrested on March 19 on charges of soliciting a ride and possession of marihuana.

8 The named defendants included justices of the peace and judges of small-claims courts, who were authorized to hold preliminary hearings in criminal cases, and a group of law enforcement officers with power to make arrests in Dade County. Gerstein was the only one who petitioned for certiorari.

After an initial delay while the Florida Legislature considered a bill that would have afforded preliminary hearings ****860** to persons charged by information, the District Court granted the relief sought. Pugh v. Rainwater, supra. The court certified the case as a class action under Fed.Rule Civ.Proc. 23(b)(2), and held that the Fourth and Fourteenth Amendments give all arrested persons charged by information a right to a judicial hearing on the question of probable cause. The District Court ordered the Dade County defendants to give the named plaintiffs an immediate preliminary hearing to determine probable ***108** cause for further detention.[9] It also ordered them to submit a plan providing preliminary hearings in all cases instituted by information.

9 The District Court correctly held that respondents' claim for relief was not barred by the equitable restrictions on federal intervention in state prosecutions, Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971). The injunction was not directed at the state prosecutions as such, but only at the legality of pretrial detention without a judicial hearing, an issue that could not be raised in defense of the criminal prosecution. The order to hold preliminary hearings could not prejudice the conduct of the trial on the merits. See Conover v. Montemuro, 477 F.2d 1073, 1082 (CA3 1972); cf. Perez v. Ledesma, 401 U.S. 82, 91 S.Ct. 674, 27 L.Ed.2d 701 (1971); Stefanelli v. Minard, 342 U.S. 117, 72 S.Ct. 118, 96 L.Ed. 138 (1951).

The defendants submitted a plan prepared by Sheriff E. Wilson Purdy, and the District Court adopted it with modifications. The final order prescribed a detailed post-arrest procedure. 336 F.Supp. 490 (SD Fla.1972). Upon arrest the accused would be taken before a magistrate for a 'first appearance hearing.' The magistrate would explain the charges, advise the accused of his rights, appoint counsel if he was indigent, and proceed with a probable cause determination unless either the prosecutor or the accused was unprepared. If either requested more time, the magistrate would set the date for a 'preliminary hearing,' to be held within four days if the accused was in custody and within 10 days if he had been released pending trial. The order provided sanctions for failure to hold the hearings at prescribed times. At the 'preliminary hearing' the accused would be entitled to counsel, and he would be allowed to confront and cross-examine adverse witnesses, to summon favorable witnesses, and to have a transcript made on request. If the magistrate found no probable cause, the accused would be discharged. He then could not be charged with the same offense by complaint or information, but only by indictment returned within 30 days.

***109** The Court of Appeals for the Fifth Circuit stayed the District Court's order pending appeal, but while the case was awaiting decision, the Dade County judiciary voluntarily adopted a similar procedure of its own. Upon learning of this development, the Court of Appeals remanded the case for specific findings on the constitutionality of the new Dade County system. Before the District Court issued its findings, however, the Florida Supreme Court amended the procedural rules governing preliminary hearings statewide, and the parties agreed that the District Court should direct its inquiry to the new rules rather than the Dade County procedures.

Under the amended rules every arrested person must be taken before a judicial officer within 24 hours. Fla.Rule Crim.Proc. 3.130(b). This 'first appearance' is similar to the 'first appearance hearing' ordered by the District Court in all respects but the crucial one: the magistrate does not make a determination of probable cause. The rule amendments also changed the procedure for preliminary hearings, restricting them to felony charges and codifying the rule that no hearings are available to persons charged by information or indictment.

Rule 3.131; see In re Rule 3.131(b), Florida Rules of Criminal Procedure, 289 So.2d 3 (Fla.1974).

In a supplemental opinion the District Court held that the amended rules had not answered the basic constitutional objection, since a defendant charged by information still could be detained **861 pending trial without a judicial determination of probable cause. 355 F.Supp. 1286 (SD Fla.1973). Reaffirming its original ruling, the District Court declared that the continuation of this practice was unconstitutional.[10] The Court of Appeals *110 affirmed, 483 F.2d 778 (1973), modifying the District Court's decree in minor particulars and suggesting that the form of preliminary hearing provided by the amended Florida rules would be acceptable, as long as it was provided to all defendants in custody pending trial. Id., at 788—789.

10 Although this ruling held a statewide 'legislative rule' unconstitutional, it was not outside the jurisdiction of a single judge by virtue of 28 U.S.C. s 2281. The original complaint did not ask for an injunction against enforcement of any state statute or legislative rule of statewide application, since the practice of denying preliminary hearings to persons charged by information was then embodied only in judicial decisions. The District Court therefore had jurisdiction to issue the initial injunction, and the Court of Appeals had jurisdiction over the appeal. On remand, the constitutionality of a state 'statute' was drawn into question for the first time when the criminal rules were amended. The District Court's supplemental opinion can fairly be read as a declaratory judgment that the amended rules were unconstitutional; the injunctive decree was never amended to incorporate that holding; and the opinion in the Court of Appeals is not inconsistent with the conclusion that the District Court did not enjoin enforcement of the statewide rule. See 483 F.2d, at 788—790. Accordingly, a district court of three judges was not required for the issuance of this order. See Kennedy v. Mendoza-Martinez, 372 U.S. 144, 152—155, 83 S.Ct. 554, 559—560, 9 L.Ed.2d 644 (1963); Flemming v. Nestor, 363 U.S. 603, 606—608, 80 S.Ct. 1367, 1370—1371, 4 L.Ed.2d 1435 (1960).

State Attorney Gerstein petitioned for review, and we granted certiorari because of the importance of the issue.[11] *111 414 U.S. 1062, 94 S.Ct. 567, 38 L.Ed.2d 467 (1973). We affirm in part and reverse in part.

11 At oral argument counsel informed us that the named respondents have been convicted. Their pretrial detention therefore has ended. This case belongs, however, to that narrow class of cases in which the termination of a class representative's claim does not moot the claims of the unnamed members of the class. See Sosna v. Iowa, 419 U.S. 393, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975). Pretrial detention is by nature temporary, and it is most unlikely that any given individual could have his constitutional claim decided on appeal before he is either released or convicted. The individual could nonetheless suffer repeated deprivations, and it is certain that other persons similarly situated will be detained under the allegedly unconstitutional procedures. The claim, in short, is one that is distinctly 'capable of repetition, yet evading review.'

At the time the complaint was filed, the named respondents were members of a class of persons detained without a judicial probable cause determination, but the record does not indicate whether any of them were still in custody awaiting trial when the District Court certified the class. Such a showing ordinarily would be required to avoid mootness under Sosna. But this case is a suitable exception to that requirement. See Sosna, supra, 419 U.S. at 402 n. 11, 95 S.Ct. at 559 n. 11; cf. Rivera v. Freeman, 469 F.2d 1159, 1162—1163 (CA9 1972). The length of pretrial custody cannot be ascertained at the outset, and it may be ended at any time by release on recognizance, dismissal of the charges, or a guilty plea, as well as by acquittal or conviction after trial. It is by no means certain that any given individual, named as plaintiff, would be in pretrial custody long enough for a district judge to certify the class. Moreover, in this case the constant existence of a class of persons suffering the deprivation is certain. The attorney representing the named respondents is a public defender, and we can safely assume that he has other clients with a continuing live interest in the case.

II

As framed by the proceedings below, this case presents two issues: whether 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.

A

Both the standards and procedures for arrest and detention have been derived from the Fourth Amendment and its common-law antecedents. See Cupp v. Murphy, 412 U.S. 291, 294—295, 93 S.Ct. 2000, 2003, 36 L.Ed.2d 900 (1973); **862 Ex parte Bollman, 4 Cranch 75, 2 L.Ed. 554 (1807);

Ex parte Burford, 3 Cranch 448, 2 L.Ed. 495 (1806). 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.' *112 Beck v. Ohio, 379 U.S. 89, 91, 85 S.Ct. 223, 225, 13 L.Ed.2d 142 (1964). See also Henry v. United States, 361 U.S. 98, 80 S.Ct. 168, 4 L.Ed.2d 134 (1959); Brinegar v. United States, 338 U.S. 160, 175—176, 69 S.Ct. 1302, 1310—1311, 93 L.Ed. 1879 (1949). 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.

'These long-prevailing standards seek to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime. They also seek to give fair leeway for enforcing the law in the community's protection. Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability. The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating these often opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice.' Id., at 176, 69 S.Ct. at 1311.

To implement the Fourth Amendment's protection against unfounded invasions of liberty and privacy, the Court has required that the existence of probable cause be decided by a neutral and detached magistrate whenever possible. The classic statement of this principle appears in Johnson v. United States, 333 U.S. 10, 13—14, 68 S.Ct. 367, 369, 92 L.Ed. 436 (1948):

> '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 protectionconsists *113 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.'

See also Terry v. Ohio, 392 U.S. 1, 20—22, 88 S.Ct. 1868, 1879—1880, 20 L.Ed.2d 889 (1968). [12]

12 We reiterated this principle in United States v. United States District Court, 407 U.S. 297, 92 S.Ct. 2125, 32 L.Ed.2d 752 (1972). In terms that apply equally to arrests, we described the 'very heart of the Fourth Amendment directive' as a requirement that 'where practical, a governmental search and seizure should represent both the efforts of the officer to gather evidence of wrongful acts and the judgment of the magistrate that the collected evidence is sufficient to justify invasion of a citizen's private premises or conversation.' Id., at 316, 92 S.Ct., at 2136.

Maximum protection of individual rights could be assured by requiring a magistrate's review of the factual justification prior to any arrest, but such a requirement would constitute an intolerable handicap for legitimate law enforcement. Thus, while the Court has expressed a preference for the use of arrest warrants when feasible, Beck v. Ohio, supra, 379 U.S. at 96, 85 S.Ct., at 228; Wong Sun v. United States, 371 U.S. 471, 479—482, 83 S.Ct. 407, 412—414, 9 L.Ed.2d 441 (1963), it has never invalidated an arrest supported by probable cause solely because the officers failed to secure a warrant. See Ker v. California, 374 U.S. 23, 83 S.Ct. 1623, 10 L.Ed.2d 726 (1963); **863 Draper v. United States, 358 U.S. 307, 79 S.Ct. 329, 3 L.Ed.2d 327 (1959); Trupiano v. United States, 334 U.S. 699, 705, 68 S.Ct. 1229, 1232, 92 L.Ed. 1663 (1948). [13]

13 Another aspect of Trupiano was overruled in United States v. Rabinowitz, 339 U.S. 56, 70 S.Ct. 430, 94 L.Ed. 653 (1950), which was overruled in turn by Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969).

The issue of warrantless arrest that has generated the most controversy, and that remains unsettled, is whether and under what circumstances an officer may enter a suspect's home to make a warrantless arrest. See Coolidge v. New Hampshire, 403 U.S. 443, 474—481, 91 S.Ct. 2022, 2042—2045, 29 L.Ed. 564 (1971); id., at 510—512 and n. 1, 91 S.Ct., at 2060—2061 (White, J., dissenting); Jones v. United States, 357 U.S. 493, 499—500, 78 S.Ct. 1253, 1257, 2 L.Ed.2d 1514 (1958).

Under this practical compromise, a policeman's on-the-scene assessment of probable cause provides legal justification *114 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. See R. Goldfarb, Ransom 32-91 (1965); L. *Katz*, Justice Is the Crime 51-62 (1972). Even pretrial release may be accompanied by burdensome conditions that effect a significant restraint of liberty. See, e.g., 18 U.S.C. ss 3146(a)(2), (5). 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. Accordingly, we hold that the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest.

This result has historical support in the common law that has guided interpretation of the Fourth Amendment. See Carroll v. United States, 267 U.S. 132, 149, 45 S.Ct. 280, 283, 69 L.Ed. 543 (1925). 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. 2 M. Hale, Pleas of the Crown 77, 81, 95, 121 (1736); 2 W. Hawkins, Pleas of the Crown 116—117 (4th ed. 1762). See also Kurtz v. Moffitt, 115 U.S. 487, 498—499, 6 S.Ct. 148, 151—152, 29 L.Ed. 458 (1885).[14] The justice of **864 the peace *115 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. 1 M. Hale, supra, at 583—586; 2 W. Hawkins, supra, at 116—119; 1 J. Stephen, History of the Criminal Law of England 233 (1883).[15] The initial determination of probable cause also could be reviewed by higher courts on a writ of habeas corpus. 2 W. Hawkins, supra, at 112—115; 1 J. Stephen, supra, at 243; see Ex parte Bollman, 4 Cranch, at 97—101. This practice furnished the model for criminal procedure in America immediately following the adoption of the *116 Fourth Amendment, see Ex parte Bollman, supra;[16] Ex parte Burford, 3 Cranch 448, 2 L.Ed. 495 (1806); United States v. Hamilton, 3 Dall. 17, 1 L.Ed. 490 (1795), and there are indications that the Framers of the Bill of Rights regarded it as a model for a 'reasonable' seizure. See Draper v. United States, 358 U.S., at 317—320, 79 S.Ct., at 335—336 (Douglas, J., dissenting).[17]

14 The primary motivation for the requirement seems to have been the penalty for allowing an offender to escape, if he had in fact committed the crime, and the fear of liability for false imprisonment, if he had not. But Hale also recognized that a judicial warrant of commitment, called a mittimus, was required for more than brief detention.
'When a private person hath arrested a felon, or one suspected of felony, he may detain him in custory till he can reasonably dismiss himself of him; but with as much speed as conveniently he can, he may do either of these things.
'1. He may carryhim to the common gaol, . . . but that is now rarely done.
'2. He may deliver him to the constable of the vill, who may either carry him to the common gaol, . . . or to a justice of peace to be examined, and farther proceeded against as case shall require. . . .
'3. Or he may carry him immediately to any justice of peace of the county where he is taken, who upon examination may discharge, bail, or commit him, as the case shall require.
'And the bringing the offender either by the constable or private person to a justice of peace is most usual and safe, because a gaoler will expect a Mittimus for his warrant of detaining.' 1 M. Hale, Pleas of the Crown 589—590 (1736).

15 The examination of the prisoner was inquisitorial, and the witnesses were questioned outside the prisoner's presence. Although this method of proceeding was considered quite harsh, 1 J. Stephen, supra, at 219—225, it was well established that the prisoner was entitled to be discharged if the investigation turned up insufficient evidence of his guilt. Id., at 233.

16 In Ex parte Bollman, two men charged in the Aaron Burr case were committed following an examination in the Circuit Court of the District of Columbia. They filed a petition for writ of habeas corpus in the Supreme Court. The Court, in an opinion by Mr. Chief Justice Marshall, affirmed its jurisdiction to issue habeas corpus to persons in custody by order of federal trial courts. Then, following arguments on the Fourth Amendment

requirement of probable cause, the Court surveyed the evidence against the prisoners and held that it did not establish probable cause that they were guilty of treason. The prisoners were discharged.

17 See also N. Lasson, The History and Development of the Fourth Amendment to the United States Constitution 15—16 (1937). A similar procedure at common law, the warrant for recovery of stolen goods, is said to have furnished the model for a 'reasonable' search under the Fourth Amendment. The victim was required to appear before a justice of the peace and make an oath of probable cause that his goods could be found in a particular place. After the warrant was executed, and the goods seized, the victim and the alleged thief would appear before the justice of the peace for a prompt determination of the cause for seizure of the goods and detention of the thief. 2 M. Hale, supra, at 149—152; T. Taylor, Two Studies in Constitutional Interpretation 24—25, 39—40 (1969); see Boyd v. United States, 116 U.S. 616, 626—629, 6 S.Ct. 524, 530—531, 29 L.Ed. 746 (1886).

B

Under the Florida procedures challenged here, a person arrested without a warrant and charged by information may be jailed or subjected to other restraints pending trial without any opportunity for a probable cause determination.[18] Petitioner defends this practice on the *117 ground that the prosecutor's decision to file an information is itself a determination of probable cause that furnishes sufficient reason to detain a defendant pending trial. Although a conscientious decision that the evidence warrants prosecution affords a measure of protection against unfounded detention, we do not think prosecutorial judgment standing alone meets the requirements of the Fourth Amendment. Indeed, we think the Court's previous decisions compel disapproval of the Florida procedure. In Albrecht v. United States, 273 U.S. 1, 5, 47 S.Ct. 250, 251, 71 L.Ed. 505 (1927), the Court held that an arrest warrant issued solely upon a **865 United States Attorney's information was invalid because the accompanying affidavits were defective. Although the Court's opinion did not explicitly state that the prosecutor's official oath could not furnish probable cause, that conclusion was implicit in the judgment that the arrest was illegal under the Fourth Amendment.[19] More recently, in Coolidge v. New Hampshire, 403 U.S. 443, 449—453, 91 S.Ct. 2022, 2029—2031, 29 L.Ed.2d 564 (1971), the Court held that a prosecutor's responsibility to law enforcement is inconsistent with the constitutional role of a neutral and detached magistrate. We reaffirmed that principle in *118 Shadwick v. City of Tampa, 407 U.S. 345, 92 S.Ct. 2119, 32 L.Ed.2d 783 (1972), and held that probable cause for the issuance of an arrest warrant must be determined by someone independent of police and prosecution. See also United States v. United States District Court, 407 U.S. 297, 317, 92 S.Ct. 2125, 2136, 32 L.Ed.2d 752 (1972).[20] The reason for this separation of functions was expressed by Mr. Justice Frankfurter in a similar context:

18 A person arrested under a warrant would have received a prior judicial determination of probable cause. Under Fla.Rule Crim.Proc. 3.120, a warrant may be issued upon a sworn complaint that states facts showing that the suspect has committed a crime. The magistrate may also take testimony under oath to determine if there is reasonable ground to believe the complaint is true.

19 By contrast, the Court has held that an indictment, 'fair upon its face,' and returned by a 'properly constituted grand jury,' conclusively determines the existence of probable cause and requires issuance of an arrest warrant without further inquiry. Ex parte United States, 287 U.S. 241, 250, 53 S.Ct. 129, 131, 77 L.Ed. 283 (1932). See also Giordenello v. United States, 357 U.S. 480, 487, 78 S.Ct. 1245, 1250, 2 L.Ed.2d 1503 (1958). The willingness to let a grand jury's judgment substitute for that of a neutral and detached magistrate is attributable to the grand jury's relationship to the courts and its historical role of protecting individuals from unjust prosecution. See United States v. Calandra, 414 U.S. 338, 342—346, 94 S.Ct. 613, 617—619, 38 L.Ed.2d 561 (1974).

20 The Court had earlier reached a different result in Ocampo v. United States, 234 U.S. 91, 34 S.Ct. 712, 58 L.Ed. 1231 (1914), a criminal appeal from the Philippine Islands. Interpreting a statutory guarantee substantially identical to the Fourth Amendment, Act of July 1, 1902, s 5, 32 Stat. 693, the Court held that an arrest warrant could issue solely upon a prosecutor's information. The Court has since held that interpretation of a statutory guarantee applicable to the Philippines is not conclusive for interpretation of a cognate provision in the Federal Constitution, Green v. United States, 355 U.S. 184, 194—198, 78 S.Ct. 221, 227—229, 2 L.Ed.2d 199 (1957). Even if it were, the result reached in Ocampo is incompatible with the later holdings of Albrecht, Coolidge, and Shadwick.

'A democratic society, in which respect for the dignity of all men is central, naturally guards against the misuse of the law enforcement process. Zeal in tracking down crime is not in itself an assurance of soberness of judgment.

Disinterestedness in law enforcement does not alone prevent disregard of cherished liberties. Experience has therefore counseled that safeguards must be provided against the dangers of the overzealous as well as the despotic. The awful instruments of the criminal law cannot be entrusted to a single functionary. The complicated process of criminal justice is therefore divided into different parts, responsibility for which is separately vested in the various participants upon whom the criminal law relies for its vindication.' McNabb v. United States, 318 U.S. 332, 343, 63 S.Ct. 608, 614, 87 L.Ed. 819 (1943).

In holding that the prosecutor's assessment of probable *119 cause is not sufficient alone to justify restraint of liberty pending trial, we do not imply that the accused is entitled to judicial oversight or review of the decision to prosecute. Instead, we adhere to the Court's prior holding that a judicial hearing is not prerequisite to prosecution by information. Beck v. Washington, 369 U.S. 541, 545, 82 S.Ct. 955, 957, 8 L.Ed.2d 98 (1962); Lem Woon v. Oregon, 229 U.S. 586, 33 S.Ct. 783, 57 L.Ed. 1340 (1913). Nor do we retreat from the established rule that illegal arrest or detention does not void a subsequent conviction. Frisbie v. Collins, 342 U.S. 519, 72 S.Ct. 509, 96 L.Ed. 541 (1952); Ker v. Illinois, 119 U.S. 436, 7 S.Ct. 225, 30 L.Ed. 421 (1886). Thus, as the **866 Court of Appeals noted below, although a suspect who is presently detained may challenge the probable cause for that confinement, a conviction will not be vacated on the ground that the defendant was detained pending trial without a determination of probable cause. 483 F.2d, at 786—787. Compare Scarbrough v. Dutton, 393 F.2d 6 (CA5 1968), with Brown v. Fauntleroy, 143 U.S.App.D.C. 116, 442 F.2d 838 (1971), and Cooley v. Stone, 134 U.S.App.D.C. 317, 414 F.2d 1213 (1969).

III

Both the District Court and the Court of Appeals held that the determination of probable cause must be accompanied by the full panoply of adversary safeguards—counsel, confrontation, cross-examination, and compulsory process for witnesses. A full preliminary hearing of this sort is modeled after the procedure used in many States to determine whether the evidence justifies going to trial under an information or presenting the case to a grand jury. See Coleman v. Alabama, 399 U.S. 1, 90 S.Ct. 1999, 26 L.Ed.2d 387 (1970); Y. Kamisar, W. LaFave & J. Israel, Modern Criminal Procedure 957—967, 996—1000 (4th ed. 1974). The standard of proof required of the prosecution is usually referred to as 'probable cause,' but in some jurisdictions it may approach a prima facie case of guilt. *120 ALI, Model Code of Pre-arraignment Procedure, Commentary on Art. 330, pp. 90—91 (Tent. Draft No. 5, 1972). When the hearing takes this form, adversary procedures are customarily employed. The importance of the issue to both the State and the accused justifies the presentation of witnesses and full exploration of their testimony on cross-examination. This kind of hearing also requires appointment of counsel for indigent defendants. Coleman v. Alabama, supra. And, as the hearing assumes increased importance and the procedures become more complex, the likelihood that it can be held promptly after arrest diminishes. See ALI, Model Code of Pre-arraignment Procedure, supra, at 33—34.

These adversary safeguards are not essential for the probable cause determination required by the Fourth Amendment. The sole issue is whether there is probable cause for detaining the arrested person pending further proceedings. This issue can be determined reliably without an adversary hearing. The standard is the same as that for arrest.[21] That standard —probable cause to believe the suspect has committed a crime—traditionally has been decided by a magistrate in a nonadversary proceeding on hearsay and written testimony, and the Court has approved these informal modes of proof.

21 Because the standards are identical, ordinarily there is no need for further investigation before the probable cause determination can be made.
'Presumably, whomever the police arrest they must arrest on 'probable cause.' It is not the function of the police to arrest, as it were, at large and to use an interrogating process at police headquarters in order to determine whom they should charge before a committing magistrate on 'probable cause.'' Mallory v. United States, 354 U.S. 449, 456, 77 S.Ct. 1356, 1360, 1 L.Ed.2d 1479 (1957).

'Guilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined to that which long experience in the common-law tradition, *121 to some extent embodied in the Constitution, has crystallized into rules of evidence consistent with that standard. These rules are historically grounded rights of our system, developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property.

'In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal

technicians, act. The **867 standard of proof is accordingly correlative to what must be proved.' Brinegar v. United States, 338 U.S., at 174—175, 69 S.Ct. 1302, 1310, 93 L.Ed. 1879.

Cf. McCray v. Illinois, 386 U.S. 300, 87 S.Ct. 1056, 18 L.Ed.2d 62 (1967).

The use of an informal procedure is justified not only by the lesser consequences of a probable cause determination but also by the nature of the determination itself. It does not require the fine resolution of conflicting evidence that a reasonable-doubt or even a preponderance standard demands, and credibility determinations are seldom crucial in deciding whether the evidence supports a reasonable belief in guilt. See F. Miller, Prosecution: The Decision to Charge a Suspect with a Crime 64—109 (1969).[22] This is not to say that confrontation and *122 cross-examination might not enhance the reliability of probable cause determinations in some cases. In most cases, however, their value would be too slight to justify holding, as a matter of constitutional principle, that these formalities and safeguards designed for trial must also be employed in making the Fourth Amendment determination of probable cause.[23]

22 In Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972), and Gagnon v. Scarpelli, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973), we held that a parolee or probationer arrested prior to revocation is entitled to an informal preliminary hearing at the place of arrest, with some provision for live testimony. 408 U.S., at 487, 92 S.Ct., at 2603; 411 U.S., at 786, 93 S.Ct., at 1761. That preliminary hearing, more than the probable cause determination required by the Fourth Amendment, serves the purpose of gathering and preserving live testimony, since the final revocation hearing frequently is held at some distance from the place where the violation occurred. 408 U.S., at 485, 92 S.Ct., at 2602; 411 U.S., at 782—783, n. 5, 93 S.Ct., at 1759—1760. Moreover, revocation proceedings may offer less protection from initial error than the more formal criminal process, where violations are defined by statute and the prosecutor has a professional duty not to charge a suspect with crime unless he is satisfied of probable cause. See ABA Code of Professional Responsibility DR 7—103(A) (Final Draft 1969) (a prosecutor 'shall not institute or cause to be instituted criminal charges when he knows or it is obvious that the charges are not supported by probable cause'); American Bar Association Project on Standards for Criminal Justice, The Prosecution Function ss 1.1, 3.4, 3.9 (1974); American College of Trial Lawyers, Code of Trial Conduct, Rule 4(c) (1963).

23 Criminal justice is already overburdened by the volume of cases and the complexities of our system. The proceeding of misdemeanors, in particular, and the early stages of prosecution generally are marked by delays that can seriously affect the quality of justice. A constitutional doctrine requiring adversary hearings for all persons detained pending trial could exacerbate the problem of pretrial delay.

Because of its limited function and its nonadversary character, the probable cause determination is not a 'critical stage' in the prosecution that would require appointed counsel. The Court has identified as 'critical stages' those pretrial procedures that would impair defense on the merits if the accused is required to proceed without counsel. Coleman v. Alabama, 399 U.S. 1, 90 S.Ct. 1999, 26 L.Ed.2d 387 (1970); United States v. Wade, 388 U.S. 218, 226—227, 87 S.Ct. 1926, 1931—1932, 18 L.Ed.2d 1149 (1967). In Coleman v. Alabama, where the Court held that a preliminary hearing was a critical stage of an Alabama prosecution, the majority and concurring opinions identified two critical factors that distinguish the Alabama preliminary hearing from the probable cause determination required by the Fourth Amendment. First, *123 under Alabama law the function of the preliminary hearing was to determine whether the evidence justified charging the suspect with an offense. A finding of no probable cause could mean that he would not be tried at all. The Fourth Amendment probable cause determination is addressed only to pretrial custody. To be sure, pretrial custody may affect to some extent the defendant's ability to **868 assist in preparation of his defense, but this does not present the high probability of substantial harm identified as controlling in Wade and Coleman. Second, Alabama allowed the suspect to confront and cross-examine prosecution witnesses at the preliminary hearing. The Court noted that the suspect's defense on the merits could be compromised if he had no legal assistance for exploring or preserving the witnesses' testimony. This consideration does not apply when the prosecution is not required to produce witnesses for cross-examination.

Although we conclude that the Constitution does not require an adversary determination of probable cause, we recognize that state systems of criminal procedure vary widely. There is no single preferred pretrial procedure, and the nature of the probable cause determination usually will be shaped to accord with a State's pretrial procedure viewed as a whole. While we limit our holding to the precise requirement of the Fourth

Amendment, we recognize the desirability of flexibility and experimentation by the States. It may be found desirable, for example, to make the probable cause determination at the suspect's first appearance before a judicial officer,[24] *124 see McNabb v. United States, 318 U.S., at 342—344, 63 S.Ct., at 613—614, or the determination may be incorporated into the procedure for setting bail or fixing other conditions of pretrial release. In some States, existing procedures may satisfy the requirement of the Fourth Amendment. Others may require only minor adjustment, such as acceleration of existing preliminary hearings. Current proposals for criminal procedure reform suggest other ways of testing probable cause for detention.[25] Whatever *125 procedure a State may adopt, it must provide a fair and reliable determination of probable cause as a condition for any significant pretrial restraint **869 of liberty,[26] and this determination must be made by a judicial officer either before or promptly after arrest.[27]

24 Several States already authorize a determination of probable cause at this stage or immediately thereafter. See, e.g., Hawaii Rev.Stat. ss 708— 9(5), 710—7 (1968); Vt. Rules Crim.Proc. 3(b), 5(c). This Court has interpreted the Federal Rules of Criminal Procedure to require a determination of probable cause at the first appearance. Jaben v. United States, 381 U.S. 214, 218, 85 S.Ct. 1365, 1367, 14 L.Ed.2d 345 (1965); Mallory v. United States, 354 U.S., at 454, 77 S.Ct., at 1359.

25 Under the Uniform Rules of Criminal Procedure (Proposed Final Draft 1974), a person arrested without a warrant is entitled, "without unnecessary delay,' to a first appearance before a magistrate and a determination that grounds exist for issuance of an arrest warrant. The determination may be made on affidavits or testimony, in the presence of the accused. Rule 311. Persons who remain in custody for inability to qualify for pretrial release are offered another opportunity for a probable cause determination at the detention hearing, held no more than five days after arrest. This is an adversary hearing, and the parties may summon witnesses, but reliable hearsay evidence may be considered. Rule 344. The ALI Model Code of Pre-arraignment Procedure (Tent. Draft No. 5, 1972, and Tent. Draft No. 5A. 1973) also provides a first appearance, at which a warrantless arrest must be supported by a reasonably detailed written statement of facts. s 310.1. The magistrate may make a determination of probable cause to hold the accused, but he is not required to do so and the accused may request an attorney for an 'adjourned session' of the first appearance to be held within two 'court days.' At that session, the magistrate makes a determination of probable cause upon a combination of written and live testimony:

'The arrested person may present written and testimonial evidence and arguments for his discharge and the state may present additional written and testimonial evidence and arguments that there is reasonable cause to believe that he has committed the crime of which he is accused. The state's submission may be made by means of affidavits, and no witnesses shall be required to appear unless the court, in the light of the evidence and arguments submitted by the parties, determines that there is a basis for believing that the appearance of one or more witnesses for whom the arrested person seeks subpoenas might lead to a finding that there is no reasonable cause.' s 310.2(2) (Tent. Draft No. 5A, 1973).

26 Because the probable cause determination is not a constitutional prerequisite to the charging decision, it is required only for those suspects who suffer restraints on liberty other than the condition that they appear for trial. There are many kinds of pretrial release and many degrees of conditional liberty. See 18 U.S.C. s 3146; American Bar Association Project on Standards for Criminal Justice, Pretrial Release s 5.2 (1974); Uniform Rules of Criminal Procedure, Rule 341 (Proposed Final Draft 1974). We cannot define specifically those that would require a prior probable cause determination, but the key factor is significant restraint on liberty.

27 In his concurring opinion, Mr. Justice STEWART objects to the Court's choice of the Fourth Amendment as the rationale for decision and suggests that the Court offers less procedural protection to a person in jail than it requires in certain civil cases. Here we deal with the complex procedures of a criminal case and a threshold right guaranteed by the Fourth Amendment. The historical basis of the probable cause requirement is quite different from the relatively recent application of variable procedural due process in debtor-creditor disputes and termination of government-created benefits. The Fourth Amendment was tailored explicitly for the criminal justice system, and its balance between individual and public interests always has been thought to define the 'process that is due' for seizures of person or property in criminal cases, including the detention of suspects pending trial. Part II—A, supra. Moreover, the Fourth Amendment probable cause determination is in fact only the first stage of an elaborate system, unique in jurisprudence, designed to safeguard the rights of those accused of criminal conduct. The relatively simple civil procedures (e.g., prior interview with school principal before suspension) presented in the cases cited in the concurring opinion are inapposite and irrelevant in the wholly different context of the criminal justice system.

It would not be practicable to follow the further suggestion implicit in Mr. Justice STEWART's concurring opinion that we leave for another day determination of the procedural safeguards that are required in making a probable-cause determination under the Fourth Amendment. The judgment under review both declares the right not to be detained without a probable-cause determination and affirms the District Court's order prescribing an adversary hearing for the implementation of that right. The circumstances of the case thus require a decision on both issues.

***126** IV

We agree with the Court of Appeals that the Fourth Amendment requires a timely judicial determination of probable cause as a prerequisite to detention, and we accordingly affirm that much of the judgment. As we do not agree that the Fourth Amendment requires the adversary hearing outlined in the District Court's decree, we reverse in part and remand to the Court of Appeals for further proceedings consistent with this opinion.

It is so ordered.

Affirmed in part, reversed in part, and remanded.

Mr. Justice STEWART, with whom Mr. Justice DOUGLAS, Mr. Justice BRENNAN, and Mr. Justice MARSHALL join, concurring.

I concur in Parts I and II of the Court's opinion, since the Constitution clearly requires at least a timely judicial determination of probable cause as a prerequisite to pretrial detention. Because Florida does not provide all defendants in custody pending trial with a fair and reliable determination of probable cause for their detention, the respondents and the members of the class they represent are entitled to declaratory and injunctive relief.

Having determined that Florida's current pretrial detention procedures are constitutionally inadequate, I think it is unnecessary to go further by way of dicta. In particular, I would not, in the abstract, attempt to specify those procedural protections that constitutionally need not be accorded incarcerated suspects awaiting trial.

***127** Specifically, I see no need in this case for the Court to say that the Constitution extends less procedural protection to an imprisoned human being than is required to test the propriety of garnishing a commercial bank account, ****870** North Georgia Finishing, Inc. v. DiChem, Inc., 419 U.S. 601, 95 S.Ct. 719, 42 L.Ed.2d 751; the custody of a refrigerator, Mitchell v. W. T. Grant Co., 416 U.S. 600, 94 S.Ct. 1895, 40 L.Ed.2d 406, the temporary suspension of a public school student, Goss v. Lopez, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725, or the suspension of a driver's license, Bell v. Burson, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90. Although it may be true that the Fourth Amendment's 'balance between individual and public interests always has been thought to define the 'process that is due' for seizures of person or property in criminal cases,' ante, at 869 n. 27, this case does not involve an initial arrest, but rather the continuing incarceration of a presumptively innocent person. Accordingly, I cannot join the Court's effort to foreclose any claim that the traditional requirements of constitutional due process are applicable in the context of pretrial detention.

It is the prerogative of each State in the first instance to develop pretrial procedures that provide defendants in pretrial custody with the fair and reliable determination of probable cause for detention required by the Constitution. Cf. Morrissey v. Brewer, 408 U.S. 471, 488, 92 S.Ct. 2593, 2603, 33 L.Ed.2d 484. The constitutionality of any particular method for determining probable cause can be properly decided only by evaluating a State's pretrial procedures as a whole, not by isolating a particular part of its total system. As the Court recognizes, great diversity exists among the procedures employed by the States in this aspect of their criminal justice systems. Ante, at 868.

There will be adequate opportunity to evaluate in an appropriate future case the constitutionality of any new procedures that may be adopted by Florida in response to the Court's judgment today holding that Florida's present procedures are constitutionally inadequate.

All Citations

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RULE CrR 3.3
TIME FOR TRIAL

(a) General Provisions.

(1) Responsibility of Court. It shall be the responsibility of the court to ensure a trial in accordance with this rule to each person charged with a crime.

(2) Precedence Over Civil Cases. Criminal trials shall take precedence over civil trials.

(3) Definitions. For purposes of this rule:

(i) "Pending charge" means the charge for which the allowable time for trial is being computed.

(ii) "Related charge" means a charge based on the same conduct as the pending charge that is ultimately file in the superior court.

(iii) "Appearance" means the defendant's physical presence in the adult division of the superior court where the pending charge was filed. Such presence constitutes appearance only if (A) the prosecutor was notified of the presence and (B) the presence is contemporaneously noted on the record under the cause number of the pending charge.

(iv) "Arraignment" means the date determined under CrR 4.1(b).

(v) "Detained in jail" means held in the custody of a correctional facility pursuant to the pending charge. Such detention excluded any period in which a defendant is on electronic home monitoring, is being held in custody on an unrelated charge or hold, or is serving a sentence of confinement.

(4) Construction. The allowable time for trial shall be computed in accordance with this rule. If a trial is timely under the language of this rule, but was delayed by circumstances not addressed in this rule or CrR 4.1, the pending charge shall not be dismissed unless the defendant's constitutional right to a speedy trial was violated.

(5) Related Charges. The computation of the allowable time for trial of a pending charge shall apply equally to all related charges.

(6) Reporting of Dismissals and Untimely Trials. The court shall report to the Administrative Office of the Courts, on a form determined by that office, any case in which

(i) the court dismissed a charge on a determination pursuant to section (h) that the charge had not been brought to trial within the time limit required by this rule, or

(ii) the time limits would have been violated absent the cure period authorized by section (g)

(b) Time for Trial.

(1) Defendant Detained in Jail. A defendant who is detained in jail shall be brought to trial within the longer of

(i) 60 days after the commencement date specified in this rule, or

(ii) the time specified under subsection (b)(5).

(2) Defendant Not Detained in Jail. A defendant who is not detained in jail shall be brought to trial within the longer of

(i) 90 days after the commencement date specified in this rule, or

(ii) the time specified in subsection (b)(5)

(3) Release of Defendant. If a defendant is released from jail before the 60-day time limit has expired, the limit shall be extended to 90 days.

(4) Return to Custody Following Release. If a defendant not detained in jail at the time the trial date was set is subsequently returned to custody on the same or related charge, the 90-day limit shall continue to apply. If the defendant is

detained in jail when trial is reset following a new commencement date, the 60-day limit shall apply.

(5) Allowable Time After Excluded Period. If any period of time is excluded pursuant to section (e), the allowable time for trial shall not expire earlier than 30 days after the end of that excluded period.

(c) Commencement Date.

(1) Initial Commencement Date. The initial commencement date shall be the date of arraignment as determined under CrR 4.1.

(2) Resetting of Commencement Date. On occurrence of one of the following events, a new commencement date shall be established, and the elapsed time shall be reset to zero. If more than one of these events occurs, the commencement date shall be the latest of the dates specified in this subsection.

(i) Waiver. The filing of a written waiver of the defendant's rights under this rule signed by the defendant. The new commencement date shall be the date specified in the waiver, which shall not be earlier than the date on which the waiver was filed. If no date is specified, the commencement date shall be the date of the trial contemporaneously or subsequently set by the court.

(ii) Failure to Appear. The failure of the defendant to appear for any proceeding at which the defendant's presence was required. The new commencement date shall be the date of the defendant's next appearance.

(iii) New Trial. The entry of an order granting a mistrial or new trial or allowing the defendant to withdraw a plea of guilty. The new commencement date shall be the date the order is entered.

(iv) Appellate Review or Stay. The acceptance of review or grant of a stay by an appellate court. The new commencement date shall be the date of the defendant's appearance that next follows the receipt by the clerk of the superior court of the mandate or written order terminating review or stay.

(v) Collateral Proceeding. The entry of an order granting a new trial pursuant to a personal restraint petition, a habeas corpus proceeding, or a motion to vacate judgment. The new ...ment date shall be the date of the defendant's appearance ...xt follows either the expiration of the time to appeal ...rder or the receipt by the clerk of the superior court of ...e of action terminating the collateral proceeding, whichever comes later.

(vi) Change of Venue. The entry of an order granting a change of venue. The new commencement date shall be the date of the order.

(vii) Disqualification of Counsel. The disqualification of the defense attorney or prosecuting attorney. The new commencement date shall be the date of the disqualification.

(d) Trial Settings and Notice---Objections---Loss of Right to Object.

(1) Initial Setting of Trial Date. The court shall, within 15 days of the defendant's actual arraignment in superior court or at the omnibus hearing, set a date for trial which is within the time limits prescribed by this rule and notify counsel for each party of the date set. If a defendant is not represented by counsel, the notice shall be given to the defendant and may be mailed to the defendant's last known address. The notice shall set forth the proper date of the defendant's arraignment and the date set for trial.

(2) Resetting of Trial Date. When the court determines that the trial date should be reset for any reason, including but not limited to the applicability of a new commencement date pursuant to subsection (c)(2) or a period of exclusion pursuant to section (e), the court shall set a new date for trial which is within the time limits prescribed and notify each counsel or party of the date set.

(3) Objection to Trial Setting. A party who objects to the date set upon the ground that it is not within the time limits prescribed by this rule must, within 10 days after the notice is mailed or otherwise given, move that the court set a trial within those time limits. Such motion shall be promptly noted for hearing by the moving party in accordance with local procedures. A party who fails, for any reason, to make such a motion shall lose the right to object that a trial commenced on such a date is not within the time limits prescribed by this rule.

(4) Loss of Right to Object. If a trial date is set outside the time allowed by this rule, but the defendant lost the right to object to that date pursuant to subsection (d)(3), that date shall be treated as the last allowable date for trial, subject to

section (g). A later trial date shall be timely only if the commencement date is reset pursuant to subsection (c)(2) or there is a subsequent excluded period pursuant to section (e) and subsection (b)(5).

(e) Excluded Periods. The following periods shall be excluded in computing the time for trial:

(1) Competency Proceedings. All proceedings relating to the competency of a defendant to stan d trial on the pending charge, beginning on the date when the competency examination is ordered and terminating when the court enters a written order finding the defendant to be competent.

(2) Proceedings on Unrelated Charges. Arraignment, pre-trial proceedings, trial, and sentencing on an unrelated charge.

(3) Continuances. Delay granted by the court pursuant to section (f).

(4) Period between Dismissal and Refiling. The time between the dismissal of a charge and the refiling of the same or related charge.

(5) Disposition of Related Charge. The period between the commencement of trial or the entry of a plea of guilty on one charge and the defendant's arraignment in superior court on a related charge.

(6) Defendant Subject to foreign or Federal Custody or Conditions. The time during which a defendant is detained in jail or prison outside the state of Washington or in a federal jail or prison and the time during which a defendant is subjected to conditions of release not imposed by a court of the State of Washington.

(7) Juvenile Proceedings. All proceedings in juvenile court.

(8) Unavoidable or Unforeseen Circumstances. Unavoidable or unforeseen circumstances affecting the time for trial beyond the control of the court or of the parties. This exclusion also applies to the cure period of section (g).

(9) Disqualification of Judge. A five-day period of time commencing with the disqualification of the judge to whom the case is assigned for trial.

(f) Continuances. Continuances or other delays may be granted as follows:

(1) Written Agreement. Upon written agreement of the parties, which must be signed by the defendant or all defendants, the court may continue the trial date to a specified date.

(2) Motion by the Court or a Party. On motion of the court or a party, the court may continue the trial date to a specified date when such continuance is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense. The motion must be made before the time for trial has expired. The court must state on the record or in writing the reasons for the continuance. The bringing of such motion by or on behalf of any party waives that party's objection to the requested delay.

(g) Cure Period. The court may continue the case beyond the limits specified in section (b) on motion of the court or a party made within five days after the time for trial has expired. Such a continuance may be granted only once in the case upon a finding on the record or in writing that the defendant will not be substantially prejudiced in the presentation of his or her defense. The period of delay shall be for no more than 14 days for a defendant detained in jail, or 28 days for a defendant not detained in jail, from the date that the continuance is granted. The court may direct the parties to remain in attendance or be on-call for trial assignment during the cure period.

(h) Dismissal With Prejudice. A charge not brought to trial within the time limit determined under this rule shall be dismissed with prejudice. The State shall provide notice of dismissal to the victim and at the court's discretion shall allow the victim to address the court regarding the impact of the crime. No case shall be dismissed for time-to-trial reasons except as expressly required by this rule, a statute, or the state or federal constitution.

[Amended effective May 21, 1976; November 17, 1978; August 1, 1980; September 1, 1986; November 29, 1991; November 7, 1995; September 1, 2000; September 1, 2001; September 1, 2003.]

INMATE

April 20, 2021 - 9:00 AM

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