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IN THE LOUISIANA SUPREME COURT

CASE NO. 09-KK-1621

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STATE OF LOUISIANA

v.

BRUCE WALLACE

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On Writ to Review an Order from the Fourth Circuit Court of Appeal  
No. 2009-K-0885  
Affirming the Order of the Honorable Gerard Hansen, Section M1  
Orleans Parish, Louisiana, in Case M-502-84

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BRIEF OF *AMICUS CURIAE*  
CENTER FOR CONSTITUTIONAL RIGHTS  
IN SUPPORT OF PETITIONER BRUCE WALLACE

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FOR *AMICUS CURIAE*  
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## SUMMARY OF THE ARGUMENT

*Gerstein v. Pugh*, 420 U.S. 103 (1975), guarantees the right to a prompt judicial determination of probable cause following a warrantless arrest. In *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991), meanwhile, the United States Supreme Court held that such a determination must occur no later than 48 hours after arrest. Louisiana state law encodes this constitutional rule, requiring that a magistrate determine probable cause, based on an affidavit sworn out by the arresting officer, within 48 hours of a warrantless arrest. See La. Code Crim. Proc. art. 230.1. In Orleans Parish, that probable cause determination is combined with several other important post-arrest steps – including the setting of bail and the appointment of counsel pursuant to La. Code Crim. Proc. art. 230.1 – at a proceeding known as the “First Appearance.”

However, the results of a survey conducted by the Center for Constitutional Rights (CCR) over the course of 60 consecutive First Appearance sessions in the magistrate section of the Orleans Parish Criminal District Court in the Spring of 2009 indicate that the requirements of *Gerstein*, *County of Riverside*, and La. Code Crim. Proc. art. 230.2, are being routinely violated. CCR collected data suggesting that the commissioners of Orleans Parish are regularly failing to read affidavits of probable cause, failing to record whether probable cause determinations have been made, and failing to make those determinations in a timely fashion. Additionally, CCR found that the commissioners spent an average of only 1.66 minutes on each First Appearance, during which time they purportedly advised each arrestee of his or her rights and the charges he or she faced; set individualized bail; appointed counsel; made a probable cause determination; and set a preliminary hearing or other next court date.

Given the fundamental nature of the rights involved, CCR urges this Court not only to grant relief to Petitioner Bruce Wallace, but to issue a clear reminder of the constitutional and statutory guarantees that frame First Appearances. Moreover, this Court should craft remedies that will ensure that these constitutional and statutory violations do not recur. CCR proposes the following three remedies: an order that the magistrate section of criminal district court maintain publicly-available records of the date and time of arrest in addition to the date and time of production of arrestees in court for First Appearances; an order that the Orleans Parish commissioners read the affidavits of probable cause into the record at these Appearances and

make a record of whether, and based on what facts, the court has made its determination of probable cause; and appointment of an independent monitor to oversee compliance with these remedies.

## ARGUMENT

### **I. DATA GATHERED BY THE CENTER FOR CONSTITUTIONAL RIGHTS (CCR) IN THE MAGISTRATE SECTION OF ORLEANS PARISH CRIMINAL DISTRICT COURT POINTS TO A SYSTEMIC FAILURE TO ADHERE TO THE CONSTITUTIONAL AND STATUTORY MANDATES GOVERNING DETERMINATIONS OF PROBABLE CAUSE FOLLOWING A WARRANTLESS ARREST.**

#### **A. The Law Governing First Appearances.**

In *Gerstein*, 420 U.S. at 103, the United States Supreme Court held that the Fourth Amendment to the United States Constitution requires a prompt judicial determination of probable cause as a prerequisite to extended pretrial detention following a warrantless arrest. Acknowledging the burden that proliferation of pretrial proceedings places on individual states' criminal justice systems, the Court stopped short of requiring an *immediate* determination of probable cause after arrest, and instead left it to the states to integrate prompt probable cause determinations into their differing systems of pretrial procedures. *Id.* at 123-124. But addressing the meaning of "prompt" in *County of Riverside*, 500 U.S. at 44, the Court crafted a bright-line rule, holding that a probable cause determination must occur "as soon [after arrest] as is reasonably feasible, *but in no event later than 48 hours of arrest.*" *County of Riverside*, 500 U.S. at 57 (emphasis supplied).<sup>1</sup>

Under *Gerstein* and *County of Riverside*, then, jurisdictions may choose to combine probable cause determinations with other pretrial proceedings, so long as they do so promptly. This necessarily means that only those proceedings that arise very early in the pretrial process, such as bail hearings and arraignments, are candidates for combination. Irrespective of which proceedings are combined, however, the Supreme Court has made clear that every effort must be

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<sup>1</sup> No Justice on the *County of Riverside* Court believed that a delay of more than 48 hours was constitutionally permissible. In dissent, Justices Marshall, Blackmun, and Stevens explained that they would have upheld the lower courts' ruling, which allowed a 36 hour delay. *County of Riverside*, 500 U.S. at 65 (Marshall, J. dissenting). Justice Scalia, writing separately in dissent, stated that he would have held that the Fourth Amendment requires a probable cause determination "certainly no more than 24 hours" after arrest. *Id.* at 68 (Scalia, J., dissenting) (emphasis supplied).

made to expedite these proceedings – and under *County of Riverside*, this means that they *must* occur, at the latest, within 48 hours of arrest. *Id.*

Louisiana state law requires that individuals arrested on suspicion of committing state offenses in Orleans Parish must be timely brought to the magistrate section of Criminal District Court, where they appear before either the elected magistrate judge, La. R. S. 13:1346, or one of four appointed commissioners. La. R. S. 13:1347; *see also* La. Dist. Ct. Appx. 3 (Criminal District Court of Orleans Parish) (“The Magistrate Section shall be composed of the Magistrate Judge and four (4) Commissioners. The purpose of this Section of Court is to provide every person arrested under state statute prompt access to a committing Magistrate who shall conduct a hearing within a reasonable time after arrest.”). This appearance – the first after the arrestee is detained – is known, intuitively, as the “First Appearance.” *Id.* According to the local rule:

First appearance hearings shall proceed in the manner described below from the time of arrest:

- (a) Arrest
- (b) Booking at Central Lockup
- (c) Defendant immediately transferred to Magistrate Section by the arresting officers for a first appearance hearing.

*Id.*

In the spirit of *Gerstein* and *County of Riverside*, which, as noted *supra*, specifically allow states a bounded flexibility in arranging early post-arrest proceedings, *see Gerstein*, 420 U.S. at 123-124, *County of Riverside*, 500 U.S. at 53, the Orleans Parish Criminal District Court has chosen to make First Appearances a forum for vindication of a number of constitutional and statutory rights. At First Appearances, the committing magistrate or commissioner must:

- Set bail, in vindication of each arrestee’s state constitutional and statutory rights. *See* La. Const. art. I, § 18; La. Code Crim. Proc. art. 311 *et seq*; La. Dist. Ct. Appx. 3 (requiring the committing judicial officer to set bail at First Appearances);
- Advise arrestees of their rights and the charges against them. *See* La. Const. art. I, § 13; La. Dist. Ct. Appx. 3 (requiring the committing judicial officer to advise arrestees of their charges and rights);
- Appoint counsel. *See* La. Const. art. I, § 13; La. Code Crim. Proc. art. 230.1 (requiring that arrested persons be brought “promptly . . . before a judge for the purpose of

appointment of counsel”<sup>2</sup>; *State v. Chaney*, 384 So. 2d 442, 443 (La. 1980) (“The language of C.Cr.P. 230.1 is express and unequivocal: it commands the sheriff to bring an arrested person before a judge within seventy-two hours for the purpose of appointment of counsel, and it orders that the prisoner be released forthwith if this procedure is not observed. These mandates must be given effect as written”). *See also Rothgery v. Gillespie County*, 128 S. Ct. 2578 (2008) (holding that the right to counsel attaches at first appearances); La. Dist. Ct. Appx. 3 (requiring the appointment of counsel for indigent defendants at first appearances); and

- Determine whether the arrest, if made without a warrant, was supported by probable cause. *See Gerstein*, 420 U.S. at 103; *County of Riverside*, 500 U.S. at 57; La. Code Crim. Proc. art. 230.2.

The judges of the Criminal District Court of Orleans Parish, sitting *en banc*, have decided that it is reasonable to expect First Appearances to occur within twelve hours of arrest, in the absence of “extreme circumstances.” La. Dist. Ct. Appx. 3 (Criminal District Court of Orleans Parish); *see also* La. Dist. Ct. Rule 1.0, 1.3(c) (requiring adoption of local rules *en banc* and official promulgation through the Office of the Judicial Administrator). In any case, to the extent that a probable cause determination is made at the First Appearance, it is black letter constitutional law that no more than 48 hours may pass between arrest and this Appearance. *Gerstein*, 420 U.S. at 103; *County of Riverside*, 500 U.S. at 57.

#### **B. CCR’s First Appearances Survey in the Magistrate Section of Orleans Parish Criminal District Court.**

Between March 30, 2009, and May 3, 2009, CCR attended all 60 First Appearance sessions that occurred in the magistrate section of Orleans Parish Criminal District Court. *See* Affidavit of Audrey Stewart, attached as Exhibit A (hereinafter “Stewart Affidavit”), at ¶ 5. CCR observed and documented a series of variables at these 60 sessions, during which a total of 1,438 arrestees were brought before the court.

For each session, CCR documented the length of the session, the name of the presiding judicial officer (either the magistrate judge or one of the commissioners), the name of the public

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<sup>2</sup> The hearing required by La. Code Crim. Proc. art. 230.1 must occur within 72 hours of arrest, exclusive of weekends and holidays. Regardless of local timing rules requiring appointment with 72 hours, it seems that the remedy of release only applies where the 72-hour rule has been violated. *See, e.g., State v. Joiner*, 2008-1653, 986 So. 2d 670 (La. Jul. 25, 2009). Nevertheless, the First Appearance at Orleans Parish Criminal District Court serves as the article 230.1 hearing; if counsel is not appointed at First Appearances, there is no later hearing within the requisite 72 hours to which detainees are brought as a matter of course.

defender present during the session, and the magistrate number<sup>3</sup> assigned to each arrestee. *Id.* at ¶ 6. CCR also documented the charges against the arrestee, whether a probable cause argument occurred, and whether a probable cause determination was made on the record. *Id.* at ¶ 7. For each session, CCR further recorded whether bail argument occurred and, where applicable, the type and amount of bail that was set. *Id.* at ¶ 8. We documented whether the arrestee was physically present when his or her case was called, and whether the affidavit supporting probable cause – known in Orleans Parish as the “gist” – was read aloud. *Id.* at ¶ 9. CCR recorded the race and criminal history of arrestees, and whether each arrestees’ indigency status was determined. *Id.* at ¶ 10. Finally, CCR documented whether an attorney from the Orleans Public Defenders was present, whether the arrestee retained private counsel, and whether interpretation services were provided. *Id.* at ¶ 11.

These data<sup>4</sup> form the basis of CCR’s preliminary conclusions, presented *infra*, about the lawfulness and constitutionality of the procedures for determining probable cause in Orleans Parish Criminal District Court.

### **C. Results from CCR’s Survey Indicates a Systemic Failure to Make Proper and Timely Probable Cause Determinations.**

As noted above, CCR’s survey is based on data collected at all 60 First Appearance sessions that occurred in the magistrate section of Orleans Parish Criminal District Court between March 30, 2009, and May 3, 2009. *See* Stewart Affidavit at ¶ 5. During this time, 1,438 arrestees passed through the magistrate section, representing a total of 2,364 charges. It should be noted that, over the course of the five-week survey, the commissioners spent an average of 1.66 minutes per arrestee at First Appearances. That is, within 100 seconds, the commissioners purportedly advised each arrestee of the charges he or she faced, as well as his or her rights; set individualized bail in light of the nine factors outlined in La. Code Crim. Proc. art. 334; appointed counsel; made a probable cause determination; and set a preliminary hearing or other next court date. It should be further noted that this is occurring in a jurisdiction where

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<sup>3</sup> The magistrate number is a number assigned by the Criminal District Court clerk’s office, before First Appearances, to every person arrested on a state criminal charge. It is distinct from the “case number,” which is assigned after institution of prosecution.

<sup>4</sup> Though voluminous, CCR can supply the raw data pertinent to this *amicus* brief to the Court upon request.

arrestees can be held for up to 120 days without being formally charged. *See* La. Code Crim. Proc. art. 701.

**i. Failure to Read the Affidavit of Probable Cause**

According to the data gathered by CCR, the committing magistrates of Orleans Parish set bail on a substantial majority of arrestees – 61%, or 869 out of 1,438 arrestees during the period of the survey – without reading, or even hearing, the entirety of the affidavit of probable cause. 38% of the time, the committing magistrates neither read nor heard *any* of the affidavit before setting bail.<sup>5</sup>

CCR recorded whether there was any indication that the committing magistrates read the affidavit of arrest, or had the affidavit read to them, for each of the 1,438 arrestees. The results of this portion of the survey are illustrated in chart form at Exhibit B, attached. CCR documented:

- *Whether the arrestee had been arrested on a warrant.* In such an instance, of course, there would be no need for the magistrate to read the affidavit of arrest, since probable cause had already been determined. There were 63 such arrestees, or 4% of the total.
- *Whether the magistrate read the entire affidavit of arrest, or had that affidavit read to him or her.* The magistrate read, or heard, the entire affidavit for 506 arrestees, or 35% of the total.
- *Whether the magistrate read only part of the affidavit of arrest, or had only part of that affidavit read to him or her.* The magistrate read, or heard, only part of the affidavit for 325 arrestees, or 23% of the total.
- *Whether the magistrate read none of the affidavit of arrest, and had none of the affidavit read to him or her.* The magistrate read and heard none of the affidavit for 544 arrestees, or 38% of the total.

In no instance was there ever any indication that any of the commissioners read the affidavits before taking the bench for First Appearances.

These data present a troubling picture. Where magistrates are not reading the gists, in whole or in part, they fail to make a probable cause determination “upon affidavits or other written evidence,” as required by state law and plain United States Supreme Court precedent. La. Code Crim. Proc. art. 230.2; *see also Gerstein*, 420 U.S. at 120 (stating that determinations of probable cause following a warrantless arrest must be made by magistrate based on hearsay and

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<sup>5</sup> Indeed, in light of the abbreviated period of time spent on each First Appearance, *see supra*, reading all but the most insubstantial gist would have been unfeasible.

written testimony); *County of Riverside*, 500 U.S. at 57. The data suggest that this is occurring at least 38% of the time. Thus, presumptively innocent arrestees are being detained for longer than 48 hours without ever receiving a determination of probable cause based on an affidavit of arrest, as required by law.

**ii. Failure to Record Whether a Probable Cause Determination Has Been Made.**

CCR's data suggest that, even when they read or hear the affidavits of arrest, the committing magistrates in Orleans Parish simply do not have a practice of making recorded probable cause determinations. CCR's survey shows that there was no record, written or oral, indicating that probable cause was considered by the committing magistrates *in 83% of cases*. Typically, the magistrate called out the name of the arrestee; the prosecutor read aloud the arrestee's charges and prior conviction history; and the commissioner then pronounced bail. The absence of any record of a probable cause determination in 83% of cases raises the troubling possibility that no consideration was given to probable cause in those cases at all. This widespread failure to make recorded determinations systematically prevents arrestees from ensuring that their rights are vindicated, prevents the higher courts from exercising their supervisory jurisdiction, and thereby bars defendants from exercising their constitutional right of access to the courts. La. Const. art. I, § 19.

CCR's survey of whether there was an on-the-record inquiry into the question of probable cause for each charge on which an arrestee was booked examined the following:

- *Whether the arrest on the charge was pursuant to a warrant, whether signed locally or from another jurisdiction.* In such an instance, of course, there would be no need for a probable cause determination. There were 165 such charges, or 7% of the total.
- *Whether the magistrate explicitly addressed probable cause by determining that probable cause existed for the charge on which the arrestee was booked, by determining that probable cause existed for a lesser-included charge, or by determining that there was no probable cause on the charge.* In such instances, the magistrate can be thought to have fulfilled his or her obligation to make a probable cause determination, pursuant to *Gerstein, County of Riverside* and article 230.2. There were 199 such charges, or a mere 8% of the total.
- *Whether the magistrate set a "48 hour hearing" for the state to produce more information justifying the arrest.* There were 42 such charges, or 2% of the total. These situations are particularly troubling, because they represent a further detention for the purpose of continued investigation, a practice explicitly forbidden by *County of Riverside*. See *County of Riverside*, 500 U.S. at 56 ("Examples of unreasonable delay are

delays for the purpose of gathering additional evidence to justify the arrest, a delay motivated by ill will against the arrested individual, or delay for delay's sake.”).

- *Whether there was no record made that the probable cause question was even considered and decided one way or another.* There were 1,958 such charges, or 83% of the total.

A chart giving graphic shape to the results of this portion of the survey is attached as Exhibit C.

A situation in which committing magistrates make *no* record of addressing probable cause 83% of the time is simply constitutionally untenable. While probable cause determinations may, of course, be made *ex parte*, there must still be a record of such a determination. *Gerstein* determinations are, of course, intended to serve as an *ex post* substitute for the issuance of a warrant before the fact. *See Gerstein*, 420 U.S. at 114. Because Louisiana's criminal code insists upon a record of the issuance of a warrant, *see* La. Code Crim. Proc. art. 202, 203, the *Gerstein* determination, made pursuant to a warrantless arrest, should be no different.

### **iii. Failure to Make a Timely Probable Cause Determination**

The data given above suggest that, in at least 38% of cases – 544 arrestees in five weeks, projecting to 5,657 arrestees in the course of a year – no constitutional probable cause determination was timely made, since the affidavit of arrest was never read.

It should be noted that the CCR survey takers were not able to record the time of each detainee's arrest, and therefore did not systematically collect data on whether each First Appearance, and the accompanying probable cause determination, or lack thereof, occurred within 48 hours of arrest.

However, as Exhibit C shows, it is clear that 2% of the time – impacting a total of 42 charges – the commissioners explicitly refused to make a probable cause determination at First Appearances and instead set the matter off for another 48 hours to allow the State to attempt to gather and provide more information. But, of course, *County of Riverside* commands a determination of probable cause within 48 hours of arrest. Indeed, it forbids courts from awarding the State this kind of additional time for further investigation. *See County of Riverside*, 500 U.S. at 56. In short, the magistrates in these instances are giving the State a second bite at the apple, though prohibited from doing so.

If, in the course of a five week survey, 42 charges – attributable to fourteen defendants – were set for an unconstitutional additional 48 hours, then it can be projected that, in the course of

a year, 145 arrestees will be detained pursuant to the commissioners' unconstitutional practice of giving the state two consecutive 48-hour periods to find reasons justifying detention.

## **II. THESE SYSTEMIC FAILURES ARE BEST ADDRESSED BY THIS COURT THROUGH A CLEAR STATEMENT OF LAW AND THE CRAFTING OF SIMPLE REMEDIES.**

The data gathered by CCR suggests that there is a disturbing trend of incomplete and untimely probable cause determinations in the magistrate section of the Orleans Parish Criminal District Court. As explained in Section I(C), *supra*, the commissioners are all too often failing to read the affidavit of probable cause; failing to record whether a probable cause determination has been made, and on what grounds; and failing to make probable cause determinations in a timely fashion. The data demonstrate that Bruce Wallace's case is by no means aberrational, but that the constitutional and statutory rights of similarly-situated defendants are being violated in the magistrate section on a consistent and systemic level.

Here, this Court has the opportunity to rectify these errors by issuing a clear statement of the law governing First Appearances to which the lower courts must adhere, and by crafting practical and straight-forward remedies to prevent further constitutional and statutory violations against arrestees like Mr. Wallace.

The systemic nature of the problem, indicated by the findings described *supra*, requires at a minimum a prompt, strong and clear statement of the law from this Court, with an emphasis on the importance of adhering to black-letter constitutional and statutory guarantees, and on the consequences of disregarding that law.

But additionally, CCR urges this Court to take three simple remedial steps to ensure that Orleans Parish Criminal District Court adheres to the mandates of the federal constitution and state statutory provisions in the future. The Louisiana Constitution, of course, endows this Court with "general supervisory jurisdiction over all other courts." La. Const. art. V § 5. This Court also possesses inherent powers "to do all things reasonably necessary for the exercise of [its] functions.' This inherent authority includes the authority 'to fashion a remedy which will promote the orderly and expeditious administration of justice.'" *State v. Peart*, 621 So. 2d 780, 790-91 (La. 1993) (citation omitted). Thus, it is squarely within this Court's power to craft and impose such remedial measures.

First, this Court should order that the criminal district court generate publicly-available records of when an arrest was made, and when the arrestee was produced in court. Given that arrestees have long been afforded the unambiguous constitutional right to be produced in court for a probable cause determination within 48 hours of arrest, this is a matter of vital public importance and should be of utmost concern to the commissioners of the criminal district court. The creation and maintenance of these publicly-available records, which would involve the expenditure of minimal administrative resources, will allow the judges of the criminal district court to effectively and properly monitor whether the commissioners, whom they employ and supervise, are honoring the mandates of *Gerstein* and *County of Riverside*, and to take appropriate action when they are not.

Additionally, this Court should order that the judicial officers of the magistrate section not only read the affidavit supporting probable cause, or “gist,” into the record in an effort to ensure that arrestees are aware of the charges against them, but also make a clear and unambiguous record of whether, and based on what facts, the court has made an independent finding of probable cause. These simple measures would make great strides in guaranteeing that the fundamental constitutional and statutory requirements governing First Appearances are met.

Finally, because the constitutional and statutory violations described above are occurring on a systemic level, and abrogate the most basic of rights, and because the commissioners of the magistrate section have proven reluctant to enforce black-letter law as written, this Court should appoint an independent monitor to oversee this process and ensure compliance. Such a monitor should have intimate familiarity not only with the workings of the magistrate section, but also with the constitutional and statutory framework that governs First Appearances. To this end, CCR proposes that a retired appellate judge would be ideally suited to this role. In any event, an independent monitor would help assure that these errors, which have been subject to rebuke by this Court in the past, *see State v. Charles*, 2009-0877, 7 So. 3d 1175 (La. Apr. 22, 2009), do not continue to occur unchecked.

## CONCLUSION

For the foregoing reasons, this Court should issue a clear statement of the law governing First Appearances, ordering that the lower courts adhere to the requirements of *Gerstein* and *County of Riverside* as well as statutory provisions; order that the criminal district court maintain publicly-available records of the date and time of arrest and production of arrestees in court for First Appearances; order that the judicial officers of the magistrate section read affidavits supporting probable cause into the record at these Appearances and make a record of whether, and based on what facts, they have made findings of probable cause; and appoint an independent monitor to oversee compliance with these remedies.

Respectfully submitted,

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