

Post Arrest Time Limits

*“The consequences of prolonged detention may be more serious than the interference occasioned by arrest.”*¹

The minute a suspect is arrested and taken into custody, a clock starts ticking. Sometimes, two clocks. Both clocks are set for 48 hours, and both are counting down the time within which officers, prosecutors, or judges must take certain action. What action?

If the arrest was made without a warrant, a judge must determine whether the arresting officer did, in fact, have probable cause. This is required under two U.S. Supreme Court cases, *Gerstein v. Pugh*² and *County of Riverside v. McLaughlin*.³ Meanwhile, the other clock is tracking the time between the suspect’s arrest and his arraignment, which is a suspect’s first court appearance.

The main function of these two proceedings is to transfer control of the suspect from law enforcement to the judiciary. But, as the court explained in *Riney v. Alaska*, they do it in different ways.

[T]he probable cause determination required by *Gerstein* is conceptually different from the procedures that generally occur at a suspect’s first appearance—reading the charges, apprising suspects of their basic procedural rights, setting bail, and making arrangements for suspects to obtain counsel. The *Gerstein* decision does not require any of these “first appearance” procedures. By the same token, the speedy accomplishment of these “first appearance” procedures is no substitute for a fair and reliable determination of probable cause by a judicial officer either before or promptly after arrest.⁴

Although the probable cause review and arraignments are both conducted by judges, officers have certain responsibilities. Mainly, they must make sure that necessary documents are delivered to the courts or prosecutors promptly so there is no unnecessary delay. And if officers fail to do so, and if this failure results in an unnecessary delay, the court may impose sanctions. Consequently, officers must know what is required of them, and how to calculate the time within which they must do it.

Before we begin, it should be noted that the time limits discussed in this article apply only so long as the suspect remains in custody, and only if his custodial status is based on the arrest.⁵ For example, a probable cause determination is not required if the defendant bails out before time runs, or if he is also being held on a probation or parole hold based on other matters.⁶

¹ *Gerstein v. Pugh* (1975) 420 US 103, 114.

² (1975) 420 US 104.

³ (1991) 500 US 44.

⁴ (1997) 935 P.2d 828, 833.

⁵ See *Gerstein v. Pugh* (1975) 420 US 103, 116, fn. 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.”]; *In re Walters* (1975) 15 Cal.3d 738, 743 [probable cause determination required “unless pending trial he is released on his own recognizance.”]; *O’Neal v. Superior Court* (1986) 185 Cal.App.3d 1086, 1090 [“(T)he Department of Corrections placed a detainer on petitioner on April 9, 1985. Once that hold was in place, petitioner was no longer detained prior to arraignment and section 825 [arraignment time limits] ceased to operate.”]; *People v. Gordon* (1978) 84 Cal.App.3d 913, 922-3.

⁶ See *People v. Hughes* (2002) 27 Cal.4th 287, 326; *Ng v. Superior Court* (1992) 4 Cal.App.4th 29, 38.

PROBABLE CAUSE REVIEW

Whenever officers arrest a suspect based on an arrest warrant or a pre-complaint (*Ramey*) warrant, their belief that probable cause exists has already been validated by a judge.⁷ But when it's a warrantless arrest, their belief that probable cause exists is necessarily untested. And if it turns out they were wrong, the suspect will have spent several hours or even days in jail on an unsupportable charge.⁸

To help prevent this from happening, the United States Supreme Court has ruled that when a suspect has been arrested and remains in custody, a judge must promptly double check the officers' determination that probable cause existed. As the Court explained:

[A] policeman's on-the-scene assessment of probable cause provides legal justification for arresting a person suspected of crime, and for a brief period of detention to take the administrative steps incident to arrest. Once the suspect is in custody, however, the reasons that justify dispensing with the magistrate's neutral judgment evaporate.⁹

Consequently, if the judge determines that probable cause exists, the suspect may be detained pending further court order. If not, he will be released unless other charges or holds are pending.¹⁰

Time limits

In the past, some courts believed that probable cause determinations must be held *immediately* after the necessary administrative details were completed.¹¹ The idea that a constitutional violation results unless officers can account for every minute of their time between the arrest and probable cause determination was, of course, unsound. As the U.S. Supreme Court pointed out in 1991, the law requires promptness—not immediacy;¹² and that in determining what is “prompt,” the courts “must allow a substantial degree of flexibility.”¹³

Still, the Court was aware that a rule requiring a “prompt” probable cause review would result in a lot of litigation and uncertainty because “promptness” means different things to different people. To avoid this, the Court ruled that when the probable cause

⁷ See *Gerstein v. Pugh* (1975) 420 US 103, 116, fn.18 [“A person arrested under a warrant would have received a prior judicial determination of probable cause.”]; *People v. Case* (1980) 105 Cal.App.3d 826, 831 [“(T)he use of the ‘*Ramey* Warrant’ form [w]as apparently to permit, prior to arrest, judicial scrutiny of an officer’s belief that he had probable cause to make the arrest without involving the prosecutor’s discretion in determining whether to initiate criminal proceedings.”]; *Goodwin v. Superior Court* (2001) 90 Cal.App.4th 215, 224-5. **Re grand jury indictment:** A probable cause determination is not required if the arrest was based on a grand jury indictment. See *Gerstein v. Pugh* (1975) 420 US 103, 116, fn.19; Penal Code §945.

⁸ See *U.S. v. Fullerton* (6th Cir. 1999) 187 F.3d 587, 590 [“We cannot overstate the importance of the constitutional requirement that there be a prompt determination of probable cause when a person is arrested without a warrant.”].

⁹ *Gerstein v. Pugh* (1975) 420 US 103, 113-4. ALSO SEE *County of Riverside v. McLaughlin* (1991) 500 US 44, 47 [“prompt judicial determination of probable cause [is] a prerequisite to an extended pretrial detention following a warrantless arrest.”].

¹⁰ See *In re Walters* (1975) 15 Cal.3d 738, 753 [“If the judicial officer finds that probable cause has not been established, the defendant must be discharged from custody.”].

¹¹ See *County of Riverside v. McLaughlin* (1991) 500 US 44, 54 [“Notwithstanding *Gerstein*’s discussion of flexibility, the Court of Appeals for the Ninth Circuit held that no flexibility was permitted. It construed *Gerstein* as requiring a probable cause determination to be made as soon as the administrative steps incident to arrest were completed, and that such steps should require only a brief period.”].

¹² See *County of Riverside v. McLaughlin* (1991) 500 US 44, 54.

¹³ *County of Riverside v. McLaughlin* (1991) 500 US 44, 56.

review occurs within 48 hours of the suspect's arrest, any delays will be presumed reasonable.¹⁴ Although the suspect may attempt to rebut this presumption with evidence that the delay was unwarranted,¹⁵ the presumption is fairly strong. As the Court noted:

[W]e believe that a jurisdiction that provides judicial determinations of probable cause within 48 hours of arrest will, as a general matter, comply with the promptness requirement of *Gerstein*. For this reason, such jurisdictions will be immune from systemic challenges.¹⁶

On the other hand, if the probable cause determination was made after 48 hours, the prosecution will have the burden of proving the delay was reasonably necessary. "Where an arrested individual does not receive a probable cause determination within 48 hours," said the Court, "the burden shifts to the government to demonstrate the existence of a bona fide emergency or other extraordinary circumstances."¹⁷

Note that in calculating the time limit, no allowance is made for weekends or holidays. It's a straight 48 hours.¹⁸

How probable cause is determined

There are two ways in which officers can obtain verification of their probable cause determination: (1) a *Gerstein-Riverside* hearing, or (2) a post-arrest *Ramey* warrant.

GERSTEIN-RIVERSIDE HEARING: The most common method of verifying probable cause is to have a judge review a DECLARATION OF PROBABLE CAUSE (with arrest report attached), witness statements, or other documents upon which probable cause was based.¹⁹ In such a proceeding, no witnesses appear for questioning,²⁰ and neither the

¹⁴ See *County of Riverside v. McLaughlin* (1991) 500 US 44, 56; *Powell v. Nevada* (1994) 511 US 79, 80 ["(*Riverside*) established that 'prompt' generally means within 48 hours of the warrantless arrest; absent extraordinary circumstances, a longer delay violates the Fourth Amendment."].

NOTE re juveniles: A probable cause determination is required within 72 hours after a juvenile is arrested. See *Alfredo A. v. Superior Court* (1994) 6 Cal.4th 1212, 1216, 1230-1.

¹⁵ See *County of Riverside v. McLaughlin* (1991) 500 US 44, 56 [a probable cause determination within 48 hours "may nonetheless violate *Gerstein* if the arrested individual can prove that his or her probable cause determination was delayed unreasonably."]; *U.S. v. Daniels* (7th Cir. 1995) 64 F.3d 311, 314 ["Because Daniels received his hearing within forty hours of arrest, we presume he received a timely hearing. Daniels can refute this presumption and demonstrate that he did not receive a timely hearing if he can prove that his probable cause determination was delayed unreasonably."]; *Hallstrom v. Garden City* (9th Cir. 1993) 991 F.2d 1473, 1479 ["A person taken before a judicial officer within the 48-hour period may still challenge the arresting officials for unreasonable delay, but she bears the burden of proving that her probable cause determination was delayed unreasonable."]. **NOTE:** The Court in *County of Riverside v. McLaughlin* (1991) 500 US 44, 56 gave the following examples of inadequate justifications for a delay: delay to try to develop probable cause, "a delay motivated by ill will against the arrested individual, or delay for delay's sake."

¹⁶ *County of Riverside v. McLaughlin* (1991) 500 US 44, 56. ALSO SEE *Alfredo A. v. Superior Court* (1994) 6 Cal.4th 1212, 1215.

¹⁷ *County of Riverside v. McLaughlin* (1991) 500 US 44, 57. ALSO SEE *Anderson v. Calderon* (9th Cir. 2000) 232 F.3d 1053, 1070 ["Under *McLaughlin's* 48-Hour Rule, the delay was presumptively unreasonable."].

¹⁸ See *County of Riverside v. McLaughlin* (1991) 500 US 44, 56-8; *Anderson v. Calderon* (9th Cir. 2000) 232 F.3d 1053, 1070 ["The *McLaughlin* Court made clear that intervening weekends or holidays would not qualify as extraordinary circumstances, so the State cannot argue that the delay was reasonable on ground that May 26 was Memorial Day."].

¹⁹ See *Gerstein v. Pugh* (1975) 420 US 103, 120 ["(Probable cause to arrest) 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."]; *Alfredo A. v. Superior Court* (1994) 6

suspect nor his attorney are present.²¹ In fact, the judge will usually read the documents alone in chambers.

In determining whether probable cause exists, judges do not engage in a meticulous examination of the facts, carefully weighing the evidence and evaluating the credibility of witnesses.²² Instead, they apply the same standards and principles they use in deciding whether to issue search and arrest warrants;²³ i.e., Does a common-sense reading of the documents demonstrate a “fair probability” that the suspect committed the crime for which he was arrested.²⁴

POST-ARREST RAMEY WARRANTS: Officers can also comply with *Gerstein-Riverside* if, after arresting the suspect, they obtain a *Ramey* arrest warrant. Such a warrant is issued by a judge who, upon reviewing an officer’s DECLARATION OF PROBABLE CAUSE, has determined that probable cause to arrest exists.²⁵ This was done, for example, in *North Carolina v. Chapman* where the court observed:

[D]efendant was arrested at 9:30 A.M. by officers without a warrant. After his interrogation was complete at 12:30 P.M., a magistrate issued an arrest warrant for him based on probable cause. This satisfies the requirement of *Riverside* and *Gerstein* that a magistrate promptly determine probable cause. The defendant was then lawfully in custody and could be interrogated in regard to other crimes.²⁶

Cal.4th 1212, 1224; *Riney v. Alaska* (1997) 935 P.2d 828, 833; *In re Walter* (1975) 15 Cal.3d 738, 750-3; Penal Code §817.

²⁰ See *Gerstein v. Pugh* (1975) 420 US 103, 120-3; *Powell v. Nevada* (1994) 511 US 79, 89 [determination must be “prompt”; “prompt” generally means within 48 hours of the warrantless arrest.”].

²¹ See *Gerstein v. Pugh* (1975) 420 US 103, 122 [(T)he probable cause determination is not a ‘critical stage’ in the prosecution that would require appointed counsel.”].

²² See *Gerstein v. Pugh* (1975) 420 US 103, 120-1.

²³ See *Gerstein v. Pugh* (1975) 420 US 103, 120-1; *People v. Aday* (1964) 226 Cal.App.2d 520, 532 [“It is well established that the phrase ‘probable cause’ is equivalent in meaning to ‘sufficient cause’ and ‘reasonable cause.’ Accordingly, the definition of probable cause hereinabove stated has been consistently applied with equal force to the issuance of warrants.”]; *Robison v. Superior Court* (1957) 49 Cal.2d 186, 188; *In re Walters* (1975) 15 Cal.3d 738, 753 [“The People need only establish a prima facie case of probable cause to detain on sworn statements or testimony sufficient to warrant a prudent man in believing that the suspect had committed or was committing an offense.”]. ALSO SEE *Riney v. Alaska* (1997) 935 P.2d 828, 834 [“Indeed, because the explicit aim of *Gerstein* is to equalize the treatment of arrestees—by giving suspects who have been arrested without a warrant the same judicial review that occurs during a warrant application—it would be anomalous to interpret *Gerstein* as conferring special procedural rights on suspects arrested without a warrant, rights not shared by suspects who have been arrested on warrants.”].

²⁴ See *Gerstein v. Pugh* (1975) 420 US 103, 120 [“The sole issue is whether there is probable cause for detaining the arrested person pending further proceedings.”]; *Alfredo A. v. Superior Court* (1994) 6 Cal.4th 1212, 1224; *Illinois v. Wardlow* (2000) 528 US 119, 125; *Illinois v. Gates* (1983) 462 US 213, 231; *Illinois v. Rodriguez* (1990) 497 US 177, 184; *Adams v. Williams* (1972) 407 US 143, 149 [“Probable cause does not require the same type of specific evidence of each element of the offense as would be needed to support a conviction.”]; *Bailey v. Superior Court* (1992) 11 Cal.App.4th 1107, 1111 [“Courts should not invalidate search or arrest warrants by imposing hypertechnical requirements rather than a commonsense approach to probable cause.”]; *U.S. v. Carranza* (9th Cir. 2002) ___ F.3d ___ [“Probable cause existed if under the totality of circumstances known to the arresting officers, a prudent person would have concluded that there was a fair probability that [the suspect] committed a crime.”]; *U.S. v. Valencia-Amezcuca* (9th Cir. 2002) 278 F.3d 901.

²⁵ See Penal Code §817, 1427; *People v. Ramey* (1976) 16 Cal.3d 263, 275; *People v. Case* (1980) 105 Cal.App.3d 826.

²⁶ (1996) 471 S.E. 2d 354, 356.

ARRAIGNMENT

As noted, the other post-arrest time limit applies to the defendant's arraignment. An arraignment is a defendant's first court appearance during which the following usually occur:

- (1) **Notified of charges:** The arrestee is notified of the charges filed against him.
- (2) **Copy of complaint:** The arrestee is given a copy of the complaint.
- (3) **Counsel appointed:** The arrestee is notified of the right to be represented by counsel. If necessary, counsel will be appointed to represent him. If the arrestee desires to retain private counsel, the magistrate will give him a reasonable amount of time in which to do so.
- (4) **Plea:** The arrestee pleads to the charge or requests a continuance for this purpose.
- (5) **Bail:** Bail is set, the arrestee is ordered held without bail, or the arrestee is released on his own recognizance.²⁷

Unlike probable cause determinations, arraignments are required of all defendants—regardless of whether they were arrested with or without a warrant.²⁸ Although defendants who have bailed or are otherwise out-of-custody must also be arraigned, they need not be arraigned within the 48 time frame.²⁹

Time limits

A defendant in custody must be arraigned within 48 hours of his arrest.³⁰ Unlike the time limits for probable cause determinations, the 48-hour countdown does not proceed nonstop:

EXCLUDE SUNDAYS AND HOLIDAYS: The clock stops running on Sundays and court holidays.³¹ For example, if the defendant was arrested at 6 P.M. on Friday, the clock

²⁷ See Penal Code §§1268 et seq., §§987-90; Cal. Const. Art. 1, §14; *People v. Powell* (1967) 67 Cal.2d 32, 60 [“The principal purposes of the requirement of prompt arraignment are to prevent secret police interrogation, to place the issue of probable cause for the arrest before a judicial officer, to provide the defendant with full advice as to his rights and an opportunity to have counsel appointed, and to enable him to apply for bail or for habeas corpus when necessary.”]; *People v. Williams* (1977) 68 Cal.3d 36, 44.

²⁸ See Penal Code §825; *People v. Thompson* (1980) 27 Cal.3d 303, 329 [“The right to a prompt arraignment is a fundamental right of the arrested person.”].

²⁹ **NOTE:** Although Penal Code §825 does not specifically exempt out-of-custody suspects from the requirement of a prompt arraignment, it impliedly does so by stating that the suspect must “be taken” before the magistrate, an act that can be undertaken only if the suspect is in custody. **ALSO SEE** Penal Code §849(a) [suspect arrested without a warrant must be taken before a magistrate “if not otherwise released”].

³⁰ See Penal Code §§825, 849(a). **NOTE:** Although §825 is contained within the Penal Code chapter entitled “The Warrant of Arrest,” it is generally assumed that its 48-hour time limit also applies to warrantless arrests. See *People v. Turner* (1994) 8 Cal.4th 137, 173, fn.6. In any event, §849(a), which applies to warrantless arrests, requires an arraignment “without unnecessary delay.” Because the U.S. Supreme Court in *Riverside* and the legislature in §849(a) generally consider 48-hours to be a reasonable limit for probable cause determinations and arraignments on warrant arrests, there is no reason to believe the standard would be different for warrantless arrests. It is, however, possible that more time may be allowed for warrantless arrests because when an arrest is made on a warrant “the authorities will normally have already investigated and evaluated the case . . .” See *People v. Bonillas* (1989) 48 Cal.3d 757, 787, fn.11. **ALSO SEE** Cal. Const. Art. 1, §14 [person charged with a felony must be arraigned “without unnecessary delay.”] **NOTE:** A willful delay in taking an arrestee before a magistrate for arraignment is a misdemeanor. See Penal Code §145.

would stop running at 12:01 A.M. on Sunday and would not start until 12:01 A.M. on Monday. Because the 48 hours would expire at 6 P.M. on Monday, the defendant would have to be arraigned on Tuesday.

IF TIME EXPIRES WHEN COURT IN SESSION: If time expires when court is in session, the defendant may be arraigned anytime that day.³²

IF TIME EXPIRES WHEN COURT NOT IN SESSION: If time expires when court is not in session, the defendant may be arraigned anytime the next court day.³³

IF ARRESTED LATE-WEDNESDAY: If the defendant is arrested on a Wednesday after the courts close, he must be arraigned sometime Friday, unless Wednesday or Friday are court holidays.³⁴

REASONABLE DELAYS

There is *always* some delay between a suspect's arrest and his arraignment and probable cause determination. The issue is whether the delay was *reasonable*. As noted, when the time limits are met, a delay is presumed to be reasonable, although the defense may attempt to prove otherwise.³⁵ If, however, the time limits are not met, the prosecution has the burden of proving the delay was reasonable.

The reasonableness of any delay usually depends on three things: (1) the length of the delay, (2) whether the delay occurred despite the officers' diligence, and (3) the reason or justification for the delay.

As we will now explain, certain justifications for delays are clearly inadequate, while others may be sufficient.

Not reasonable

Delays for the following reasons are unjustified:

- The delay "motivated by ill will" against the arrestee.
- The delay made the work of the police or DA "easier."
- The delay occurred so the arresting officer could get some sleep.
- The delay occurred because the arresting officer's shift had ended.
- The delay was "not unusual."
- The delay resulted from a departmental policy of seeking probable cause determinations at the latest possible hour.³⁶

Administrative delays

Delays for administrative purposes are usually reasonable because there are certain administrative tasks that must be completed whenever a person is arrested. For example, the courts have noted that officers may need to write crime and arrest reports, review

³¹ See Penal Code §825(a)(1); *People v. Turner* (1994) 8 Cal.4th 137, 175; *People v. Gordon* (1978) 84 Cal.App.3d 913, 922.

³² See Penal Code §825(a)(2); *People v. Gordon* (1978) 84 Cal.App.3d 913, 922.

³³ See Penal Code §825(a)(2).

³⁴ See Penal Code §825(a)(2).

³⁵ See *County of Riverside v. McLaughlin* (1991) 500 US 44, 56; *People v. Thompson* (1980) 27 Cal.3d 303, 329; *People v. Turner* (1994) 8 Cal.4th 137, 175; *Youngblood v. Gates* (1988) 200 Cal.App.3d 1302, 1312. **NOTE:** If the time limits are met, a violation does not result merely because delayed even a "few hours" if the delay was reasonable; e.g., delay to consolidate arraignment and probable cause determination. See *County of Riverside v. McLaughlin* (1991) 500 US 44, 54 [Court notes that *Gerstein* is "not that inflexible" as to render a delay of "even a few hours" unconstitutional if the purpose of the delay was to consolidate the probable cause determination and arraignment].

³⁶ See *Riverside v. McLaughlin* (1991) 500 US 44, 55-6; *People v. Thompson* (1980) 27 Cal.3d 303, 329.

reports written by other officers, inventory property, obtain criminal histories, book the suspect, prepare the necessary documents pertaining to probable cause and charging, and otherwise “cope with the everyday problems of processing suspects through an overly burdened criminal justice system.”³⁷ Furthermore, delays for these purposes might be even longer on Mondays because the number of weekend arrests “is often higher and available resources tend to be limited.”³⁸ Consequently, the U.S. Supreme Court has ruled that in determining whether an administrative delay was reasonably necessary, “courts must allow a substantial degree of flexibility.”³⁹

Delay for charging

Arraignment of a defendant will sometimes be briefly delayed because of the charging or intake process. Specifically, prosecutors must review the officers’ reports to determine whether there is sufficient evidence to file charges and, if so, what charges to file. Although prosecuting agencies are organized so they can perform this function without exceeding the time limits, in some cases—especially complex cases—delays may occur.

When this happens, a brief delay is usually viewed as reasonable so long as officers and prosecutors were diligent. This is because it is in the best interests of both the defendant and the public that the charging process not be rushed—that charges be filed only after careful review. As the California Supreme Court stated in *People v. Turner* where a murder defendant argued his arraignment was unreasonably delayed:

[T]he charge of murder is generally considered to be the most serious of all criminal charges, and it should not be publicized lightly or casually. Here, the case involved potential charges of double murder, robbery, and the concomitant special circumstances. In view of the complexity of the charging decisions involved, including the discernment of each suspect’s level of culpability, the delay was not unreasonable.⁴⁰

Similarly, in *People v. Bonillas*,⁴¹ where a psychiatric evaluation of a murder defendant resulted in a delay in arraigning him, the court ruled the delay was reasonable

³⁷ See *County of Riverside v. McLaughlin* (1991) 500 US 44, 55; *People v. Williams* (1977) 68 Cal.App.3d 36, 43 [delay “for the district attorney to evaluate the evidence for the limited purpose of determining what charge, if any, is to be filed; and to complete the necessary clerical and administrative tasks to prepare a formal pleading.”]; *People v. Thompson* (1980) 27 Cal.3d 303, 329; *Youngblood v. Gates* (1988) 200 Cal.App.3d 1302, 1320 [some delay to evaluate a case is permitted]; *People v. Turner* (1994) 8 Cal.4th 137, 176 [“(O)fficer Green used the time from Monday to Wednesday not to further investigate defendant, but rather to coordinate the necessary reports and transcripts for submission to the district attorney’s office and complete the filing of the complaint.”]; *Kanekoa v. Honolulu* (9th Cir. 1989) 879 F.2d 607, 611; *Hallstrom v. Garden City* (9th Cir. 1993) 991 F.2d 1473, 1481 [not reasonable to delay a probable cause determination for four days even though delay was caused by the defendant’s refusal to answer questions that were necessary to complete the booking process; although a short delay to “allow tempers to cool, and the opportunity for calm reconsideration” might be justifiable]. ALSO SEE *County of Riverside v. McLaughlin* (1991) 500 US 44, 56-7 [“Courts cannot ignore the often unavoidable delays in transporting arrested persons from one facility to another, handling late-night bookings where no magistrate is readily available, obtaining the presence of an arresting officer who may be busy processing other suspects or securing the premises of an arrest, and other practical realities.”].

³⁸ See *County of Riverside v. McLaughlin* (1991) 500 US 44, 55.

³⁹ See *County of Riverside v. McLaughlin* (1991) 500 US 44, 56.

⁴⁰ (1994) 8 Cal.4th 137, 175. ALSO SEE *People v. King* (1969) 270 Cal.App.2d 817, 822 [“When several persons are jointly suspected of involvement in the same crime, a reasonable delay in arraignment in order to evaluate the case against each of them would appear to qualify as necessary delay within the meaning of the Penal Code.”].

⁴¹ (1989) 48 Cal.3d 757.

because the defendant's mental state "was obviously material" in determining what charges should be filed.

Defendant injured or sick

A delay in arraigning a defendant is reasonable if the defendant was unable to appear because he was sick or injured.⁴² As the California Supreme Court noted, "[I]t would be an unreasonable application of [the arraignment statute] to require that a hospitalized defendant be taken before a magistrate until it was possible to do so without jeopardy to his health."⁴³

Delay to combine court proceedings

It is sometimes possible to combine the probable cause determination and the arraignment so that the arraigning magistrate can make the probable cause determination. So long as the probable cause determination was made within 48 hours of arrest, a *Gerstein-Riverside* violation will not result merely because the probable cause determination might have been completed earlier.⁴⁴

Investigative delays

The arrest of a suspect seldom signals the completion of an investigation. Whether the suspect was arrested with or without a warrant, in most cases there are many more things that must be done. For example, officers may need to interrogate the suspect, interview witnesses, track down and interrogate the suspect's accomplices, check fingerprints, obtain forensic reports, seek and execute search warrants, and conduct lineups. The question is whether a delay is considered justifiable if it is attributable to such activities.

If the suspect's arraignment and probable cause determination occur within the time limits, a delay for further investigation is almost always considered reasonable.⁴⁵

⁴² See *People v. Taylor* (1967) 250 Cal.App.2d 367, 371; *People v. Williams* (1977) 68 Cal.App.3d 36, 43.

⁴³ *In re Walker* (1974) 10 Cal.3d 764, 778.

⁴⁴ See *Gerstein v. Pugh* (1975) 420 US 103, 123 ["It may be found desirable to make the probable cause determination at the suspect's first appearance before a judicial officer."]; *County of Riverside v. McLaughlin* (1991) 500 US 44, 55 ["Because *Gerstein* permits jurisdictions to incorporate probable cause determinations into other pretrial procedures, some delays are inevitable."].

⁴⁵ **NOTE:** If the suspect is willing to speak with officers, a delay attributable to the interview ought to be deemed reasonable because the law views police interrogation as a highly worthwhile activity that serves the public interest. See *People v. Morris* (1991) 53 Cal.3d 152, 200 ["Defendant cites no controlling authority that would justify suppressing a voluntarily given statement merely because defendant was arraigned a few hours after his companions and on the same day as his arrest. We decline to create any such authority."]; *Kanekoa v. Honolulu* (9th Cir. 1989) 879 F.2d 607, 611 [court rules the interviews with the suspects "may have constituted administrative steps which justified detention"]; *Sanders v. City of Houston* (S.D. Tex 1982) 543 F.Supp. 694, 700 ["Administrative steps" includes "interrogating the suspect"]; *Riney v. Alaska* (1997) 935 P.2d 828, 835 ["So long as the police do not detain a suspect for the purpose of gathering probable cause to justify the arrest after the fact, questioning an arrestee about the crime(s) for which he or she has been arrested does not constitute an 'unreasonable' delay under *Gerstein* and *McLaughlin*."]; *North Carolina v. Chapman* (1996) 471 S.E. 354, 356 ["From the time the defendant was arrested at 9:30 a.m. until he was taken before a magistrate at 8 p.m., a large part of the time was spent interrogating the defendant. There were several crimes involved. The officers had the right to conduct these interrogations, and it did not cause an unnecessary delay for them to do so."]. **NOTE:** In *Youngblood v. Gates* (1988) 200 Cal.App.3d 1302, 1320 the court stated that all delays for the purpose of interrogation are unnecessary, citing *People v. Powell*

If, however, the time limits are exceeded, a delay for further investigation will usually be considered justifiable only if, (1) the crime was serious, (2) officers were at all times diligently engaged in actions they reasonably believed were necessary to solve the crime or obtain necessary evidence, and (3) officers reasonably believed these actions could not be postponed without risking the loss of necessary evidence, the identification or apprehension of additional suspects, or otherwise compromising the integrity of their investigation.⁴⁶

CONSEQUENCES OF VIOLATIONS

If there was an unreasonable delay in a *Gerstein-Riverside* probable cause determination or an arraignment, the question arises: What are the consequences? Two

(1967) 67 Cal.2d 32. But nothing in *Powell* supports such a sweeping *per se* rule. On the contrary, *Powell* was based on the unique and unreasonable circumstances surrounding the interrogations. The *Youngblood* court also took issue with a ruling in *People v. Haney* (1967) 249 Cal.App.2d 810, 815 which the *Youngblood* court, at p. 1320, interpreted as granting officers automatic permission to delay an arraignment for the purpose of interrogating the suspect. Again, the *Youngblood* court mischaracterized the ruling; i.e., *Haney*, at p. 815, was based on specific facts that justified the delay. ALSO SEE *Dunaway v. New York* (1979) 442 US 200 [Court repeatedly states that questioning a suspect at a police station is proper if there is probable cause to arrest]; *McNeil v. Wisconsin* (1991) 501 US 171, 181; *Moran v. Burbine* (1986) 475 US 412, 426.

⁴⁶ See *County of Riverside v. McLaughlin* (1991) 500 US 44, 54 [Court noted that a delay for a “few hours” would not violate *Gerstein* if justified by judicial efficiency (it would seem that a reasonable delay to obtain reliable evidence to help prove or disprove guilt in a serious case would be even more justified)]; *People v. Turner* (1994) 8 Cal.4th 137, 175-6; *People v. Bonillas* (1989) 48 Cal.3d 757, 788 [“Even if [arraignment was delayed so that a murder suspect could be examined by a psychiatrist] such an examination is within the permitted purpose of evaluating the evidence for the purpose of determining what charges should be filed. Defendant’s mental state was obviously material to that purpose.”]; *U.S. v. Daniels* (7th Cir. 1995) 64 F.3d 311, 314 [“Daniels’ argument seems to interpret *Riverside* to preclude law enforcement from bolstering its case against a defendant while he awaits his *Gerstein* hearing; that is a ludicrous position. *Gerstein* and its progeny simply prohibit law enforcement from detaining a defendant to gather evidence to justify his arrest, which is a wholly different matter.”]; *People v. King* (1969) 270 Cal.App.2d 817, 822-3; *Sanders v. City of Houston* (S.D. Tex 1982) 543 F.Supp. 694, 700 [“Administrative steps” includes “conducting lineups” and “verifying alibis”]; *U.S. v. Sholola* (7th Cir. 1997) 124 F.3d 803, 820. ⁴⁶ **NOTE:** An example of a case in which an investigative delay was ruled unjustifiable is found in *Willis v. Chicago* (7th Cir. 1993) 999 F.2d 284. Briefly, officers arrested Willis for a series of sexual assaults that occurred in the Chicago Police Department’s Area 3. After Willis was identified in a physical lineup, other officers, who suspected he had also committed sexual assaults in Area 2, drove him to the Area 2 station where additional lineups were conducted. In ruling there had been an unreasonable delay in obtaining a probable cause determination on the Area 3 charges, the court said, “Processing on the Area 3 charges for which he had been arrested was completed in ample time for Mr. Willis to appear at the February 12 court call. The parties agree that he was detained solely to permit the police to place him in lineups relating to other uncharged crimes. The arrest yet to be judicially scrutinized was used as an opportunity to build a separate case against him.” The problem with this ruling is that it was based on language in *County of Riverside v. McLaughlin* (1991) 500 US 44, 56 that a delay is unreasonable if its only purpose was to gather evidence to justify the arrest. See *Willis* at p. 289. But the delay in *Willis* was not for this purpose—probable cause to arrest already existed. Undeterred, the *Willis* court said that a delay to develop probable cause is “certainly analogous” to a delay to investigate a separate crime. It failed, however, explain how it reached the dubious conclusion that a delay for an admittedly improper purpose (developing probable cause for an arrest that has already been made) is analogous to a delay for an admittedly proper purpose (obtaining reliable evidence that the suspect committed other sexual assaults).

things are clear: First, a conviction will not be overturned as the result.⁴⁷ Second, although officers and their departments may be sued civilly, as a practical matter, this is unlikely unless the violation was flagrant.⁴⁸

Defendants sometimes argue that they must be released from custody as the result of the violation. There is, however, no legal justification for release. The U.S. Supreme Court has made it clear that, as far as the Fourth Amendment is concerned, a suspect is lawfully in custody if there is probable cause to arrest him.⁴⁹ In fact, the Court has indicated that a suspect who was ordered released could be immediately rearrested if probable cause continued to exist.⁵⁰

The question remains whether evidence can be suppressed as the result of a violation.⁵¹ The issue was raised in the United States Supreme Court case of *Powell v. Nevada*,⁵² but the Court, after noting it had not yet resolved the issue, decided to let it remain unresolved. Still, it appears that suppression will only be ordered as follows.

In the case of an unreasonably delayed probable cause review, it is likely that, as the dissenters in *Powell* reasoned, that if probable cause to arrest did, in fact, exist, there should be no suppression consequences. After all, the violation had absolutely no adverse affect on the arrestee. As Justice Thomas observed in *Powell*, “The timing of the probable-cause determination would have affected petitioner’s statement only if a proper hearing at or before the 48-hour mark would have resulted in a finding of no probable cause.”⁵³

⁴⁷ See *Gerstein v. Pugh* (1975) 420 US 103, 123 [“(A) conviction will not be vacated on the ground that the defendant was detained pending trial without a determination of probable cause.”]; *People v. Valenzuela* (1978) 86 Cal.App.3d 427, 430 [“Neither sections 825 nor 849 contain any language authorizing or requiring a dismissal of a prosecution by reason of delay in arraignment.”].

⁴⁸ See *U.S. v. Fullerton* (6th Cir. 1999) 187 F.3d 587, 592. **NOTE:** Where there has been a delay in arraigning a suspect, it appears the only remedy is a suit for false imprisonment or the like. See, for example, *City of Newport Beach v. Sasse* (1970) 9 Cal.App.3d 803; *Dragna v. White* (1955) 45 Cal.2d 469; *Gorlack v. Ferrari* (1960) 184 Cal.App.2d 702, 710; *Florio v. Lawton* (1960) 187 Cal.App.2d 657, 668; *People v. Valenzuela* (1978) 86 Cal.App.3d 427.

⁴⁹ See *Gerstein v. Pugh* (1974) 420 US 103, 113-4 [“(A) policeman’s on-the-scene assessment of probable cause provides legal justification for arresting a person suspected of crime . . .”]; *New York v. Harris* (1990) 495 US 14, 18 [“Nothing in the reasoning of [*Payton v. New York*] suggests that an arrest in a home without a warrant but with probable cause somehow renders unlawful continued custody of the suspect once he is removed from the house.”]; *People v. Watkins* (1994) 26 Cal.App.4th 19, 29 [“Where there is probable cause to arrest, the fact that police illegally enter a home to make a warrantless arrest neither invalidates the arrest itself nor requires suppression of any postarrest statements the defendant makes at the police station.”]; Penal Code §836(a).

⁵⁰ See *New York v. Harris* (1990) 495 US 14, 18 [“Nor is there any claim that the warrantless arrest required the police to release Harris or that Harris could not be immediately rearrested if momentarily released. Because the officers had probable cause to arrest Harris for a crime, Harris was not unlawfully in custody . . .”].

⁵¹ See *U.S. v. Fullerton* (6th Cir. 1999) 187 F.3d 587, 590 [“There is much confusion over the appropriate remedy for a *McLaughlin* violation.”]; *U.S. v. Sholola* (7th Cir. 1997) 124 F.3d 803, 821 [“The appellant has not cited (nor are we aware of) any federal circuit court opinions that lend credence to his position that suppression is the proper remedy in *Riverside* cases.”]; *Anderson v. Calderon* (9th Cir. 2000) 232 F.3d 1053, 1071 [“(I)t is well settled that a *McLaughlin* violation arises from the Fourth Amendment. Although suppression of evidence has been a preferred remedy for a Fourth Amendment violation, it is not the automatic remedy for any such violation.”].

⁵² (1994) 511 US 79.

⁵³ *Powell v. Nevada* (1994) 511 US 79, 90 [conc. opn. of Thomas, J.].

On the other hand, if probable cause did not exist, or if there was an unreasonable delay in arraigning a defendant, the courts might suppress evidence only if there was a direct causal link between the delay and the discovery or seizure of the evidence. In other words, evidence should not be suppressed if the link between it and the delay was weakened or attenuated so that the evidence was no longer “tainted” by the delay.⁵⁴

For example, in *People v. Turner*⁵⁵ the defendant argued that a statement he made during a delay in arraignment should be suppressed because it is “nonsensical” to believe he would have made the statement “if he had been arraigned and had counsel appointed, and that the statement were [therefore] a direct product of the delay in arraignment.” The California Supreme Court ruled such a “but for” connection is insufficient to establish the necessary link. Said the court, “To justify exclusion of a statement, defendant must show that the delay produced his admissions or that there was an essential connection between the illegal detention and admissions of guilt.”

In determining whether the link is sufficiently strong so as to justify suppression, the courts consider the following circumstances:

EVIDENCE OBTAINED BEFORE TIME RAN: If the evidence was obtained before time ran, it would not have been attributable to the delay and would, therefore, not be suppressed.⁵⁶

PURPOSE OF DELAY: Evidence is more apt to be deemed “tainted” if the sole purpose of the delay was to obtain the evidence that the defendant is seeking to suppress.⁵⁷ On the other hand, there would be less justification for suppressing the evidence if there was some plausible—though not “reasonable”—justification for the delay.⁵⁸

⁵⁴ See *Murray v. United States* (1988) 487 US 533, 536-7; *Dunaway v. New York* (1979) 442 US 200, 217; *Oregon v. Elstad* (1985) 470 US 298, 306; *People v. Williams* (1988) 45 Cal.3d 1268, 1299; *People v. Wharton* (1991) 53 Cal.3d 522, 579-80; *People v. Thompson* (1980) 27 Cal.3d 303, 329-30; *People v. Morris* (1991) 53 Cal.3d 152, 200; *Anderson v. Calderon* (9th Cir. 2000) 232 F.3d 1053, 1071 [“(W)e conclude that the appropriate remedy for a *McLaughlin* violation is the exclusion of the evidence in question—if it was fruit of the poisonous tree.”]. **NOTE re burden of proof:** A defendant who seeks the suppression of derivative evidence bears the burden of making a prima facie showing that the evidence was tainted by the illegal police conduct. See *People v. Mayfield* (1997) 14 Cal.4th 668, 760. **NOTE: No “but for” test:** Evidence is not “fruit” of a delay merely because it would not have been obtained if the probable cause determination or arraignment had been held earlier; i.e. no “but for” test. See *Wong Sun v. United States* (1963) 371 US 471, 487-8; *Segura v. United States* (1984) 468 US 796, 815 [“The Court has never held that evidence is “fruit of the poisonous tree” simply because “it would not have come to light but for the illegal actions of the police.”]; *Brown v. Illinois* (1975) 422 US 590, 603; *New York v. Harris* (1990) 495 US 14, 17; *People v. Sims* (1993) 5 Cal.4th 405, 445; *People v. Williams* (1977) 68 Cal.App.3d 36, 45 [court describes as “ludicrous” the assertion that if the defendant had not been in illegal custody he could have disposed of the evidence before it was seized by the police]; *Anderson v. Calderon* (9th Cir. 2000) 232 F.3d 1053, 1075 [“There may have existed a ‘but for’ relationship between the extended detention and the confessions . . . but no legally cognizable causal connection.”].

⁵⁵ (1994) 8 Cal.4th 137, 176. ALSO SEE *People v. Morris* (1991) 53 Cal.3d 152, 200.

⁵⁶ See *U.S. v. Fullerton* (6th Cir. 1999) 187 F.3d 587, 591 [“Because the evidence in question, the pager, was obtained incident to the lawful arrest and during the first forty-eight hours, the district court properly admitted the pager at trial.”].

⁵⁷ See *Rawlings v. Kentucky* (1980) 448 US 98, 110; *Brown v. Illinois* (1975) 422 US 590, 604; *People v. Coe* (1991) 228 Cal.App.3d 526, 532; *People v. Poole* (1986) 182 Cal.App.3d 1004, 1015; *People v. Beardslee* (1991) 53 Cal.3d 68, 111; *People v. Henderson* (1990) 220 Cal.App.3d 1632, 1651; *People v. Gonzalez* (1998) 64 Cal.App.4th 432, 445-6; *U.S. v. Tamura* (9th Cir. 1982) 694 F.2d 591, 597.

⁵⁸ See *People v. Turner* (1994) 8 Cal.4th 137, 176 [“(T)here is no evidence that the arraignment was delayed for purposes of obtaining the challenged statements.”].

FLAGRANCY OF THE DELAY: The longer the delay—the more flagrant the violation—the more likely the evidence will be deemed “fruit” of the delay.⁵⁹

INDEPENDENT INTERVENING ACT: Another important factor in determining whether evidence was tainted by an unreasonable delay is whether something happened during the delay to break the chain of causation between the delay and the discovery of the evidence.⁶⁰ For example, if the suspect unexpectedly or spontaneously said something incriminating during the delay or if he initiated the interview, it is likely that a court would find that the suspect’s decision to make the statement was not the “fruit” of the delay.⁶¹ The fact that the suspect voluntarily waived his *Miranda* rights before making an incriminating statement is relevant in determining whether the statement was the “fruit” of the delay⁶² but it is not enough, in and of itself, to break the chain of causation.⁶³

Similarly, if evidence was seized pursuant to a search warrant that was obtained during a delay, the evidence would certainly not be suppressed if the warrant was independent of the delay. As a general rule, a warrant will be deemed independent of a delay if, (1) no facts contained in the affidavit were attributable to the delay or, if they were, probable cause would have existed if they were deleted; and (2) the decision to seek the warrant was not influenced by any information obtained from the suspect after the delay became unreasonable.⁶⁴

⁵⁹ See *Rawlings v. Kentucky* (1980) 448 US 98, 110; *Brown v. Illinois* (1975) 422 US 590, 604. **NOTE:** In the conventional “fruits” analysis, the more time that elapses between the officers’ illegal conduct and the discovery of the evidence the less likely the evidence will be deemed the “fruit” of the misconduct. See *Brown v. Illinois* (1975) 422 US 590, 603; *Lozoya v. Superior Court* (1987) 189 Cal.App.3d 1332, 1341; *People v. Henderson* (1990) 220 Cal.App.3d 1632, 1651; *People v. Gonzalez* (1998) 64 Cal.App.4th 432, 443-4. But in the context of post-arrest delays, it would seem to be just the opposite: the longer the delay (i.e., the more flagrant the violation), the more likely a court will find a causal connection between the delay and the evidence. See *Black v. Oklahoma* (1994) 871 P.2d 35, 39 [“We find the longer the time a defendant sits in jail without some form of probable cause hearing, the more likely he will be coerced into giving evidence he otherwise would not give . . .”].

⁶⁰ See *People v. Sims* (1993) 5 Cal.4th 405, 445; *United States v. Crews* (1980) 445 US 463, 471; *People v. Coe* (1991) 228 Cal.App.3d 526, 531; *People v. Gonzalez* (1998) 64 Cal.App.4th 432, 445-6.

⁶¹ See *Rawlings v. Kentucky* (1980) 448 US 98, 108 [“Here, where petitioner’s admissions were apparently spontaneous reactions to the discovery of his drugs in Cox’s purse, we have little doubt that this factor weighs heavily in favor of a finding that petitioner acted of free will unaffected by the initial illegality.”]; *People v. Turner* (1994) 8 Cal.4th 137, 176; *People v. Thompson* (1980) 27 Cal.3d 303, 330 [suspect “initiated further conversations. The decision to confess was itself free and voluntary. Under these circumstances, even if section 825 were violated, that would not render his confession inadmissible.”]. **ALSO SEE** *U.S. v. Ramos* (8th Cir. 1994) 42 F.3d 1160, 1164[during illegal (but not flagrantly illegal) detention officer’s warning that suspect did not have to consent and suspect’s signing consent form broke the chain of causation].

⁶² See *People v. Turner* (1994) 8 Cal.4th 137, 176.

⁶³ See *Brown v. Illinois* (1975) 422 US 590, 603; *Dunaway v. New York* (1979) 442 US 200, 217-9; *Rawlings v. Kentucky* (1980) 448 US 98, 107; *Taylor v. Alabama* (1982) 457 US 687, 690; *People v. DeVaughn* (1977) 18 Cal.3d 889, 898; *People v. Poole* (1986) 182 Cal.App.3d 1004, 1014; *People v. De Juan* (1985) 171 Cal.App.3d 1110, 1124; *In re Jorge S.* (1977) 74 Cal.App.3d 852, 860.

⁶⁴ See *People v. Weiss* (1999) 20 Cal.4th 1073; *Murray v. United States* (1988) 487 US 533, 542; *Segura v. United States* (1984) 468 US 796, 813-5; *People v. Bennett* (1998) 17 Cal.4th 373, 389, fn.4, 391; *People v. Koch* (1989) 209 Cal.App.3d 770, 786; *People v. Angulo* (1988) 199 Cal.App.3d 370, 375; *People v. Torres* (1992) 6 Cal.App.4th 1324, 1334; *People v. Gesner* (1988) 202 Cal.App.3d 581, 589.

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