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The Fourth Amendment Hearing: Prompt Judicial Review of All Fourth Amendment Warrantless Conduct for an Imprisoned Defendant

Matthew C. Ford

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I. INTRODUCTION

What type of protection does the Fourth Amendment, with its prohibition against "unreasonable searches and seizures," provide a defendant who is imprisoned based solely on the actions and judgment of a police officer? Does the Fourth Amendment require judicial review of such warrantless state action? And if so, how swift must that judicial review be? It appears that "prompt" judicial review is required for warrantless government seizures, that is, warrantless arrests, that result in imprisonment. The Supreme Court has held that a judge must determine, in a timely manner, whether probable cause existed for a warrantless arrest that leads to prolonged incarceration. Without a quick judicial decision on the merits of the arrest, any continued imprisonment could be an unreasonable seizure. What about warrantless government searches that result in jail time? Should not the same "prompt" judicial review requirement apply to these searches as apply to warrantless arrests? Or are warrantless seizures that result in imprisonment a greater threat to the rights guaranteed by the Fourth Amendment than warrantless searches that result in imprisonment? Is such hierarchical thinking justifiable in the Fourth Amendment context?

1 J.D. Candidate, May 2006. The Catholic University of America, Columbus School of Law. The author wishes to thank the members of the Lehigh County, Pennsylvania criminal justice system, whose names can be found in the footnotes of this Comment, for their time and their insight. In particular, the author would like to thank Judge Kelly Banach for her guidance and advice throughout the writing process. The author also would like to thank his parents for their unconditional love and support, without which he may have found himself on the wrong end of a Gerstein hearing. Finally and most importantly, the author would like to thank his wife, Patterson. Her belief in him, her constant love, and her never-ending sacrifice have made the last three years possible.

2. Gerstein v. Pugh, 420 U.S. 103, 125 (1975). The Supreme Court reviewed a Florida law that permitted the government to detain a person charged by information "for a substantial period solely on the decision of a prosecutor." Id. at 106. The Court determined that such a detention could easily result in an illegal seizure and "that the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest." Id. at 114.
A Judge assesses the legality of a warrantless search at a suppression hearing. If a warrantless search is held illegal, the judge will exclude any evidence obtained as a result of the search from use at trial. But the Supreme Court has never addressed the timeliness or the requirement of a suppression hearing. As a result, several months may pass before a neutral and detached judge will pass on the legality of a warrantless search. For a defendant who is incarcerated based solely on evidence obtained through an illegal search, the suppression hearing offers little consolation since “[p]rettrial confinement may imperil the suspect’s job, interrupt his source of income, and impair his family relationships.”

Plea bargains offer an alternative means for an individual in prison as a result of an illegal warrantless search to end the ongoing “unreasonable seizure.” Due to the realities of the criminal justice system, not every case can be litigated. The government handles its overwhelming criminal caseload by offering defendants favorable sentences in exchange for a guilty plea. A plea bargain and the corresponding guilty plea are viewed as beneficial to all involved; but plea bargains prevent judicial review of warrantless searches and result in convictions based on illegally obtained evidence. In a situation where an imprisoned defendant has been subjected to an illegal search, a plea bargain and its promise of freedom present a more attractive option than a suppression hearing, which will not be held for months, and its Fourth Amendment remedy of

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3. See, e.g., PA. R. CRIM. P. 578-581 (illustrating Pennsylvania’s requirements for and use of a suppression hearing).
4. See, e.g., id. R. 581(I)-(J).
5. See Commonwealth v. DeBlase, 665 A.2d 427, 431 (Pa. 1995) (using a two-prong analysis to determine if a violation of a defendant’s right to a speedy trial has occurred). In Pennsylvania, the scheduling of a suppression hearing cannot run afoul of the state’s rules of criminal procedure or the Sixth Amendment’s guarantee of a “speedy trial.” Id. Pennsylvania implemented its rules of criminal procedure “to give substantive effect to the United States Supreme Court’s observation that state courts could . . . establish fixed time periods within which criminal cases must normally be brought by the Commonwealth.” Id.
6. Compare PA. R. CRIM. P. 580 (“[A]ll pretrial motions shall be determined before trial.”), with id. R. 600 (“Trial in a court case . . . against the defendant, when the defendant is incarcerated on that case, shall commence no later than 180 days from the date on which the complaint is filed.”).
8. See Santobello v. New York, 404 U.S. 257, 260 (1971) (pointing out the additional resources the criminal justice system would need if every case went to trial).
9. See id. (acknowledging the vital role plea bargaining plays in the “administration of justice”).
10. See Blackledge v. Allison, 431 U.S. 63, 71 (1977) (highlighting the advantages of plea bargaining for the defendant, the prosecution, and judges).
11. See infra Parts II.E.5, III.B.
the exclusionary rule. Is a plea bargain a satisfactory replacement for a judicial determination of the legality of a warrantless search or does it emphasize the importance of a prompt determination by an independent judge of all Fourth Amendment warrantless conduct?

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." An illegal search by the federal or state government violates that mandate, but nothing can "'cure the invasion of the defendant's rights which he has already suffered.'" Therefore, the prevention of Fourth Amendment violations is the best guarantee of the Fourth Amendment's protections. To that end, courts have aimed to deter law enforcement officials from violating the Fourth Amendment by excluding evidence obtained by an illegal search from use at trial.

A different scenario presents itself when an individual is arrested without a warrant and imprisoned—an ongoing seizure. No independent determination as to the arrest's legality has occurred and, therefore, the reasonableness of the ongoing seizure is uncertain. The Supreme Court declared the stakes regarding Fourth Amendment protections as "high" in such a warrantless situation. Specifically, "the Fourth Amendment requires a [prompt] judicial determination of probable cause as a prerequisite to extended restraint of liberty following [a warrantless] arrest." States' rules of criminal procedure follow this mandate by requiring an arraignment before a magistrate "without unnecessary delay" after a warrantless arrest. However, no such requirement exists

13. U.S. CONST. amend. IV.
15. See Elkins v. United States, 364 U.S. 206, 217 (1960) (discussing the purpose of the exclusionary remedy for Fourth Amendment violations as "compel[ling] respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it").
18. Id.
19. See, e.g., PA. R. CRIM. P. 519(A) (requiring a preliminary arraignment "without unnecessary delay" when a defendant is arrested without a warrant); id. R. 540 cmt. (citing County of Riverside v. McLaughlin, 500 U.S. 44 (1991), for the proposition of "prompt determination of probable cause before a defendant may be detained"). The prompt judicial review at an arraignment, however, is of the arrest itself. See id. R. 519, 540(D)
to determine the validity of a warrantless search that leads to imprisonment; an imprisoned defendant will have to wait several months for a suppression hearing for that judgment. Yet this runs afoul of the Fourth Amendment, which makes the stakes just as high for a warrantless search that leads to an ongoing seizure as it does for a warrantless arrest.

This Comment addresses the timing of judicial review of the legality of a warrantless search that results in the arrest and imprisonment of a defendant. First, this Comment discusses the requirement of independent judicial review in ensuring the guarantees of the Fourth Amendment. In doing so, this Comment then covers the necessary promptness of judicial review in the realm of warrantless arrests that lead to imprisonment, and examines the exclusionary rule, the remedy for defendants who are incarcerated due to illegal warrantless searches. Then, through analyzing one state's criminal justice system for illustrative purposes, this Comment reveals what is in practice an untimely application of the exclusionary rule. This Comment then focuses on the dangers of an untimely suppression hearing, in particular, the increased jail time for illegally searched defendants, the exploitation of the plea bargain system, the replacement of the neutral judge with the prosecutor, and the dilution of the purpose of the exclusionary rule. This Comment concludes that criminal procedures need to alter the timetable for judicial review of warrantless searches that result in the incarceration of defendants; and such an alteration would properly address the unreasonable imprisonment of a defendant, serve the purpose of the exclusionary rule, and strike the correct Fourth Amendment balance.

(stating the necessary determination of probable cause for warrantless arrests with no discussion of warrantless searches).

20. See supra note 6 and accompanying text. In fact, evidence that is illegally obtained and would be inadmissible at trial can be the basis for a magistrate holding that probable cause existed for an arrest. See 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 1.6(d), at 168 (3d ed. 1996). Professor LaFave discusses the use of evidence in preliminary hearings and finds that "the prevailing view... is... the magistrate may take into account evidence offered by the prosecution without regard to whether that evidence was obtained by an illegal search." Id. As a result, an illegal search can uphold the legality of an arrest and the continued imprisonment of a defendant. See id.

21. See Arizona v. Hicks, 480 U.S. 321, 328 (1987) ("Although the interest protected by the Fourth Amendment injunction against unreasonable searches is quite different from that protected by its injunction against unreasonable seizures, neither the one nor the other is of inferior worth or necessarily requires only lesser protection." (citation omitted)); cf. Texas v. Brown, 460 U.S. 730, 747-48 (1983) (Stevens, J., concurring in the judgment) (explaining that a difference exists between the interests protected by a search and a seizure and, as a result, the difference affects the application of the "plain view" doctrine). Justice Stevens, however, does begin his analysis by stating, "our Fourth Amendment cases sometimes refer indiscriminately to searches and seizures." Id. at 747.
II. APPLICABLE PRECEDENT

A. An Introduction to the Fourth Amendment

The Fourth Amendment, composed of only one sentence, which includes the Reasonableness Clause and the Warrant Clause, has created a deluge of federal and state case law and scholarly commentary. The boundaries of a “search” and a “seizure” are not bright lines, but rather they require a case-by-case analysis. Furthermore, the primary remedy for violations of the Fourth Amendment’s guarantees has been “vigorously debated by legal commentators.” Despite some ambiguity and disagreement, the Fourth Amendment protects individuals from unreasonable searches and seizures by government officials. The determination of what is “unreasonable” often involves balancing the

22. See, e.g., Akhil Reed Amar, Fourth Amendment First Principles, 107 HARV. L. REV. 757, 759, 816-17 (1994) (calling the current state of Fourth Amendment law and analysis a “doctrinal mess” and suggesting a new approach to Fourth Amendment law centered on a “reasonableness norm”); Craig M. Bradley, Two Models of the Fourth Amendment, 83 MICH. L. REV. 1468, 1500-01 (1985) (suggesting two possible models for Fourth Amendment analysis since the Supreme Court has created a “mire of contradiction and confusion”); Tracey Maclin, When the Cure for the Fourth Amendment Is Worse Than the Disease, 68 S. CAL. L. REV. 1 (1994) (critiquing Professor Amar’s article); Carol S. Steiker, Second Thoughts About First Principles, 107 HARV. L. REV. 820, 825, 846-47, 856-57 (1994) (arguing that warrants, probable cause, and the exclusionary rule should be the cornerstone of Fourth Amendment jurisprudence); Scott E. Sundby, A Return to Fourth Amendment Basics: Undoing the Mischief of Camara and Terry, 72 MINN. L. REV. 383, 384-86 (1988) (reviewing the relationship of the Warrant Clause and the Reasonableness Clause of the Fourth Amendment and suggesting a working model for the Fourth Amendment “to meet its interpretational challenges”).

23. See United States v. Mendenhall, 446 U.S. 544, 554 (1980) (plurality opinion) (determining if a seizure has occurred by asking whether “in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave”); Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (creating the current two-prong test as to what constitutes a search); Lewis R. Katz, In Search of a Fourth Amendment for the Twenty-first Century, 65 IND. L.J. 549, 554-55 (1990) (arguing for a two-tiered approach to Fourth Amendment protection from government searches to protect invasions of privacy in today’s technologically advanced society); Wayne R. LaFave, Pinguitudinous Police, Pachydermatous Prey: Whence Fourth Amendment “Seizure”?, 1991 U. ILL. L. REV. 729, 762-64 (arguing for the Court to return to its earlier holdings, which provided greater protection of citizens from police seizures of persons).

24. 1 LAFAVE, supra note 20, § 1.2 at 24 (citing commentators that question the “validity and efficacy of the Fourth Amendment exclusionary rule”).

privacy rights of an individual against the interests of the law enforcement community in crime prevention and safety.  

In the field of warrantless police action, the line between reasonable and unreasonable searches is not always easily determined by the "'hurried judgment of a law enforcement officer "engaged in the often competitive enterprise of ferreting out crime."'"  

In addition, government prosecutors' role in the criminal justice system of pursuing convictions may taint their objectivity in assessing the reasonableness of a search. Therefore, due to the difficulty and importance in determining the "unreasonable" line, the Supreme Court has insisted upon the role of the "neutral and detached judicial officer" in passing upon the legality of a government search.

B. The Role of the Neutral and Detached Judge in Providing Fourth Amendment Protection

In *Johnson v. United States*, the Supreme Court recognized the importance of the independent judiciary in preserving Fourth Amendment rights. The police officers in that case responded to a report that someone was smoking opium in a hotel. The smell of opium led the police to the defendant's room. The police officers knocked on the door, and after the defendant allowed them in the room, the police officers arrested her and searched the hotel room.

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26. See *Terry v. Ohio*, 392 U.S. 1, 20-21 (1968) ("[F]or there is 'no ready test for determining reasonableness other than by balancing the need to search [or seize] by a police officer against the invasion which the search [or seizure] entails.'" (second and fourth alterations in original) (quoting *Camara v. Mun. Court*, 387 U.S. 523, 534-37 (1967))).


28. See *Shadwick v. City of Tampa*, 407 U.S. 345, 348 (1972) (citing *Wong Sun v. United States*, 371 U.S. 471 (1963), and *Jones v. United States*, 362 U.S. 257 (1960)) (noting that warrants must be issued by "someone independent of the police and prosecution"); *Coolidge v. New Hampshire*, 403 U.S. 443, 449-50 (1971) (holding as invalid a search warrant issued by the State Attorney General because he was the chief prosecutor in the case and, therefore, did not satisfy the requirement of a neutral and detached judge). In addition, the Supreme Court stated the prosecution's decision to file an information "standing alone [does not] meet[] the requirements of the Fourth Amendment." *Gerstein v. Pugh*, 420 U.S. 103, 117 (1975).


30. 333 U.S. 10 (1948).

31. *Id.* at 13-14.

32. *Id.* at 12.

33. *Id.* Since the police officers were narcotic agents and opium has a "distinctive and unmistakable" smell, they were able to identify the opium burning in the hotel. *Id.*

34. *Id.* The search of the room turned up opium and drug smoking apparatus. *Id.* The search was not justifiable as a search incident to arrest because the police officers did
The Supreme Court acknowledged that the officers most likely possessed enough evidence to obtain a search warrant from a magistrate. Yet, the Court did not believe that such a post-search determination was sufficient to justify the warrantless search of the room. Holding the search unconstitutional under the Fourth Amendment, the Court stated that “[t]he point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate . . .”,

Since Johnson, the Court has given police officers wide discretion to search without a warrant. Acknowledging the realities and dangers of police work, in many instances the Supreme Court has relied solely on the Reasonableness Clause of the Fourth Amendment to judge the constitutionality of police action. However, even though the prominence of the Warrant Clause and its search warrant requirement has diminished, Johnson's insistence on the presence of a bulwark between police officers and citizens persists. After the Court

not have probable cause to arrest the defendant until they unlawfully entered the room and determined she was the sole occupant. Id. at 16-17. The arrest was therefore unlawful. Id.

35. Id. at 13.
36. Id. at 14. The Court rejected the notion that warrantless searches are valid if they are based on police officers’ assumptions “that [they possess] evidence sufficient to support a magistrate’s disinterested determination to issue a search warrant” because it would “reduce the [Fourth] Amendment to a nullity.” Id.
37. Id. at 13-14.
38. See Terry v. Ohio, 392 U.S. 1, 20 (1968) (“[W]e deal here with an entire rubric of police conduct . . . which historically has not been, and as a practical matter could not be, subjected to the warrant procedure.”); JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE § 18.01, at 292 (3d ed. 2002) (identifying Terry v. Ohio as the Supreme Court case where police conduct began to be judged not on the basis of “whether it is reasonable to procure a search warrant, but whether the search was reasonable” (quoting United States v. Rabinowitz, 339 U.S. 56, 66 (1950))).
39. See Terry, 392 U.S. at 20, 30 (holding that the need for an officer to take “swift action predicated upon the on-the-spot observations . . . on the beat” to protect himself and others justifies a limited search when “tested by the Fourth Amendment’s general proscription against unreasonable searches and seizures”); Sundby, supra note 22, at 395 (viewing Terry v. Ohio as a case that “provided reasonableness an even greater role as an independent factor in fourth amendment analysis”).
40. See DRESSLER, supra note 38, § 18.01, at 292-93 (explaining how the Supreme Court’s decision in Terry v. Ohio made warrantless police action much easier to justify).
41. See Terry, 392 U.S. at 30-31 (allowing limited warrantless searches and seizures by police officers for the officer’s protection, as long as such police conduct is ultimately rendered reasonable by a judge). The Court stated:
established the importance of the neutral and detached judicial official for the enforcement of the Fourth Amendment, an issue developed over when a judge should scrutinize the warrantless conduct of a police officer.42

C. The Timeliness of Judicial Review of Warrantless Police Arrests

In Gerstein v. Pugh,43 the Supreme Court recognized the importance of a prompt judicial review when the warrantless conduct of a police officer results in the extended imprisonment of an individual.44 In that case, two men, Pugh and Henderson, filed a class action after they were arrested and detained in prison without any preliminary determination of probable cause by an independent judge.45 Under the state system in which they were held, no judicial determination as to the probable cause for an arrest was required until thirty days after the arrest.46 As a result, after a person was arrested without a warrant, he “could be detained for a substantial period solely on the decision of a prosecutor.”47 The plaintiffs requested declaratory and injunctive relief, basing their claim on a purported constitutional right to a prompt judicial hearing to decide whether probable cause existed for their arrest and detention.48

[T]he police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant an intrusion. The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances.

Id. at 21 (footnote omitted). In addition, the Pennsylvania Supreme Court has recognized “that both state and federal interpretations of the 4th Amendment require a warrant to be issued by a ‘neutral and detached magistrate,’ because . . . there is a requirement of ‘an independent determination of probable cause.’” Commonwealth v. Edmunds, 586 A.2d 887, 905 (Pa. 1991) (citations omitted).

43. 420 U.S. 103 (1975).
44. Id. at 125. This case involved a warrantless arrest, an imprisoned defendant, and the requisite judicial determination of probable cause. See id. at 105 & n.1. The case does not mention warrantless searches and judicial review of their “unreasonableness”; however, the rationale of the Court’s opinion in Gerstein may easily apply to such Fourth Amendment conduct. See infra Part III.A.
45. Gerstein, 420 U.S. at 105-07. Pugh was charged “with robbery, carrying a concealed weapon, and possession of a firearm during commission of a felony.” Id. at 105 n.1. He was denied bail because conviction on one of the charges could have resulted in a life sentence. Id. at 105. Henderson was charged with “breaking and entering and assault and battery.” Id. at 105 n.1. He was granted bail, but could not post the required $4500 bond. Id. at 105.
46. See id. at 106.
47. Id.
48. Id. at 106-07.
The Court began its analysis in *Gerstein* by acknowledging the demands of law enforcement. However, the Court also limited the authority of police officers by reiterating the importance of the neutral and detached magistrate in affording Fourth Amendment protection. In particular, the Court emphasized the need for an unbiased judge to scrutinize a warrantless arrest before an individual should be required to spend long periods of time behind bars. The Court observed that “[o]nce the suspect is in custody ... the reasons that justify dispensing with the magistrate’s neutral judgment evaporate. ... 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 Court concluded that a prolonged detention of a suspect, arrested without a warrant and held without a timely determination of probable cause by a judicial official, could be an unreasonable seizure under the Fourth Amendment. Therefore, federal and state criminal justice systems must require a “fair and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty ... by a judicial officer either before or promptly after arrest.”

The Court’s decision then outlined the “adversary safeguards” that are constitutionally required for a *Gerstein* probable cause hearing. The Court deemed the full range of rights available to a defendant at trial as

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49. *Id.* at 112 (citing *Brinegar v. United States*, 338 U.S. 160, 176 (1949)). Due to the many unexpected circumstances that confront police officers on the beat, the Court stated it would not invalidate an arrest supported by probable cause because a police officer failed to receive prior judicial approval. *Id.* at 113.

50. *Id.* at 112-13.

51. *Id.* at 114.

52. *Id.* at 114. The Court expanded upon the negative impact the detention has on the suspect and his interests, explaining that “[t]he consequences of prolonged detention may be more serious than the interference occasioned by arrest. Pretrial confinement may imperil the suspect’s job, interrupt his source of income, and impair his family relationships. Even pretrial release may be accompanied by burdensome conditions that effect a significant restraint of liberty.” *Id.* (citations omitted); see also *Thies v. State*, 189 N.W. 539, 541 (Wis. 1922). In explaining the purpose of a preliminary hearing, the *Thies* court emphasized the protection of personal privacy interests:

The object or purpose of the preliminary investigation is to prevent hasty, malicious, improvident, and oppressive prosecutions, to protect the person charged from open and public accusations of crime, to avoid both for the defendant and the public the expense of a public trial, and to save the defendant from the humiliation and anxiety involved in public prosecution, and to discover whether or not there are substantial grounds upon which a prosecution may be based.

*Id.*

53. See *Gerstein*, 420 U.S. at 116-17, 125.

54. See id. at 125 (footnote omitted).

55. *Id.* at 119-23.
not necessary for a probable cause hearing. The Court justified the need for fewer protections for a defendant "by the lesser consequences of a probable cause determination [and] by the nature of the determination itself." Also, the Court wanted to broadly construe the requirements for a Gerstein hearing because it "recognize[d] the desirability of flexibility and experimentation by the States" in their development of criminal procedures.

In County of Riverside v. McLaughlin, the Court clarified Gerstein's timing requirement of "prompt" judicial examination of the existence of probable cause for a warrantless arrest that leads to imprisonment. McLaughlin involved a class action suit that contested Riverside County's policy of "combining probable cause determinations with its arraignment procedures." The plaintiffs alleged that this policy violated the prompt probable cause determination required by Gerstein since judicial review of warrantless detention was often delayed as long as five days.

The Court reiterated the tension in Gerstein between a state's interest in effective law enforcement and a suspect's interest in personal freedom and privacy. And even though Gerstein required the states to hold prompt probable cause hearings, federalism concerns necessitated giving

56. Id. at 119-20. The probable cause hearing serves a fixed purpose—determination of pretrial custody—and is not a "'critical stage' in the prosecution." Id. at 122. Because the probable cause determination is limited in function and non-adversarial in nature, the Court held that the right to counsel does not apply to such a hearing. Id.

57. Id. at 121-22. The Court contrasted the requirements of a trial with those of a probable cause hearing. Id. A probable cause hearing does not involve the "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." Id. at 121. In addition, the Court questioned the need for confrontation and cross-examination of witnesses at a probable cause hearing. Id. at 121-22; see also DRESSLER, supra note 38, § 1.03[C][2], at 7 ("Because a so-called 'Gerstein hearing' serves as a post-arrest equivalent of a pre-arrest warrant-application hearing, the proceeding may be conducted in the same manner as a warrant hearing . . . .") (footnote omitted)).

58. Gerstein, 420 U.S. at 123.
60. Id. at 47, 56.
61. Id. at 47.
62. Id. at 47-48. The county policy required probable cause arraignments for warrantless arrests to be conducted "without unnecessary delay and, in any event, within two days of arrest." Id. at 47. The two day requirement, however, excluded weekends and holidays. Id. As a result, "an individual arrested without a warrant late in the week may in some cases be held for as long as five days before receiving a probable cause determination." Id.
63. See id. at 52 (comparing a state's interest in the protection of the public from individuals engaged in crime with an individual's privacy interest in not being wrongly detained in jail).
flexibility to the states in fulfilling this mandate.64 The Court, however, felt it was necessary "to articulate more clearly the boundaries of what is permissible under the Fourth Amendment."65 Therefore, the Court held 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."66 Although the forty-eight hour requirement was the outer limit of a permissible probable cause hearing, the Court determined forty-eight hours provided the states with sufficient time to incorporate a probable cause hearing with other pretrial proceedings and thereby maintain flexibility.67

Gerstein and McLaughlin established the timetable for the mandatory judicial determination of the existence of probable cause for a warrantless arrest that leads to imprisonment.68 Although neither case explicitly states it, jurisdictions require a suspect's release from prison if probable cause is not established at a Gerstein hearing.69 On the other hand, when police officers conduct a warrantless search that leads to imprisonment, a judge reviews the search's legality only upon a defendant's request.70 In addition, the Supreme Court has not weighed in

64. Id. at 53. States needed to comply with the “prompt” requirement of Gerstein, but the Court did not want to impose a fixed scheme on the states. Id. The Court further stated that each state had a unique criminal justice system and “individual States may choose to comply in different ways.” Id.

65. Id. at 56.

66. Id. However, a Gerstein hearing that occurs within forty-eight hours will be found unconstitutional “if the arrested individual can prove that his or her probable cause determination was delayed unreasonably.” Id. When a Gerstein hearing is held after the forty-eight hour window, the government has the burden “to demonstrate the existence of a bona fide emergency or other extraordinary circumstance.” Id. at 57.

67. See id. at 57-58. But see id. at 66-69 (Scalia, J., dissenting) (agreeing with the Gerstein premise but disagreeing with the forty-eight hour requirement). In his dissent, Justice Scalia argued that the states should receive no accommodation in the timing of the probable cause hearing for the sake of flexibility. Id. at 64-65. According to Justice Scalia, “prompt” means no longer than twenty-four hours, otherwise an “unreasonable seizure” has taken place. Id. at 70.

68. Id. at 56 (majority opinion); Gerstein v. Pugh, 420 U.S. 103, 125 (1975). See generally Brinegar v. United States, 338 U.S. 160, 175-76 (1949) (establishing that probable cause to arrest exists “where ‘the facts and circumstances within [the officers’] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that’ an offense has been or is being committed” (alterations in original) (quoting Carroll v. United States, 267 U.S. 132, 162 (1925))).

69. See, e.g., PA. R. CRIM. P. 540(D) (“If the defendant was arrested without a warrant . . . unless the issuing authority makes a determination of probable cause, the defendant shall not be detained.”).

70. Id. R. 581 cmt. (“[F]ailure to file the motion within the appropriate time limit constitutes a waiver of the right to suppress.”). A defendant must actively assert his Fourth Amendment rights if he wishes to obtain relief from a warrantless search that
on the timing of such a review for an imprisoned suspect. Regardless of the timing of the review, the remedy for an illegal warrantless search is the exclusion of the illegally obtained evidence from the prosecution of the one searched. Without such a remedy for illegal searches, the Fourth Amendment would be no more than "a form of words."

D. *The Exclusionary Rule Remedy Applied by a Neutral and Detached Judge*

The exclusionary rule entered Fourth Amendment jurisprudence with the Supreme Court decision of *Boyd v. United States;* however, it was in *Weeks v. United States* that the exclusionary rule was recognized as the remedy for federal violations of the Fourth Amendment. Then, in

violates those rights. 5 LAFAVE, *supra* note 20, § 11.1, at 2-3. Therefore, the courts do not act sua sponte to adjudicate the merits of a warrantless search; rather, any judicial review of a warrantless search occurs only if a defendant files an appropriate motion seeking such action. *See id.* And although the defendant's motion must be timely, "it may generally be said that in the great majority of jurisdictions an objection comes too late if it is made for the first time at the trial; a motion to suppress must be made and adequately pursued at some pretrial stage." *Id.* § 11.1(a) (footnote omitted). *Contra Gerstein,* 420 U.S. at 114 ("[W]e hold that the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest."). The procedure outlined in *Gerstein* requires the neutral and detached magistrate to automatically review the merits of a warrantless arrest that leads to imprisonment. *See id.* at 114-15.

71. A reason for the lack of Supreme Court precedent concerning the timing of judicial review of a warrantless search is that the "wrong condemned by the Amendment is 'fully accomplished' by the unlawful search or seizure itself and [judicial review and the application of the exclusionary rule cannot] 'cure the invasion of the defendant's rights which he has already suffered.'" United States v. Leon, 468 U.S. 897, 906 (1984) (quoting Stone v. Powell, 428 U.S. 465, 540 (1976) (White, J. dissenting)). However, when a defendant is incarcerated as a result of an illegal warrantless search, the imprisonment itself can be categorized as an ongoing unreasonable seizure and the "fully accomplished wrong" rationale should not apply. *See infra* Part III.A.

72. *See 1 LAFAVE, supra* note 20, § 1.6, at 155-56 (outlining how, procedurally, evidence illegally obtained by law enforcement is excluded from introduction at trial).

73. Silverthorne Lumber Co. v. United States, 251 U.S. 385, 391-92 (1920) (discussing the importance of prohibiting the government from benefiting from any use of illegally obtained evidence if the Fourth Amendment is to have any bite).

74. 116 U.S. 616, 630-33 (1886).

75. 232 U.S. 383 (1914).

76. *See id.* at 393, 398. The Court held that the introduction into evidence of letters taken from the defendant's house by a federal marshal in violation of the Fourth Amendment resulted in "prejudicial error." *Id.* at 398. The Court, after reviewing the history of the Fourth Amendment, stated that the purpose of the Fourth Amendment was to limit the authority of the courts and law enforcement officials and, in the process, protect citizens from unreasonable searches and seizures. *Id.* at 391-92. Specifically, the Court stated that "[i]t is true that protection reaches all alike, whether accused of crime or not, and the duty of giving it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws." *Id.* at 392. The Court did not think the
Mapp v. Ohio,77 the exclusionary remedy for Fourth Amendment violations became applicable to the states—"[t]o hold otherwise is to grant the right but in reality to withhold its privilege and enjoyment."78

Mapp articulated two main rationale supporting the exclusionary rule.79 First, the suppression of illegally obtained evidence provides a "deterrent safeguard without insistence upon which the Fourth Amendment would have been reduced to a 'form of words.'"80 As applied in later cases, the rule's deterrent purpose is aimed at illegal law enforcement conduct.81 Second, judicial integrity requires the application
of the exclusionary rule. Judges cannot allow police to benefit from violations of the very law that judges are entrusted to uphold.

In United States v. Calandra, the Supreme Court severed the exclusionary rule from any constitutional basis. The Court decreed that the exclusionary rule is a judicial remedy and not an absolute constitutional guarantee. As a remedy, a balancing test could be used to determine if the exclusionary rule applies to a particular criminal proceeding. And in effectuating this balancing test, the exclusionary rule's only purpose is "to deter future unlawful police conduct." In Calandra, John Calandra was summoned to testify before a grand jury. The government planned to question Calandra regarding evidence it had obtained from a search of his workplace. Before he testified, Calandra filed and won a motion suppressing the evidence seized from

82. Mapp, 367 U.S. at 659; see also Elkins v. United States, 364 U.S. 206, 222-23 (1960) (asserting that the judicial acts of admitting and excluding evidence from trial are the equivalent of deeming the police conduct that acquired the evidence constitutional and unconstitutional, respectively).

83. See Mapp, 367 U.S. at 659. The Court considered a judge that permits a police officer to use illegally obtained evidence to convict a known criminal to be a greater threat to liberty than setting a criminal free. Id. The Court believed that "[n]othing can destroy a government more quickly than its failure to observe its own laws." Id.


85. Id. at 348.

86. Id.

87. Id. The Court compared the exclusionary remedy with other remedial devices and restricted its use "to those areas where its remedial objectives are thought most efficaciously served." Id.

88. Id. at 347. The Court dismissed the "judicial integrity" purpose in a footnote by stating that "illegal conduct is hardly sanctioned, nor are the foundations of the Republic imperiled, by declining to make an unprecedented extension of the exclusionary rule . . . where the rule's objectives would not be effectively served and where other . . . values would be unduly prejudiced." Id. at 356 n.11. A footnote in United States v. Janis, 428 U.S. 433 (1976), fully sheds light on why "judicial integrity" has been relegated to dissenting opinions and footnote status as a motivating purpose for the exclusionary rule:

The primary meaning of "judicial integrity" in the context of evidentiary rules is that the courts must not commit or encourage violations of the Constitution. In the Fourth Amendment area, however, the evidence is unquestionably accurate, and the violation is complete by the time the evidence is presented to the court. The focus therefore must be on the question whether the admission of the evidence encourages violations of Fourth Amendment rights. As the Court has noted in recent cases, this inquiry is essentially the same as the inquiry into whether exclusion would serve a deterrent purpose.

Id. at 458 n.35 (citation omitted).

89. Calandra, 414 U.S. at 341.

90. Id.
his office. Calandra notified the government that he would not answer any questions before the grand jury based on information obtained from the search of his workplace. The district court and the Sixth Circuit upheld Calandra's refusal to testify and it applied the exclusionary rule to the grand jury proceedings. The Supreme Court reversed.

The Court delineated the purpose of the exclusionary rule as one of prevention. According to the Court, the rule serves as a "deter[rent] to future unlawful police conduct" and a "safeguard [of] Fourth Amendment rights." The ability of the rule to deter illegal searches, however, determines the limit of its use. So the Court adopted a balancing test to determine when to apply the exclusionary rule in a given criminal proceeding. In this test, the exclusionary rule's deterrent effect on illegal police action is balanced against the cost to the public of excluding probative evidence in the prosecution of crime. Deterrence, and thus exclusion, weighs heaviest when "the Government's unlawful conduct would result in imposition of a criminal sanction on the victim of the search."

The Calandra Court weighed the harm to the functioning of the grand jury against any increased deterrent effect on unlawful police conduct. It held that the impairment to the grand jury system far exceeded any additional deterrent effect created by broadening the exclusionary rule's

91. Id. The district court suppressed the evidence found at Calandra's workplace on the grounds "that the search warrant had been issued without probable cause and that the search had exceeded the scope of the warrant." Id. at 342.
92. Id. at 341.
93. Id. at 341-42.
94. Id. at 342.
95. Id. at 347. Although the "judicial integrity" purpose espoused in Mapp found no support in the majority, the dissent believed it remained an essential underlying principle for the exclusionary rule. Id. at 355-361 (Brennan, J., dissenting). The dissent, relying on the words of Justice Holmes, believed "it a less evil that some criminals should escape than that the Government should play an ignoble part." Id. at 358-59 (quoting Olmstead v. United States, 277 U.S. 438, 470 (1928) (Holmes, J., dissenting)).
96. Id. at 347-48 (majority opinion).
97. See id. at 348. As noted in a subsequent case, "[b]ecause of the inherent trustworthiness of seized tangible evidence and the resulting social costs from its loss through suppression, application of the exclusionary rule has been carefully 'restricted to those areas where its remedial objectives are thought most efficaciously served.'" Illinois v. Gates, 462 U.S. 213, 254-55 (1983) (White, J., concurring) (quoting Calandra, 414 U.S. at 348).
98. Calandra, 414 U.S. at 348.
100. Calandra, 414 U.S. at 348.
101. Id. at 349-51.
application to a grand jury proceeding.\(^{102}\) The Court reasoned that "[s]uch an extension would deter only police investigation consciously directed toward the discovery of evidence solely for use in a grand jury investigation."\(^{103}\) And the inadmissibility of such evidence at a criminal trial sufficiently deterred any motivation the police possessed to disregard the Fourth Amendment in order to secure a grand jury indictment.\(^{104}\) Therefore, the Court held that the exclusionary rule does not apply to grand jury proceedings.\(^{105}\)

The *Calandra* rationale and balancing test have guided the Court’s application of the exclusionary rule in various proceedings.\(^{106}\) However, due to the inability to collect empirical evidence measuring the deterrent effect of the exclusionary rule, it is difficult to measure the effectiveness of the rule’s implementation.\(^{107}\) The Court has “relied, instead, on its own assumptions of human nature and the interrelationship of the various components of the law enforcement system” to determine

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102. *Id.* The Court emphasized that the role of the grand jury in the criminal justice system is not the adjudication of guilt or innocence. *Id.* at 349. Rather, the grand jury is an investigative body not subject to the evidentiary rules of a trial. *Id.* By allowing *Calandra* and others to use the exclusionary rule in grand jury proceedings, the grand jury would turn into a mini-trial and would “halt the orderly progress of an investigation.” *Id.* at 349-50. In addition, suppression hearings for a grand jury proceeding “might necessitate extended litigation of issues only tangentially related to the grand jury’s primary objective.” *Id.* at 349.

103. *Id.* at 351.

104. *Id.* The Court also stated that the prosecutor himself provided another safeguard to prevent police violations of the Fourth Amendment motivated by obtaining a grand jury indictment. *Id.* In particular, “a prosecutor would be unlikely to request an indictment where a conviction could not be obtained.” *Id.*

105. *Id.* at 354. Although the Court acknowledged the “[s]uppression of the use of illegally seized evidence against the search victim in a criminal trial [as] . . . an important method of effectuating the Fourth Amendment,” the Court refused to hold that the Fourth Amendment required application of the exclusionary rule to *all* proceedings or situations that may deter police misconduct. *Id.* at 350.

106. See, e.g., Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 359, 369 (1998) (holding that the exclusionary rule does not apply to parole revocation hearings and therefore, evidence obtained from a parolee in violation of his Fourth Amendment rights is admissible); United States v. Leon, 468 U.S. 897, 918-22 (1984) (holding that the exclusionary rule does not apply when a “good faith” violation of the Fourth Amendment occurs); INS v. Lopez-Mendoza, 468 U.S. 1032, 1034, 1043 (1984) (holding that the exclusionary rule does not apply in deportation proceedings because its “deterrent value” is “significantly reduce[d]”); United States v. Janis, 428 U.S. 433, 459-60 (1976) (holding that the exclusionary rule does not apply to federal civil tax proceedings when the evidence in question was obtained by a state law enforcement officer).

107. See Illinois v. Gates, 462 U.S. 213, 259-60 (1983) (White, J., concurring) (“The deterrent effect of the exclusionary rule has never been established by empirical evidence, despite repeated attempts.”); 1 LAFAVE, supra note 20, § 1.2(b), at 29 (citing various studies and Supreme Court opinions to support the conclusion that “it has not been clearly established that the exclusionary rule does deter, or that it does not”).
questions of exclusion and deterrence under the Fourth Amendment. Therefore, despite the lack of empirical evidence to support the notion that the exclusion of illegally seized evidence curtails illegal police conduct, the Court has held that the exclusionary rule is best served when illegally obtained evidence is inadmissible at trial.

Several states' use of the exclusionary rule has exceeded the deterrent purpose of Calandra. For example, the Pennsylvania Supreme Court has recognized "its exclusionary rule [as] grounded in the protection of privacy" and "use[s] the rule to remedy present violations of individual privacy rights." Therefore, in Pennsylvania’s criminal proceedings, its exclusionary rule, grounded in its state constitution, serves to safeguard the privacy of its citizens and surpasses the protections of Calandra.

109. See Stone v. Powell, 428 U.S. 465, 492 (1976) (discussing the Court's assumption that the exclusion of illegally obtained evidence at trial will deter police misconduct "by removing the incentive to disregard [the Fourth Amendment]"); Calandra, 414 U.S. at 348.
110. See Commonwealth v. Edmunds, 586 A.2d 887, 899-901 (Pa. 1991) (noting the different applications of the "good-faith" exception to the exclusionary rule by various state high courts under their respective state constitutions). State courts are allowed to interpret their state constitutions independent of the United States Constitution. Id. at 894. States "are free to reject the conclusions of the United States Supreme Court so long as [they] remain faithful to the minimum guarantees [of individual freedom that the Supreme Court has recognized as] established by the United States Constitution." Id. at 895.
113. See Edmunds, 586 A.2d at 888, 897-99 (holding that the "good faith' exception to the exclusionary rule as articulated by the United States Supreme Court in the case of United States v. Leon, . . . frustrate[s] the guarantees embodied in . . . the Pennsylvania Constitution" (citation omitted)). In Edmunds, the Pennsylvania Supreme Court rejected the U.S. Supreme Court's use of the deterrent purpose of the exclusionary rule to justify the "good faith" exception in Leon:

Whether the United States Supreme Court has determined that the exclusionary rule does not advance the 4th Amendment purpose of deterring police conduct is irrelevant. . . . What is significant, however, is that our [state] Constitution has historically been interpreted to incorporate a strong right of privacy . . . . Citizens in this Commonwealth possess such rights, even where a police officer in "good faith" carrying out his or her duties inadvertently invades the privacy . . . .

Id. at 899.
E. Pennsylvania Criminal Procedures

Pennsylvania, its state constitution, and its Rules of Criminal Procedure provide a framework to explore the previously discussed facets of the Fourth Amendment. The Fourth Amendment and its protections are applicable to Pennsylvania through the Due Process Clause of the Fourteenth Amendment. In addition, Pennsylvania's own state constitution provides nearly the identical protection as the Fourth Amendment. However, the Pennsylvania Supreme Court has interpreted the language of its state constitution to grant greater protection against unreasonable searches and seizures than the protection the United States Supreme Court has acknowledged is required under the Fourth Amendment. In reviewing the legality of a search under the Pennsylvania Constitution, Pennsylvania state judges will give added weight to the rights of the individual when they are balanced against the needs of law enforcement.

114. For the purpose of Section E, it is worthwhile to view how an individual, we will call him Matt, arrested and imprisoned as a result of an illegal warrantless search, will experience the Fourth Amendment protections of the Pennsylvania system. We will assume that Matt has been charged with a crime more serious than a misdemeanor of the second degree, since the arresting officer may release from custody a defendant who has been arrested without a warrant and charged with no offense more serious than a misdemeanor of the second degree. PA. R. CRIM. P. 519(B).

115. See supra note 78 and accompanying text.

116. PA. CONST. art. I, § 8. Like the Fourth Amendment, the Pennsylvania provision consists of a Reasonableness Clause and Warrant Clause. Id. Since this Comment is concerned with warrantless searches, the Reasonableness Clause and its language are as follows: "The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures .... " Id.

117. See Commonwealth v. Jackson, 698 A.2d 571, 573 (Pa. 1997) ("The protection against unreasonable searches and seizures afforded by the Pennsylvania Constitution is broader than that under the federal Constitution." (citing Edmunds, 586 A.2d 887 (1991))). It is worth noting that a state can give its citizens greater protection against unreasonable searches and seizures than the Federal Constitution and the Supreme Court's interpretation of the Constitution, but never less. Id.

118. See In re B.C., 683 A.2d 919, 926-27 (Pa. Super. Ct. 1996) (comparing the Pennsylvania courts' application of the state constitution with the federal courts' application of the federal constitution, in the realm of searches and seizures, and finding that the Pennsylvania courts "mandate[] a greater need for protection from illegal government conduct offensive to the right of privacy" (emphasis omitted) (quoting Commonwealth v. Schaeffer, 536 A.2d 354, 360 (Pa. Super Ct. 1987))), appeal granted, 734 A.2d 392 (Pa. 1998), appeal dismissed, 754 A.2d 665 (Pa. 2000). The Pennsylvania Superior Court acknowledged that both federal and state courts, in their prevention of unreasonable searches and seizures, "seek[] to strike the appropriate balance between preserving the privacy interests of citizens and permitting law enforcement officials to act without hamstringing restraints." Id. at 928. However, Pennsylvania courts differ from their federal counterparts in that "[f]ederal decisions ... tend to lend greater weight to the interests of law enforcement, while the decisions of [the] Commonwealth courts more often emphasize the preservation of individual privacy." Id.
1. Arrest, Preliminary Arraignment, and Preliminary Hearing

Once a suspect is arrested without a warrant, based on a warrantless search, a complaint will be filed against the suspect. The suspect will then be brought in front of the “proper issuing authority without unnecessary delay” for a preliminary arraignment to determine if probable cause existed for the warrantless arrest. The promptness of this proceeding is required to be in compliance with the forty-eight hour window of McLaughlin. If the neutral and detached magistrate decides probable cause existed and the suspect cannot post bail, the suspect will be imprisoned until the preliminary hearing three to ten days later.

The purpose of the later preliminary hearing in front of the magistrate is for the state to establish the existence of a prima facie case against the defendant. The prosecution can present any “legally competent”

119. Assuming the prosecution is successful at this stage and Matt is held for court, Matt’s total time spent in jail at the conclusion of a preliminary hearing will be a maximum of twelve days. See PA. R. CRIM. P. 540(F); infra text accompanying notes 120-23. However, Matt’s warrantless search will not be reviewed by an independent judge during this time. See infra note 126 and accompanying text. The twelve day timeline assumes that no continuances have been granted.

120. PA. R. CRIM. P. 519(A)(1).

121. Id. The preliminary arraignment is Pennsylvania’s answer to the Gerstein hearing. See Gerstein v. Pugh, 420 U.S. 103, 114, 125 (1975) (“[J]udicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest”). The preliminary arraignment serves several functions. In addition to determining probable cause, the issuing authority will read the charges against the defendant and advise him of his rights. PA. R. CRIM. P. 540(E). The charges filed against the defendant are contained within the complaint. Id. R. 503-504. The rights to which the defendant is entitled are the right to his own or appointed counsel and the right to a preliminary hearing. Id. R. 540(E). Bail, if available, is also set at the preliminary arraignment. Id. Finally, unless waived, the issuing authority will set a date for a preliminary hearing that is not “less than 3 nor more than 10 days after the preliminary arraignment.” Id. R. 540(F). In addition, the “issuing authority” satisfies the Gerstein and Fourth Amendment requirement of a neutral and detached judicial official. Compare id. R. 103 (defining “issuing authority” for purposes of the Pennsylvania Rules of Criminal Procedure), with Shadwick v. City of Tampa, 407 U.S. 345, 348-50 (1972) (defining the requirements of a magistrate for Fourth Amendment purposes).


123. PA. R. CRIM. P. 540(F)(1), (G). Under the rules, “[a]fter the preliminary arraignment, if the defendant is detained, the defendant shall be given an immediate and reasonable opportunity to post bail . . . . [I]f the defendant does not post bail, he or she shall be committed to jail as provided by law.” Id. R. 540(G).

124. Id. R. 543(A). The Pennsylvania Supreme Court has noted:

The preliminary hearing is not a trial. The principal function of a preliminary hearing is to protect an individual’s right against an unlawful arrest and detention. At this hearing the Commonwealth bears the burden of establishing at least a prima facie case that a crime has been committed and that the accused is probably the one who committed it . . . . In order to meet its burden at the
evidence to establish the prima facie case. An objection by the
defendant that the evidence offered by the prosecution is the result of an
illegal search will usually fail. Therefore, the prosecution will be able
to create its prima facie case, and keep the defendant in prison, based on
evidence that could later be held inadmissible because it was obtained in
violation of the defendant's constitutional rights. If the prosecution
"establishes a prima facie case of the defendant's guilt," the defendant
will be imprisoned until his later formal arraignment in the trial court,
unless he meets bail. If the prosecution fails to meet its burden, the
defendant will be released and the charges will be dismissed.

preliminary hearing, the Commonwealth is required to present evidence with
regard to each of the material elements of the charge and to establish sufficient
probable cause to warrant the belief that the accused committed the offense.

Pennsylvania does not consider the weight or credibility of evidence offered at the
preliminary hearing. Commonwealth v. Wojdak, 466 A.2d 991, 997 (Pa. 1983); see also
magistrate is precluded from considering the credibility of a witness who is called upon to
testify during the preliminary hearing." (citing Wojdak, 466 A.2d 991)). And hearsay
evidence can be relied upon to establish a prima facie case, but it cannot be the sole basis
2002).

126. Interview with Benjamin Traud, Assistant Dist. Att'y, Lehigh County, Pa., in
Allentown, Pa. (Sept. 22, 2004); see also supra note 125 and accompanying text. The
prosecution will successfully argue discovery has not yet occurred and admissibility is an
issue for the suppression hearing. Interview with Benjamin Traud, supra; see also FED. R.
CRIM. P. 5.1(e) ("At the preliminary hearing, the defendant may cross-examine adverse
witnesses and may introduce evidence but may not object to evidence on the ground that
it was unlawfully acquired.").

127. See infra Part II.E.4.

128. PA. R. CRIM. P. 543(B)-(C). If the issuing authority already set bail, the amount
can be modified at this time. Id. R. 543(C)(2). It is worth noting that at the preliminary
hearing a defendant can enter a guilty plea for certain charges. Id. R. 550(A). The offense
charged must be one which, by statute, grants the district judge, "the issuing authority" or
magistrate in Pennsylvania, the power to exercise such jurisdiction. Id. In order to accept
the guilty plea, the district judge must determine that the plea is voluntary. Id. R. 550(B).
The district judge should inquire into the voluntariness of the guilty plea, much like a trial
judge. Id. R. 550(B) & cmt.; see also infra notes 162-53 and accompanying text (describing
the "colloquy" a trial judge should undertake to determine the voluntariness of a guilty
plea). Most of the guilty pleas at this stage are a result of a plea agreement between the
prosecution and the defendant. Interview with Benjamin Traud, supra note 126. The
defendant is able to leave jail and the prosecution is able to lighten its caseload of a minor
offense. Id. However, when a plea agreement is used, an independent judge does not
review the merits of any warrantless search. See infra note 153 and accompanying text.

129. PA. R. CRIM. P. 543(B).
2. Information and Arraignment\textsuperscript{130}

The Pennsylvania state criminal justice system is an “information jurisdiction” as opposed to an “indictment jurisdiction.”\textsuperscript{131} Therefore, when the case is “bound over” at the preliminary hearing, it is sent to the trial court and not a grand jury.\textsuperscript{132} The Commonwealth attorney, that is, the district attorney, is responsible for preparing an information and filing it with the appropriate county court to institute the trial proceedings.\textsuperscript{133} This filing process will often take in excess of a month to complete.\textsuperscript{134} Within ten days of the district attorney filing the information, an arraignment will be conducted in open court, unless the defendant waives the proceeding.\textsuperscript{135} The purpose of the arraignment is to advise the defendant of his charges, to have the defendant provide an answer to the charges, to ensure the defendant is aware of his right to

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\textsuperscript{130} If the prosecution establishes a prima facie case and bail is not met, Matt could sit an additional fifty days in jail waiting for his arraignment. \textit{See infra} text accompanying notes 132-35. At his arraignment, he will be in front of a neutral and detached judge, but no determination will be made as to the legality of the warrantless search that placed him in jail. \textit{See infra} text accompanying note 136. His total number of days in jail at the conclusion of his arraignment will be sixty-two days. \textit{See supra} note 119.

\textsuperscript{131} See PA. R. CRIM. P. 560. In an information jurisdiction, “[a] formal criminal charge [is] made by a prosecutor without a grand-jury indictment.” BLACK’S LAW DICTIONARY 783 (7th ed. 1999). In an indictment jurisdiction, “[t]he formal written accusation of a crime [is] made by a grand jury and presented to a court for prosecution against the accused person.” \textit{Id.} at 776. \textit{See generally} 1 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 1.3(l)-(m), at 119-22 (2d ed. 1999) (explaining the differences between the various state criminal justice systems). After the preliminary hearing, a criminal case will usually follow one of two routes:

If the magistrate concludes that the evidence presented establishes probable cause, he will “bind the case over” to the next stage in the proceedings. In an indictment jurisdiction, the case is bound over to the grand jury, and in a jurisdiction that permits the direct filing of an information, the case is bound over directly to the general trial court. \textit{Id.} § 1.3(l) (citations omitted).

\textsuperscript{132} See PA. R. CRIM. P. 543(B), 560(A).

\textsuperscript{133} Id. R. 560.

\textsuperscript{134} Telephone Interview with Kelly L. Banach, Judge, Court of Common Pleas, Criminal Div., Lehigh County, Pa. (Nov. 4, 2004). Local court rules will determine this time requirement. In Lehigh County, Pennsylvania, the court rules, as determined by the president judge, require a district attorney to file an information against a defendant within forty days of his preliminary hearing. \textit{Id.} This has recently been reduced from forty-five days. \textit{Id.} The forty days allow a district attorney to be assigned to the case, review the case, and confirm the case’s merits. \textit{Id.} The forty days also permit a district attorney and the clerk’s office to complete the necessary administrative steps associated with a criminal case. \textit{Id.}

\textsuperscript{135} PA. R. CRIM. P. 571. Local court rules can alter the ten day default time requirement. \textit{Id.} In addition, the court can extend the ten day window for “cause shown.” \textit{Id.}
counsel, and to start the clock running for discovery and pretrial motions.136

3. Pretrial Motions137

Pennsylvania requires one "Omnibus Pretrial Motion for Relief."138 The omnibus motion must contain all pretrial relief requests of the defendant, including the suppression of illegally obtained evidence.139 Unless extenuating circumstances arise, the defendant must file an omnibus pretrial motion seeking the exclusion of evidence from trial within thirty days of arraignment.140 Once filed, the only time restriction on the adjudication of the motion is that it be determined "prior to or at trial."141 Pennsylvania's Rules of Criminal Procedure guarantee an incarcerated defendant the shortest wait for trial and, consequently, for a suppression hearing. The rules dictate that all imprisoned defendants receive a trial that will "commence no later than 180 days from the date on which the complaint is filed."142

4. Suppression Hearing143

Once an omnibus motion is filed, the court will schedule a hearing to

136. Id. R. 571 cmt. Local court rules determine the "form and manner" of the arraignment. Id. R. 571(A).

137. Matt, who may simply lack the financial wherewithal to pay bail, could legally wait six months in prison in order to obtain a ruling on his motion that questions the legality of the warrantless search that placed him in jail. See infra text accompanying notes 139-42.

138. PA. R. CRIM. P. 578.

139. Id. R. 578 & cmt.

140. Id. R. 579. However, the Comment following Rule 579 states: "This rule is not intended to preclude the filing by any party of a motion prior to arraignment when circumstances necessitate such a motion and when otherwise not precluded by rule or by law." Id. R. 579 cmt. If a defendant fails to file an omnibus motion, he will have waived his right to contest and suppress any evidence offered against him at trial. Id. R. 581(B) & cmt.

141. Id. R. 581(E).

142. Id. R. 600(A)(2); cf. id. R. 600(A)(3) (setting out the prompt trial requirement for a defendant who "is at liberty on bail" as "no later than 365 days from the date on which the complaint is filed").

143. Because Matt was subject to an illegal warrantless search, the suppression hearing will finally vindicate him. The judge in his case will apply the exclusionary rule, the acknowledged remedy for Fourth Amendment violations by police officers. See supra text accompanying notes 76-78. The evidence obtained by the illegal warrantless search will be suppressed, and the charges against him will be dropped as long as there is no other evidence to support the state's case. See infra text accompanying notes 148-49. The problem is that he will have to wait several months behind bars to receive this relief. See supra text accompanying notes 141-42.
determine the merits of any claims raised in the motion. A suppression hearing is held when the defendant seeks to suppress any evidence obtained by the state in violation of the defendant's rights, in this case his Fourth Amendment rights. The state will need to prove by a preponderance of the evidence "that the challenged evidence was not obtained in violation of the defendant's rights." If the judge determines that the evidence was obtained in accordance with the law, the evidence can be used against the defendant at trial. If, however, the judge concludes that the evidence was obtained in violation of the defendant's Fourth Amendment rights, the evidence will be excluded from the state's case at trial. When the court renders such a decision, the state must decide whether it has enough remaining evidence to proceed against the defendant.

5. Plea Bargains

Pennsylvania's criminal justice system, like most criminal justice systems, offers defendants an alternative to the trial process to secure their early exit from prison. Through plea bargaining, defendants can enter a guilty plea in exchange for a favorable handling of their case by the state. However, most often, the defendant must forfeit any claim of a Fourth Amendment search violation. As a result, with a plea

144. PA. R. CRIM. P. 581(E). The Rules require the court to give the state adequate time prior to a suppression hearing to investigate the claims contained in the motion. Id.
145. Id. R. 581.
146. Id. R. 581(H) & cmt. The state will have both the burden of production and the burden of persuasion at a suppression hearing. Id. R. 581 cmt.
147. Id. R. 581(I)-(J). At the conclusion of the suppression hearing, the judge will enter findings of fact and conclusions of law as to whether the evidence in question is admissible at trial. Id. R. 581(I).
148. See id. R. 581(I).
149. In most drug cases, if the state loses the suppression hearing, the drugs will be suppressed and the state will lose its only evidence. Interview with Benjamin Traud, supra note 126. As a result, the charges will be dropped and the defendant will be released from prison. Id.
150. Although the acceptance of a plea bargain by Matt will most likely result in his early departure from prison, it comes at the price of a conviction on his record and no independent determination of whether his Fourth Amendment rights were violated. See infra text accompanying notes 151-54.
151. PA. R. CRIM. P. 590(B) & cmt.
152. The state is more likely to offer a plea agreement to a defendant prior to a suppression hearing. Interview with Maureen Coggins, Chief Pub. Defender, Lehigh County, Pa., in Allentown, Pa. (Sept. 22, 2004); Interview with Benjamin Traud, supra note 126; see also infra text accompanying notes 164-67. The state may still make a plea offer after the defendant loses at the suppression hearing; however, the offer will not be as favorable to the defendant because the state knows that it can use the seized evidence, it is
bargain, an independent judge will never pass judgment on the legality of certain warrantless police conduct under the Fourth Amendment and the exclusionary rule will never be applied. But plea agreements guarantee defendants a faster conclusion to their case than the suppression hearing route does.

The Supreme Court has recognized the vital role plea agreements play in the criminal justice system. In fact, the Court has made it clear that there is nothing unconstitutional about encouraging guilty pleas. Guilty pleas benefit both the state and the defendant. At the same time, more confident it will secure a conviction, and it does not have the need to seek a plea. Interview with Maureen Coggins, supra.

153. See discussion infra Part III.B. If the plea agreement is accepted prior to the suppression hearing, the sole opportunity for a Pennsylvania state judge to rule on the constitutionality of a warrantless search and apply the exclusionary rule has been eliminated. See PA. R. CRIM. P. 581. If earlier police misconduct occurred, it escapes airing in the courtroom and the condemnation by the judge through a suppression order—two parts of a suppression hearing that contribute to the exclusionary rule's deterrent effect. Telephone Interview with Kelly L. Banach, supra note 134.

154. Compare supra Part II.E.3. (requiring that the suppression hearing for an imprisoned defendant be held no later than 180 days after a complaint is filed), with supra Part II.E.5. (explaining the state's preference to strike plea agreements prior to a suppression hearing).

155. See Santobello v. New York, 404 U.S. 257, 261 (1971) (discussing plea agreements as "not only an essential part of the process but a highly desirable part"). The Court listed various benefits of plea bargaining:

It leads to prompt and largely final disposition of most criminal cases; it avoids much of the corrosive impact of enforced idleness during pretrial confinement for those who are denied release pending trial; it protects the public from those accused persons who are prone to continue criminal conduct even while on pretrial release; and, by shortening the time between charge and disposition, it enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned.

Id.

156. See Corbitt v. New Jersey, 439 U.S. 212, 219 & n.9 (1978) (asserting that the Court's case law has established that a state may encourage a guilty plea by offering favorable treatment in return for the plea). The Court held:

"While confronting a defendant with the risk of more severe punishment clearly may have a 'discouraging effect on the defendant's assertion of his trial rights, the imposition of these difficult choices [is] an inevitable'—and permissible—'attribute of any legitimate system which tolerates and encourages the negotiation of pleas.' . . . [T]his Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forgo his right to plead not guilty."

Id. at 220-21 (emphasis added) (first alteration in original) (citation omitted) (quoting Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978)).

157. See id. at 220 (explaining that a defendant derives the benefit of "a lesser penalty than that required to be imposed after a guilty verdict by a jury" by accepting a plea agreement); Blackledge v. Allison, 431 U.S. 63, 71 (1977) (detailing the advantages of a
time, since the guilty plea results in a conviction, the defendant waives certain constitutional trial rights.\textsuperscript{158} Therefore, the defendant's waiver of these rights and his plea of guilty must be voluntary and knowing.\textsuperscript{159}

The Pennsylvania Supreme Court has addressed and accepted the role of plea bargaining in its criminal justice system.\textsuperscript{160} In addition, guilty pleas and plea agreements are covered in the Pennsylvania Rules of Criminal Procedure.\textsuperscript{161} Guilty pleas must be entered in court, and the judge must ascertain whether the plea is "voluntarily and

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  \item \textbf{plea bargain to both sides}. For a defendant, "[he] avoids extended pretrial incarceration and the anxieties and uncertainties of a trial, he gains a speedy disposition of his case, the chance to acknowledge his guilt, and a prompt start in realizing whatever potential there may be for rehabilitation." \textit{Id.} And the prosecution is able to "conserve vital and scarce resources," which it would have used in trying the case. \textit{Id.}
  
  \textbf{158.} \textit{See} Boykin v. Alabama, 395 U.S. 238, 242-43 (1969) (discussing the function and consequences of a guilty plea). The Court considers three federal constitutional trial rights waived in a plea bargain: the right against compulsory self-incrimination, the right to trial by jury, and the right to confrontation. \textit{Id.} at 243. \textit{But see supra} note 71 (discussing the nature of the Fourth Amendment). A Fourth Amendment right is not waived when a defendant enters a guilty plea because any violation of the Amendment has already occurred and, therefore, no personal constitutional right exists to waive. \textit{See supra} note 71. However, the Court has failed to recognize the possibility of an ongoing Fourth Amendment violation when an incarcerated defendant's warrantless search has not been subject to judicial review. \textit{See infra} Part III.A. In addition, the Supreme Court has not considered the effect a plea agreement, which may result in the non-application of the exclusionary rule to a conviction based on an illegal warrantless search, has on the deterrent purpose of the exclusionary rule and the Fourth Amendment. \textit{See infra} Part III.B.
  
  \textbf{159.} \textit{See} Parke v. Raley, 506 U.S. 20, 28-29 (1992) (summarizing the Court's requirements for a valid guilty plea); Commonwealth \textit{ex rel. Kerekes v. Maroney}, 223 A.2d 699, 701-02 (Pa. 1966) (discussing the validity of a guilty plea and its dependence upon whether the plea was "the defendant's own voluntary and intelligent choice"). A court, in accepting a guilty plea derived from a plea agreement, must assess whether the defendant's waiver of his \textit{trial} rights is "an intentional relinquishment or abandonment of a known right or privilege." \textit{"McCarthy v. United States, 394 U.S. 459, 466 (1969) (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)); see also FED R. CRIM. P. 11(c). In order for the plea to be voluntary, it is also essential that "the defendant possesses an understanding of the law in relation to the facts." McCarthy, 394 U.S. at 466.}

  \textbf{160.} \textit{See Kerekes}, 223 A.2d at 703-05 (presenting the opposing views as to the merits of plea bargaining). The Pennsylvania Supreme Court stated that both the state and the defendant benefit from a plea bargain system. \textit{Id.} at 704. By denying the state the ability to bargain, there would be "a substantial increase in required prosecutorial manpower and in the number of necessary trials," although no important state interest would be served by obtaining increased sentences. \textit{Id.} As for the defendant, "the abolition of plea bargaining might be disastrous, for there would then be little incentive for the state to acquiesce in less than the maximum available punishment." \textit{Id.} at 704-05. In the court's opinion, "there is neither an overriding interest of society which would prohibit such prosecutorial discretion nor must such bargaining invariably infringe upon the defendant's constitutional rights." \textit{Id.} at 705.

  \textbf{161.} \textit{See PA. R. CRIM. P. 590.}
understandingly tendered.” As part of the judge’s mandated guilty plea inquiry, the protections of the Fourth Amendment are not addressed—regardless if it is a warrantless search case or if the suppression hearing has taken place.

Most plea bargains in Pennsylvania courts are reached prior to a suppression hearing. The main reason for this timing is that plea

162. Id. R. 590(A). Similar to the requirements in Supreme Court case law, a Pennsylvania judge must make an independent inquiry of the defendant to ascertain the “voluntary and understandingly tendered” nature of a guilty plea. Compare supra note 159 (discussing the Supreme Court’s requirements for the assessment of guilty pleas), with PA. R. CRIM. P. 590 cmt. (discussing how Pennsylvania judges should assess guilty pleas). The comment to Rule 590 lists the questions that, at a minimum, a judge must ask prior to accepting a guilty plea. Id.; see also Commonwealth v. Willis, 369 A.2d 1189, 1189-90 (Pa. 1977) (listing six questions a judge must ask when accepting a guilty plea). However, the comment also notes that “[i]t is difficult to formulate a comprehensive list of questions a judge must ask of a defendant in determining whether the judge should accept the plea of guilty.” PA. R. CRIM. P. 590 cmt.

163. See PA. R. CRIM. P. 590 cmt. (listing the questions a judge must ask, which do not include inquiry into the protections of the Fourth Amendment). The comment to Rule 590 of the Pennsylvania Rules of Criminal Procedure states:

Court decisions may add areas to be encompassed in determining whether the defendant understands the full impact and consequences of the plea, but is nevertheless willing to enter that plea. At a minimum the judge should ask questions to elicit the following information:

(1) Does the defendant understand the nature of the charges to which he or she is pleading guilty or nolo contendere?

(2) Is there a factual basis for the plea?

(3) Does the defendant understand that he or she has the right to trial by jury?

(4) Does the defendant understand that he or she is presumed innocent until found guilty?

(5) Is the defendant aware of the permissible range of sentences and/or fines for the offenses charged?

(6) Is the defendant aware that the judge is not bound by the terms of any plea agreement tendered unless the judge accepts such agreement?

Inquiry into the above six areas is mandatory during a guilty plea colloquy. Id. When a guilty plea is offered as part of a plea agreement, the Pennsylvania rules require the judge to assure himself that the defendant understands and voluntarily enters into the “terms” of the plea agreement. Id. R. 590(B)(2). The Rules define “terms” as follows: “The [district attorney] in exchange for the defendant’s plea of guilty . . . promises concessions such as a reduction of a charge to a less serious offense, the dropping of one or more additional charges, a recommendation of a lenient sentence, or a combination of these.” Id. R. 590 cmt.; see also Commonwealth v. Porreca, 595 A.2d 23, 27 (Pa. 1991) (relying on the Supreme Court decision of Santobello v. New York, 404 U.S. 257 (1971), and requiring the state’s trial courts to ask defendants if they understand and concur in any plea agreement).

164. Interview with Benjamin Traud, supra note 126. District attorneys prefer to resolve cases through plea bargains before a suppression hearing is held for several reasons, including questionable searches, caseload, and lack of confidence in the police witness. Id.
bargains are offered at the sole discretion of the prosecution. Once a suppression hearing has been held and decided in the prosecution's favor, the prosecution has little motivation to offer a defendant any further "deals." A great uncertainty in the state's case, the admissibility of key evidence at trial, has been resolved in its favor.

III. AN IMPRISONED DEFENDANT, SUBJECT OF A WARRANTLESS SEARCH—UNREASONABLE SEIZURE AND INEFFECTIVE EXCLUSIONARY RULE

When a defendant is imprisoned as a result of a warrantless arrest in Pennsylvania, the Fourth Amendment's safeguards are activated. First, a neutral magistrate makes a prompt determination of whether probable cause existed for the arrest. The procedure ensures that the initial arrest was valid, and that the continued "seizure" of the defendant in prison is reasonable under the Fourth Amendment. However, the Gerstein probable cause hearing does not consider the legality of any warrantless search that may have led to the arrest. In other words, courts charged with ensuring the reasonableness of a prolonged imprisonment too often do not review the Fourth Amendment's full

165. See Commonwealth v. Stafford, 416 A.2d 570, 573 (Pa. Super. Ct. 1979) (responding to a defendant's claim that his Fourteenth Amendment equal protection rights were violated because a district attorney refused to offer him a plea bargain by stating that "[t]he decision as to whether to enter into plea negotiations is a function of prosecutorial discretion and we will not review such decisions unless such decisions are based upon an invidious classification").

166. Interview with Maureen Coggins, supra note 152; Interview with Benjamin Traud, supra note 126. If the suppression motion is decided in the defendant's favor, in many instances the charges against the defendant will be dropped for want of evidence. Interview with Maureen Coggins, supra note 152; Interview with Benjamin Traud, supra note 126.

167. In addition, once a case reaches the suppression hearing, the prosecution has invested a large amount of resources and time into the case. Interview with Benjamin Traud, supra note 126. Preparation for trial will be minimal and success at trial will be more likely. Id.

168. See supra Part II.E.1. The Court summarized the Gerstein v. Pugh, 420 U.S. 103 (1975), holding in County of Riverside v. McLaughlin, 500 U.S. 44 (1991), by stating that "warrantless arrests are permitted but persons arrested without a warrant must promptly be brought before a neutral magistrate for a judicial determination of probable cause." Id. at 53.

169. See supra Part II.E.1. In addition, within ten days of the arrest, the state is required to establish a prima facie case of the defendant's guilt in order to move forward with its case. See supra Part II.E.1.

170. See McLaughlin, 500 U.S. at 70 (Scalia, J., dissenting) (warning of the possibility of an "unreasonable seizure" when there is a delay in the probable cause determination for a warrantless arrest of an imprisoned defendant); supra Part II.E.1; infra Part III.A.

171. See Gerstein, 420 U.S. at 120 ("The sole issue is whether there is probable cause for detaining the arrested person pending further proceedings.").
guarantee—a person's security against unreasonable searches and seizures.\textsuperscript{172} The principles that underlie the prompt application of the Fourth Amendment's protections to a warrantless arrest equally apply to a warrantless search.\textsuperscript{173} Although a suppression hearing has been devised to adjudicate the soundness of a warrantless search, its timing fails an unreasonably incarcerated defendant.\textsuperscript{174} In addition, the delay in holding the suppression hearing, when considered with the plea bargaining process, eliminates the neutral magistrate and defeats the purposes of the exclusionary rule.\textsuperscript{175}

\textbf{A. The Warrantless Search that Leads to an Unreasonable Seizure}

The Fourth Amendment safeguards an individual from "unreasonable searches and seizures" by the government.\textsuperscript{176} The text of the Fourth Amendment and its interpretation by the Supreme Court treat these two illegal government actions equally.\textsuperscript{177} However, this parity has not been extended to the treatment of warrantless government action that leads to imprisonment as the Court has provided greater safeguards against warrantless arrests than warrantless searches.\textsuperscript{178}

In \textit{Gerstein}, the Court focused on individuals who were arrested without a warrant and detained in jail.\textsuperscript{179} Without a pre-arrest or pre-detention judicial determination as to the legality of the arrests, the Court was concerned that the defendants could be subject to an ongoing illegal seizure—imprisonment—because their arrests were based on less than probable cause.\textsuperscript{180} As a result, the initial illegal seizure—the arrest—would result in an ongoing illegal seizure—the imprisonment. The neutral magistrate was designed to protect against such violations of

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\item \textsuperscript{172} U.S. CONST. amend. IV.
\item \textsuperscript{173} See \textit{Gerstein}, 420 U.S. at 114 (stressing the importance of providing "meaningful protection from unfounded interference with liberty" and of protecting against unreasonable "extended restraint of liberty following arrest"); \textit{supra} Part II.C.
\item \textsuperscript{174} See \textit{supra} Parts II.E.3-4, III.A.
\item \textsuperscript{175} See \textit{supra} Part III.B.
\item \textsuperscript{176} U.S. CONST. amend. IV.
\item \textsuperscript{177} The text of the Fourth Amendment does not provide greater protection from unreasonable seizures than from unreasonable searches, or vice versa. See \textit{id}. The Supreme Court has recognized this equality of protection. See \textit{Arizona v. Hicks}, 480 U.S. 321, 328 (1987) (acknowledging the difference with respect to the interest each protects, but the equality as to the level of protection the Court affords both an illegal search and an illegal seizure); \textit{Horton v. California}, 496 U.S. 128, 143 (1990) (Brennan, J., dissenting) (citing \textit{Hicks}, 480 U.S. at 328, for the proposition that a search and a seizure should be treated equally for Fourth Amendment purposes); \textit{supra} note 21.
\item \textsuperscript{178} See \textit{Gerstein}, 420 U.S. at 114 (requiring the prompt judicial review of a warrantless arrest when it leads to the imprisonment of a defendant).
\item \textsuperscript{179} See \textit{supra} notes 44-45 and accompanying text.
\item \textsuperscript{180} See \textit{supra} notes 52-53 and accompanying text.
\end{itemize}
the Fourth Amendment by the police. But in order to protect a defendant from an ongoing illegal seizure, the merits of the initial seizure require quick judicial review. The application of the Gerstein principle in the area of warrantless searches is easily argued and easily applied given the Fourth Amendment's equal treatment of searches and seizures.

When police officers conduct a warrantless search, no judicial review of the merits of the search is conducted as a matter of course. No

181. See supra Part II.B.
182. See supra Part II.C. As the Court stated, "the [prompt] detached judgment of a neutral magistrate [to determine the legality of an arrest] is essential if the Fourth Amendment is to furnish meaningful protection from unfounded interference with liberty [caused by imprisonment]." Gerstein, 420 U.S. at 114.
183. See supra note 177 and accompanying text. Compare Terry v. Ohio, 392 U.S. 1, 19-27 (1968) (justifying warrantless police action, both search and seizure, by balancing the government's interest against the individual's privacy interests), with Gerstein, 420 U.S. at 113-14 (applying the same balancing test but only to a warrantless seizure that leads to imprisonment). The Court in Terry applied an analysis to a warrantless search and seizure incident that would later be used in Gerstein's arrest scenario. In Terry, a balance was struck between the state and the individual's competing interests. Terry, 392 U.S. at 19-27. The Court recognized the realities of police work and, therefore, permitted warrantless searches and seizures. Id. at 22-24, 27. At the same time, the Court also realized that "[t]he scheme of the Fourth Amendment becomes meaningful only when . . . those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge." Id. at 21. The Gerstein Court achieved the same "practical compromise" between an "individual's right to liberty and the State's duty to control crime" in the context of a warrantless arrest. Gerstein, 420 U.S. at 112-13. With respect to the state's interests, the Court believed that warrantless arrests were needed so as not to handcuff effective law enforcement. Id. at 113. Since police did not have to submit evidence to an independent magistrate prior to an arrest in order to obtain an arrest warrant, the "danger that the suspect will escape or commit further crimes" was avoided. Id. at 114. At the same time, individual rights needed to be protected and the Court assured this protection by requiring that a neutral and detached magistrate review a warrantless arrest. Id. Although the "maximum protection" of pre-arrest judicial review was not feasible, "[o]nce the suspect [was] in custody . . . the reasons that justif[ied] dispensing with the magistrate's neutral judgment evaporate[d]." Id. at 113-14. In order to obtain the fair balance, the Court held that the judicial review of the warrantless arrest needed to occur promptly after arrest. Id. at 114, 124-25. Unfortunately, the Court in Gerstein did not have the chance to consider both searches and seizures like Terry and apply "promptly" to the full Fourth Amendment in its holding.

184. See, e.g., PA. R. CRIM. P. 581 & cmt. (explaining that a defendant must "make a motion to the court to suppress any evidence alleged to have been obtained in violation of the defendant's rights" and noting "that failure to file the motion within the appropriate time limit constitutes a waiver of the right to suppress"). In order to gain relief from an unreasonable warrantless search, a defendant is required to file a motion with the court. Id. R. 581 cmt. Contra United States v. Ventresca, 380 U.S. 102, 105-06 (1965) (expressing a preference for Fourth Amendment police conduct supported by a warrant); United States v. Lefkowitz, 285 U.S. 452, 464 (1932) ("[T]he informed and deliberate determinations of magistrates empowered to issue warrants as to what searches and seizures are permissible under the Constitution are to be preferred over the hurried action
parallel has been drawn with Gerstein to automatically require a prompt post-search equivalent of a pre-search search warrant application hearing for a defendant who is imprisoned.\textsuperscript{185} As a result, in Pennsylvania, the judicial review of a warrantless search at a suppression hearing does not take place for several months after the arrest, if it takes place at all.\textsuperscript{186} For a defendant who is unable to make bail, the several months between a warrantless search and a suppression hearing is time spent in jail.\textsuperscript{187} Therefore, a warrantless search with no pre-search or pre-detention judicial review that is deemed an "unreasonable search" at a suppression hearing can result in the same ongoing illegal seizure of a defendant that

of officers and others who may happen to make arrests."). A valid search warrant includes a pre-search judicial review of the basis for a search. See supra Part II.B.; see also 2 LAFAVE, supra note 20, § 4.2, at 438 ("The warrant process, it is said, 'interposes an orderly procedure' involving 'judicial impartiality' whereby a 'neutral and detached magistrate' can make 'informed and deliberate determinations' on the issue of probable cause." (footnotes omitted)). But see Terry, 392 U.S. at 20 (expressing the preference for warrants, but acknowledging that circumstances exist where they are not required). The Supreme Court stated:

[The police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure or that in most instances failure to comply with the warrant requirement can only be excused by exigent circumstances. But we deal here with an entire rubric of police conduct—necessarily swift action predicated upon the on-the-spot observations of the officer on the beat—which historically has not been, and as a practical matter could not be, subjected to the warrant procedure.]

Id. (citations omitted).

185. See supra note 57; supra text accompanying notes 70-71. Professor LaFave discusses the probable cause determination for warrantless police action as follows:

When the police make an arrest or search without a warrant, they initially make the probable cause decision themselves. The "on-the-scene assessment of probable cause provides a legal justification for arresting a person suspected of crime, and for a brief period of detention to take the administrative steps incident to arrest," but an ex parte "judicial determination of probable cause [is] a prerequisite to extended restraint on liberty following arrest." This means, of course, that a judicial determination of probable cause for the arrest is not constitutionally required as a matter of routine, but need occur only if the arrestee fails to obtain his prompt release unaccompanied "by burdensome conditions that effect a significant restraint on liberty.

Otherwise, a subsequent judicial determination of whether there was probable cause for the warrantless police action will occur only if initiated by the defendant upon a motion to suppress evidence claimed to be a fruit of an illegal arrest or search.

2 LAFAVE, supra note 20, § 3.1(d), at 17-18 (emphasis added) (alteration in original) (footnotes omitted). As Professor LaFave's account indicates, warrantless searches and warrantless seizures are viewed alike, except in the requirements and timing of judicial review when the warrantless action results in imprisonment. See id.

186. See supra Part II.E.3-5.

187. See supra Part II.E.1-4.
was at issue in Gerstein. In other words, an initial illegal search—the warrantless search—can result in an ongoing illegal seizure—the imprisonment. For that reason, Gerstein's rationale as applied to warrantless seizures should also apply to warrantless searches and prohibit the practice of delayed judicial review.

The Court has rendered the stakes "high" when defendants are incarcerated, and therefore, the basis for imprisonment must be legitimate and the determination of its reasonableness must be prompt. Under the Supreme Court's interpretation of the Fourth Amendment, individuals are accorded the same protection from illegal searches as illegal seizures. If a warrantless seizure requires prompt judicial review when it is the basis for imprisonment, it follows that prompt judicial review should be required of a warrantless search when it is the basis for imprisonment in order to avoid an ongoing illegal seizure. Because Gerstein was concerned with the Fourth Amendment's ability "to furnish meaningful protection from unfounded interference[s] with liberty," the requirement of prompt judicial review must cover the entire Fourth Amendment and protect a person imprisoned due to a warrantless seizure or a warrantless search.

B. Late Suppression Hearings Benefit the State in Plea Bargaining While Removing the Neutral Magistrate and Eviscerating the Exclusionary Rule of Its Purpose

By not requiring a "prompt" judicial determination of the legality of a warrantless search for an incarcerated defendant, the timing of the suppression hearing, in states like Pennsylvania, presents problems beyond the possibility of an ongoing, unreasonable seizure of the defendant. First, the district attorney's use of plea bargaining will eliminate the essential role of the neutral magistrate in guaranteeing the protections of the Fourth Amendment. Through the plea bargaining process, the district attorney may convince the incarcerated defendant to forgo the suppression hearing in the distant future for his immediate release from prison. Second, the use of the plea bargaining system, in

188. Compare supra text accompanying notes 186-87 (an initial illegal search), with Gerstein, 420 U.S. at 116, 125 (an ongoing illegal seizure).
189. See Gerstein, 420 U.S. at 114; supra Part II.C.
190. See supra note 177. A neutral and detached magistrate's review, either before or after such police action, ensures this protection. See supra Part II.B.
192. See supra Part II.E.5.
193. See supra Part II.E.5.
conjunction with the late suppression hearing, greatly weakens the main purpose of the exclusionary rule—its deterrent effect on police.194

In Pennsylvania criminal cases, various administrative steps must be completed and several months must pass before a suppression hearing is held and the Fourth Amendment protections applied.195 For a defendant who is incarcerated due to a warrantless search, this timeline provides little solace.196 On the other hand, for the district attorney who wishes to efficiently and effectively dispose of his cases, the longer a defendant spends in jail awaiting a suppression hearing, the more willing the defendant will be to bargain for his freedom.197 In addition, because this period prior to the suppression hearing is the most likely time in which a district attorney will exercise his discretion to offer a plea bargain, plea agreements will be offered and struck prior to any judicial review of questionable Fourth Amendment police conduct outlined in a suppression motion.198 Therefore, the plea bargaining process often precludes consideration of a warrantless search by an independent judiciary. In assessing the legality of a warrantless search that led to a defendant's charges, the district attorney will typically confirm the judgment of a police officer, a fellow member of the law enforcement community.199 Although a plea bargain must be presented and accepted

194. See supra Part II.D.
195. See supra Part II.E.1-4.
196. See supra note 52.
197. Interview with Benjamin Traud, supra note 126. The advantage the district attorney receives at the bargaining table as a result of the defendant's vulnerable position allows him to obtain favorable convictions with minimal resources expended. Id.
198. See supra Part II.E.5; supra note 164.
199. See Gerstein v. Pugh, 420 U.S. 103, 117-18 (1975) (discussing why the decisions of a prosecutor as to the merits of an arrest are not satisfactory under the Fourth Amendment). The Court in Gerstein dismissed the state's argument 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." Id. at 117. The Court continued, "we do not think prosecutorial judgment standing alone meets the requirements of the Fourth Amendment," and held "that the prosecutor's assessment of probable cause is not sufficient alone to justify restraint of liberty pending trial." Id. at 117-19; see also supra note 28 and accompanying text. But see United States v. Calandra, 414 U.S. 338, 350-52 (1974) (considering the prosecution's discretion in a grand jury proceeding as an important reason for not applying the exclusionary rule to grand jury investigations). Although Calandra did not apply the exclusionary rule in grand jury proceedings, it is important to note that the Court assumed that any illegally obtained evidence presented to the grand jury would eventually be tested by a trial proceeding. Id. at 351. In addition, the defendant in Calandra was not imprisoned. See id. at 340-42. See generally PA. R. OF PROF'L CONDUCT 3.8 (outlining the special responsibilities of a prosecutor and his independence from police). According to the Pennsylvania Rules of Professional Conduct, a prosecutor must abide by the enumerated standards when carrying out his duties as a "minister of justice," including to "refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause." Id. R. 3.8 & cmt.
by the trial judge, the trial judge is not required to inquire into the merits of any warrantless search that led to the charges.\textsuperscript{200} In sum, a late suppression hearing can often mean no suppression hearing.\textsuperscript{201} Thus, criminal procedures in states like Pennsylvania enhance the government’s plea bargaining power, and in turn, undercut an incarcerated defendant’s Fourth Amendment right to a neutral magistrate’s review of warrantless police conduct.

\begin{quotation}
\textsuperscript{200} See supra note 163 and accompanying text. However, the judge’s colloquy listed in the Pennsylvania rules is the minimum inquiry a judge must make in accepting a plea. Pa. R. CRIM. P. 590 cmt. The comment to Rule 590 states that “it is difficult to formulate a comprehensive list of questions a judge must ask of a defendant in determining whether the judge should accept the plea of guilty.” Id. Therefore, prior to accepting a guilty plea, a trial judge may inform a defendant, who had been subject to a warrantless search, that he has the right to contest the merits of that search through a suppression hearing. Telephone Interview with Kelly L. Banach, supra note 134. But such an inquiry is not required. Id. The lack of a requirement to review Fourth Amendment issues before accepting a plea agreement may be due to the assumption that the unreasonable search or seizure had already been completed. See Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 362-63 (1998); United States v. Leon, 468 U.S. 897, 906 (1984) (“The wrong condemned by the [Fourth] Amendment is ‘fully accomplished’ by the unlawful search or seizure itself… . The [exclusionary] rule thus operates as ‘a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.’” (citations omitted) (quoting Calandra, 414 U.S. at 348)). However, an incarcerated defendant can be subject to an ongoing unreasonable seizure when his imprisonment is based on a warrantless search and the legality of that search has never been adjudicated. See supra Part III.A. See generally County of Riverside v. McLaughlin, 500 U.S. 44, 70 (1991) (Scalia, J., dissenting) (explaining when the lateness of a probable cause determination becomes an “unreasonable seizure”). The plea bargaining process may or may not end an ongoing illegal seizure. It will depend on whether the terms of the plea agreement result in the defendant’s release from prison, thereby ending any ongoing seizure. Therefore, a plea bargain that carries with it additional jail time will not only require a defendant’s waiver of his constitutional trial rights, see supra note 158 and accompanying text, but also his approval of a possible ongoing illegal seizure—a Fourth Amendment violation—which may not be knowing and voluntary. See supra note 159 and accompanying text. The possibility of such an occurrence derives from the lack of a required pre-plea bargain judicial review of any warrantless search of an incarcerated defendant.

\textsuperscript{201} See supra note 197 and accompanying text. Compare Peter F. Nardulli, The Societal Costs of the Exclusionary Rule Revisited, 1987 U. ILL. L. REV. 223, 226-28 (1987) (discussing author’s study on the impact of the exclusionary rule on the number of suppression motions filed in felony cases), with infra note 206 (illustrating that the majority of felony cases are disposed of by guilty pleas), and supra note 152 (discussing the increased likelihood that the state will offer a plea agreement before a suppression hearing). In Nardulli’s first study, he found that “in felony criminal cases drawn from samples of nine middle-sized jurisdictions in three states (Illinois, Michigan, and Pennsylvania) . . . motions to suppress physical evidence are filed in fewer than 5%, largely drug and weapons cases.” Nardulli, supra, at 226. In Nardulli’s second study, “2,759 cases from the city of Chicago were examined to determine the role and impact of the exclusionary rule in a major urban jurisdiction.” Id. at 227. In that study, motions to suppress physical evidence were filed in nine percent of the cases. Id.
\end{quotation}
In the absence of judicial review of an imprisoned defendant's warrantless search, the exclusionary rule is not applied and its purpose is not served. In *Calandra*, the Supreme Court refused to apply the exclusionary rule to grand jury proceedings. The Court reasoned that "[s]uch an extension would deter only police investigation consciously directed toward the discovery of evidence solely for use in grand jury investigation. [T]his incentive . . . is substantially negated by the inadmissibility of the illegally seized evidence in a subsequent criminal prosecution of the search victim." But what if illegally seized evidence forms the basis of a criminal conviction of a search victim because a suppression hearing and a trial never occur? What if the grand jury indictment, or the prosecution information in Pennsylvania, is the only obstacle police officers need to overcome to obtain a guilty plea? With the extensive use of plea bargains in the criminal justice system, the "what ifs" are a reality and, as a result, *Calandra's* arguments against early application of the exclusionary rule, based on the rule's eventual application at trial, fail. The admissibility of illegally seized evidence in a criminal trial of a search victim is never adjudicated when convictions are obtained through plea agreements prior to a suppression hearing and trial. As a result, police conduct has become directed toward the discovery of evidence solely for use in proceedings prior to a suppression hearing and trial and only an extension of the exclusionary rule will effectively deter police violations of the Fourth Amendment.

202. The late suppression hearing sets in motion a chain reaction starting with increased jail time, see supra Part II.E.1-4, which leads to increased plea bargaining, see supra note 197 and accompanying text, and ends in the removal of the independent bulwark that typically exists between police officer conduct and defendants, see supra Part III.B. The absence of judicial review due to plea bargaining negates the utility of the exclusionary rule. See supra text accompanying notes 151-53.


204. *Id.* at 351; see also supra note 106 and accompanying text (discussing cases where the Supreme Court refused to extend the application of the exclusionary rule). The Court's opinion in *Pennsylvania Board of Probation and Parole v. Scott*, 524 U.S. 357 (1998), typifies the reasoning behind the limited application of the exclusionary rule outside the trial setting: "[B]ecause the rule is prudential rather than constitutionally mandated, we have held it to be applicable only where its deterrence benefits outweigh its 'substantial social costs.' Recognizing these costs, we have repeatedly declined to extend the exclusionary rule to proceedings other than criminal trials." *Scott*, 524 U.S. at 363 (citation omitted).

205. See supra text accompanying notes 198-201.

206. See United States v. Janis, 428 U.S. 433, 454, 459 (1976) (requiring the exclusionary rule to result in "appreciable deterrence" in order to apply it to a given situation); BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS — 2002, at 455 tbl.5.57 (Kathleen Maguire & Ann L. Pastore eds., 2003) (analyzing the disposition of felony cases in the seventy-five largest counties in the United States for the year of 1998). Of the 50,284 defendants arrested and
Since the Court "relie[s] ... on its own assumptions of human nature and the interrelationship of the various components of the law enforcement system" to determine questions of exclusion and deterrence under the Fourth Amendment, so must this Comment. Police officers are trained in the nuances of Fourth Amendment law in order to ensure that their warrantless searches are upheld in a suppression hearing. However, when those warrantless searches are not regularly subject to the unbiased, critical eye of a neutral magistrate, a police officer has no way of knowing if his conduct truly complies with the Fourth Amendment. Habits form and certain types of illegal warrantless searches may persist among police officers because the merits of such a search are subject only to the uncritical review of a district attorney and the evidence obtained from the search is used in a conviction that is part of a plea bargain. Therefore, as a result of a plea bargain, a suppression hearing is not held, illegal evidence is not excluded, and the exclusionary rule does not deter future unlawful police searches.

Only by consistently having an independent judiciary apply the exclusionary rule prior to any guilty plea in all warrantless search cases will the prevention of police misconduct be accomplished. Otherwise, plea agreements and their resulting partnership between police officers and district attorneys are an invitation for police officers to ignore the prohibitions of the Fourth Amendment. In Pennsylvania, where the exclusionary rule is used "to remedy present violations of individual privacy rights," an across-the-board approach—judicial review required

charged, sixty-eight percent were convicted. Of those convictions, sixty-five percent were disposed of by a plea and only three percent actually reached trial. Of the 18,336 defendants arrested and charged with a drug offense, seventy-two percent were convicted. Of those convictions, seventy percent were disposed of by pleas and three percent were convicted by trial. However, no information is provided as to the percentage of the pleas accepted prior to a suppression hearing. See id. But see supra note 152.


208. Interview with Ronald Paret, Narcotics Agent for the Bureau of Narcotics Investigation & Drug Control, Office of Attorney General for the Commonwealth of Pa., in Allentown, Pa. (Sept. 21, 2004). In Pennsylvania, police officers are trained in federal and state search and seizure law. Id. Police officers receive case law updates from and consult with government attorneys on a regular basis. Id.

209. See supra Part II.B.

210. See supra notes 199, 205 and accompanying text. When a plea agreement does occur, the police officer's conduct is validated by the conviction even though the legality of the officer's conduct never came to light under judicial review.

211. See supra Part III.B.
for all warrantless searches—would seem to be the only means to accomplish this goal.\textsuperscript{212}

IV. THE REQUIREMENT OF A PROMPT FOURTH AMENDMENT HEARING FOR ALL IMPRISONED DEFENDANTS

In order to avoid defendants being subject to "unfounded interference[s] with [their] liberty" in the form of imprisonment, a neutral and detached magistrate must be required to promptly review all warrantless Fourth Amendment police action that leads to detention.\textsuperscript{213} The principle behind a prompt \textit{Gerstein} hearing for a warrantless arrest should be extended to the determination of the merits of a warrantless search.\textsuperscript{214} The same "practical compromise" can be struck so that warrantless searches are allowed in recognition of "the realities of law enforcement," but such searches would require prompt judicial review to protect "the rights of individuals."\textsuperscript{215} The result of a prompt "Fourth Amendment hearing," including a review of both police search and seizure procedures, would remove the concerns outlined above. Any ongoing, unreasonable seizure ends.\textsuperscript{216} A district attorney does not replace the neutral magistrate in the determination of the legality of a warrantless search.\textsuperscript{217} The defendant and the prosecutor are placed on equal terms in a plea agreement.\textsuperscript{218} And the deterrent effect of the exclusionary rule is restored because police know their searches are guaranteed judicial review.\textsuperscript{219}

\begin{itemize}
\item \textsuperscript{212} See supra Part II.D.
\item \textsuperscript{213} See \textit{Gerstein v. Pugh}, 420 U.S. 103, 114 (1975).
\item \textsuperscript{214} A common law and historical precedent for the promptness of a warrantless search hearing can arguably be found in footnote seventeen of \textit{Gerstein}:
\begin{itemize}
\item 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 \textit{prompt} determination of the cause for seizure of the goods and detention of the thief. \textit{Gerstein}, 420 U.S. at 116 n.17 (emphasis added) (citing 2 M. HALE, \textit{PLEAS OF THE CROWN} 149-52 (1736)). If the common law required a prompt judicial determination of the merits of a search conducted with a warrant, it surely would require a prompt judicial determination of a warrantless search.
\item \textsuperscript{215} County of Riverside v. McLaughlin, 500 U.S. 44, 52-53 (1991). The Court explained the "practical compromise" struck in \textit{Gerstein}: "[W]arrantless arrests are permitted but persons arrested without a warrant must promptly be brought before a neutral magistrate for a judicial determination of probable cause." \textit{Id.} at 53.
\item \textsuperscript{216} See supra Part III.A.
\item \textsuperscript{217} See supra Part III.B.
\item \textsuperscript{218} See supra Parts II.E.5, III.B.
\item \textsuperscript{219} See supra Part III.B.
\end{itemize}
\end{itemize}
Many problems may arise if a Fourth Amendment hearing is implemented in lieu of a suppression hearing. The appropriate procedural safeguards would be difficult to establish as discovery, witness availability, and a defendant's right to counsel may be difficult to guarantee within days, let alone hours, of a warrantless search. In addition, the standard of review used in a suppression hearing would create problems as many magistrates are not attorneys and are not versed in the intricacies of Fourth Amendment law. However, such problems can be minimized if the Fourth Amendment hearing supplements a suppression hearing in the same way the Gerstein hearing has supplemented a trial. The Fourth Amendment hearing is an initial obstacle the prosecution must overcome due to the occurrence of a warrantless search in order to detain a defendant.

In addition to the probable cause requirement outlined in Gerstein, the prosecution would have to prove the "reasonableness" of any warrantless search of an incarcerated defendant to a neutral magistrate at a Fourth Amendment hearing. What is a reasonable search under the Fourth Amendment is far from clear; however, for purposes of a Fourth Amendment hearing, an objective definition of "reasonableness" would


221. Interview with Maureen Coggins, supra note 152; see also supra Part II.E.3.

222. See PA. CONST. art. V, § 12(a) (detailing the minimal requirements to be a justice of the peace in Pennsylvania). The Pennsylvania Constitution provides the following qualifications to hold certain state judicial positions:

Justices, judges and justices of the peace shall be citizens of the Commonwealth. Justices and judges . . . shall be members of the bar of the Supreme Court. . . . [J]ustices of the peace, for a period of one year preceding their election or appointment and during their continuance in office, shall reside within their respective districts . . . .

Id. Those qualified under the justice of the peace standard conduct preliminary arraignments in Pennsylvania, the equivalent of a Gerstein hearing. Interview with Benjamin Traud, supra note 126. In one Pennsylvania county, the district justices include a former police officer and a former barber. Id.

223. Under this Comment, the Fourth Amendment hearing would engulf the Gerstein hearing, since it would require a judicial review of warrantless arrests and warrantless searches.

224. The Fourth Amendment hearing would require a two-step approach. Any warrantless search would be considered first by the neutral and detached magistrate. If the warrantless search is upheld, the warrantless arrest would be considered and the evidence of the warrantless search could be used in the determination of probable cause. If the warrantless search is not upheld, the merits of the warrantless arrest must be based on any evidence not obtained by the search.
need to be developed. With an objective standard that can be easily applied by a magistrate, the Fourth Amendment hearing would retain the "informality" of a Gerstein hearing, but also recognize the importance of prompt judicial review of all warrantless police conduct that leads to imprisonment. This informal procedure would also diminish the need for many of the safeguards provided to a defendant at trial, but provide the defendant with many of the benefits of a suppression hearing. Such a Fourth Amendment hearing would strike

225. The explanation of probable cause in Gerstein sheds light on the objective standard of "reasonableness" that would be used in a Fourth Amendment hearing:

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.

"In dealing with probable cause... 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. Gerstein, 420 U.S. at 120-21 (quoting Brinegar v. United States, 338 U.S. 160, 174-75 (1949)); see also supra note 57. Because the review of any warrantless search at a Fourth Amendment hearing would serve as a post-search equivalent of a pre-search warrant-application hearing, the proceeding may be conducted in the same manner as a warrant hearing.

226. See Gerstein, 420 U.S. at 121. The Court justified the informal procedures of a Gerstein hearing "not only by the lesser consequences of a probable cause determination but also by the nature of the determination itself." Id. In addition, this framework for a Fourth Amendment hearing would respect the federalism concerns underlying the Gerstein hearing. See supra text accompanying note 58.

227. See Gerstein, 420 U.S. at 121-22 (explaining that more adversary safeguards are not needed at a probable cause hearing because guilt is not being determined). The Court has stated that "[b]ecause 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." Id. at 122.

228. The early review of the warrantless search would create a record of the circumstances surrounding the search while the details were still fresh on a police officer's mind. Interview with Maureen Coggins, supra note 152. That same record would be a valuable resource to the defendant as an impeachment tool in future court proceedings. Id. In addition, Professor LaFave lists various reasons why a pre-trial suppression hearing is beneficial to both sides, reasons that are even more applicable with a prompt Fourth Amendment hearing:

[1]: it is to the advantage of both the prosecution and defense to know in advance of the time set for trial whether certain items will or will not be admitted into evidence. If the pretrial motion is granted, this "may result in abandonment of the prosecution," thus avoiding the "waste of prosecutorial and judicial resources occasioned by preparation for trial" which otherwise would have to begin only to be terminated at some point thereafter. Also, "[a]n adverse ruling on a pretrial motion will permit the government to change the theory of its case, to develop or place greater reliance upon untainted evidence or otherwise to modify its trial strategy." If the pretrial motion is denied, then the defendant is in a position at that time to either plead guilty and gain whatever concessions might be obtained
the appropriate balance between state interests and individual privacy rights, a balance that is at the core of Fourth Amendment jurisprudence.\footnote{229}

V. CONCLUSION

The Fourth Amendment provides protection from unreasonable searches and seizures. The worst type of unreasonable seizure is an ongoing one. The Supreme Court has recognized this fact and has required the prompt judicial review of any warrantless arrest that leads to imprisonment. But until the Court extends this requirement to the other half of the Fourth Amendment, warrantless searches that result in imprisonment, an individual's Fourth Amendment guarantees are in jeopardy. A prompt Fourth Amendment hearing would rectify this problem by requiring pre-detention review of warrantless searches and warrantless seizures, ensuring a greater role for a neutral and detached magistrate in all warrantless police action, and applying the exclusionary rule in a way that serves its deterrent purpose. A Fourth Amendment hearing would prevent the "unfounded interference with liberty" that a state criminal justice system can create when a warrantless search leads to imprisonment.

\footnote{by so pleading without causing the commencement of a trial, or to go to trial with a somewhat different defense strategy.} 5 LAFAVE, supra note 20, § 11.1(a), at 5-6 (alteration in original) (footnotes omitted).

\footnote{229. The state would be permitted to carry out warrantless searches in appropriate circumstances in recognition of the realities of police work. But if the warrantless search resulted in the imprisonment of the defendant, an individual's privacy rights, and his interest against an "unfounded interference with [his] liberty," would move to the forefront and demand a prompt judicial determination of the merits of the warrantless search. See supra notes 26, 63, and 183.}