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The Availability of a First Appearance and Preliminary Hearing — Now You See Them, Now You Don’t

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Originally, the Arkansas Constitution required that all prosecutions, except for a few limited categories of offenses, be instituted by indictment or presentment. In 1937 the Arkansas Constitution was amended to provide that all offenses which had been required to be prosecuted by indictment could be prosecuted either by indictment by a grand jury or by information filed by the prosecuting attorney. The constitutionality of this practice of charging offenses by information has been upheld by the United States Supreme Court and the Arkansas courts. In 1977, the Prosecutors’ Trial Manual noted that the standard practice in Arkansas was to charge criminal offenses by information.

The 1937 amendment brought Arkansas within the majority of jurisdictions, commonly referred to as “information” states, which permit felony prosecutions to be brought either by information or indictment. In all but a few of these states, however, an information can be filed only if there has been either a preliminary hearing bindover by the magistrate or a waiver of the hearing. Arkansas is one of those few states which do not require a preliminary hearing bindover or waiver of the hearing prior to filing of the information.

It has been noted that even these so-called “direct filing” jurisdictions which do not require a preliminary hearing do add special requirements to the filing process to ensure that the information is supported by probable cause. For example, at least one state requires that direct filing be approved by a magistrate who reviews affidavits accompanying the information to determine that probable cause exists, and another state requires the prosecutor to certify that the information is based upon testimony received under oath from the material witness or witnesses for the offense. The Uniform Rules of Criminal Procedure provide for a probable cause determination at the first appearance, after which, if the defendant is unable to obtain his pretrial release, he is entitled to a probable cause determination at an adversary hearing within five days after his arrest. Arkansas has no such special requirements. What pretrial procedures, then, are available for a defendant to challenge his prosecution based on the absence of probable cause for detention or prosecution? Though the statutes and state rules of criminal procedure appear to provide several safeguards, as we shall see, these safeguards are to a large extent illusory.

The First Appearance and Preliminary Examination

A. Now You See Them ....

1. The Statutes

Three sections of the Arkansas statutes govern the pre-arraignment appearances of the defendant before a magistrate. These sections, 43-601, 43-603 and 43-605, have been treated by the courts as the governing provisions for any claim to a preliminary examination or first appearance in Arkansas. Section 43-601 provides in the case of a warrantless arrest, that the defendant shall be “forthwith” carried before the most convenient magistrate of the county in which the arrest is made and that the grounds for the arrest be stated to the magistrate. If the magistrate believes there to be sufficient grounds for an examination, then he shall by written order have the defendant conveyed before a magistrate of the county in which the offense is charged to have been committed.
person has been brought before the magistrate with the authority to examine the charge. It simply provides that the charge shall be “forth-with” examined, “reasonable time” being allowed for procuring counsel and the attendance of witnesses. The magistrate, before commencing the examination, must state the charge and ask the defendant whether he requires counsel. The magistrate is to release the defendant under section 43-618 if there is not “sufficient cause” for believing the defendant committed the offense, and is to hold the defendant for trial under section 43-619 if there are “reasonable grounds” to believe the defendant guilty. Thus these statutory provisions do not set forth a first appearance as a separate and distinct proceeding from the preliminary examination except when the defendant is first brought before a magistrate not in the county in which the offense was committed.

The Arkansas Supreme Court has held that sections 43-601 and 43-603 are directory and not mandatory, and that therefore failure to provide a preliminary examination or first appearance under these provisions is not reversible error. Moreover, in Payne v. State, the appellant contended that a preliminary examination was required before a prosecutor could file an information under section 43-806, which states that: Whenever a defendant has been held to answer at a preliminary examination to await the action of the grand jury, or has been held for the circuit court, the prosecuting attorney may proceed to file information in the circuit court and to trial of the case; provided the prosecuting attorney, with the consent of the circuit court, may nolle prosequi any indictment or information pending in said court.


In Payne, the defendant was arrested without a warrant but was never taken before a magistrate. During his incarceration he gave a confession which the United States Supreme Court subsequently found to be coerced. The Supreme Court, in evaluating the evidence of coercion, noted that Payne “was denied a hearing before a magistrate at which he would have been advised of his right to remain silent and of his right to counsel, as required by Arkansas statutes . . . .” The Court had earlier in the opinion referred to the Arkansas procedures under sections 43-601 and 43-605. Though there is some ambiguity in the Supreme Court’s statement as to whether it thought the hearing was required, or only that the warnings were required when there was a hearing, the opinion in its entirety suggests that the Court viewed section 43-601 as requiring a preliminary examination for all warrantless arrests. Nevertheless, since Payne, several decisions of the Arkansas Supreme Court have reiterated that section 43-601 is directory and not mandatory.

2. The Arkansas Rules of Criminal Procedure

On January 1, 1976, the Arkansas Rules of Criminal Procedure went into effect. Rule 8.1, “Prompt First Appearance,” provides that “an arrested person who is not released by citation or by other lawful manner shall be taken before a judicial officer without unnecessary delay.” At the first appearance, the judicial officer must inform the defendant that: (1) he is not required to say anything, and that anything he says can be used against him; (2) he has a right to counsel; and (3) he has a right to communicate with his counsel, his family, or his friends, and that reasonable means will be provided for him to do so. Rule 8.3(c) requires the judicial officer, prior to the question of the defendant’s pretrial release, to determine “by an informal, non-adversary hearing whether there is probable cause for detaining the arrested person pending further proceedings.” It also provides that the standard for determining probable cause shall be the same as that which governs arrests with or without a warrant. Except for these two sentences in Rule 8.3(c), there is no further reference in the Rules to a probable cause determination or any explicit reference to a preliminary hearing.

Rule 8.1 is taken almost verbatim from the 1968 Approved Draft of the ABA Standards for Pretrial Release. Significantly Rule 8.3, based on section 4.3 of the 1968 Standards, omits that section’s requirement that the defendant be adequately advised, “... where applicable, [that] defendant has a right to a preliminary examination.” The two sentences in Rule 8.3(c) dealing with the probable cause determination do not appear in the corresponding subdivision of the 1968 ABA Standard. The Prosecutors’ Trial Manual suggests that the omission of any “significant” discussion of the preliminary hearing in the Arkansas Rules may have occurred because the drafters were awaiting the Supreme Court’s decision in Gerstein v. Pugh. However, what appears to be the omission of any discussion of the preliminary hearing in the Rules may be more logically attributed to a lack of such discussion in the 1968 ABA Standards for Pretrial Release upon which they were based.

3. Gerstein v. Pugh

Only a few months before the Arkansas Rules took effect, the United States Supreme Court decided Gerstein v. Pugh, a case challenging the constitutionality of Florida’s pretrial procedures. The Court focused on two issues: whether a person arrested and held for trial on an information is entitled to a judicial determination of
probable cause for detention, and, if so, whether a full-blown adversarial hearing was required for the probable cause determination. In response to the first issue, the Court held that the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest. The Court accordingly disapproved of the Florida procedure which permitted a person arrested without a warrant and charged by information to be jailed or subjected to other restraints pending trial without any opportunity for a probable cause determination. In so holding, the Court also made it clear what it was not holding:

In holding that the prosecutor’s assessment of probable cause is not sufficient alone to justify restraint of liberty pending trial, we do not imply that the accused is entitled to judicial oversight or review of the decision to prosecute. Instead, we adhere to the Court’s prior holding that a judicial hearing is not prerequisite to prosecution by information. Nor do we retreat from the established rule that illegal arrest or detention does not void a subsequent conviction.

420 U.S. at 118-119, 95 S. Ct. at 865-866 (citations omitted).

Having found that a pretrial detention hearing was required, the Court nevertheless held that the issue could be determined reliably without an adversary hearing, with the standard of review in the hearing being the same as that for arrest—probable cause to believe the suspect has committed a crime. This determination could be made without cross-examination, or a right to appointed counsel. Beyond these parameters, however, the Court left much discretion in the states to fashion appropriate procedures:

Although we conclude that the Constitution does not require an adversary determination of probable cause, we recognize that state systems of criminal procedure vary widely. There is no single preferred pretrial procedure, and the nature of the probable cause determination usually will be shaped to accord with a State’s pretrial procedure viewed as a whole. Whatever procedure a state may adopt, it must provide a fair and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty, and this determination must be made by a judicial officer either before or promptly after arrest.

Id. at 123-125, 95 S. Ct. at 868-869 (footnotes and citations omitted).

In summary, then, an Arkansas defense attorney, seeking protection of his or her client before the filing of an information, may turn to three sources for that protection. The Arkansas statute, the Rules of Criminal Procedure and the U.S. Supreme Court case of Gerstein v. Pugh all appear to provide limitations on the state’s ability to detain or otherwise affect the rights of the arrested person. The remainder of this Article will demonstrate that these limitations are, mostly, illusory.

B. Now You Don’t . . .

As noted earlier, the Arkansas Supreme Court has made it clear that a first appearance or preliminary examination is not required under the Arkansas statutes. The only provision of the Arkansas Rules which arguably might mandate a preliminary hearing is the requirement of Rule 8.3(c) that a probable cause determination be made, although it refers to an “informal, non-adversary hearing.” However, the introduction to the 1968 ABA Standard upon which the first sentence of Rule 8.3(c) is based makes it clear that the question of pretrial release under that standard is to be made at the first appearance. Since the second sentence of Rule 8.3(c) requires the judicial officer “first” (that is, prior to the question of pretrial release) to determine probable cause, the Rule is read more logically as mandating its probable cause determination at the first appearance. Such an interpretation is also more in keeping with the requirement of Rule 8.5 that the pretrial release inquiry be conducted prior to or at the first appearance of the defendant.

This perspective — that the probable cause determination required in Rule 8.3(c) is to be made in the first appearance and not in a preliminary examination — was taken by the Federal District Court for the Western District of Arkansas in Reeves v. Marby. In Reeves, the defendant claimed that he had been denied counsel in his preliminary hearing. Because there is a right to counsel in a “preliminary hearing” as defined by the Supreme Court in Coleman v. Alabama, but not in the Gerstein probable cause hearing, the district court had to determine the nature of the Arkansas preliminary hearing. The district court noted that the two factors cited in Coleman to distinguish a preliminary hearing from a Gerstein probable cause hearing are: (1) that the function of the preliminary hearing is to determine whether the evidence justifies charging the defendant with a criminal offense, not to determine whether there are sufficient grounds for pretrial detention; and (2) in a preliminary hearing the suspect may confront and cross-examine prosecution witnesses. Based on this analysis, the court concluded:

Since neither Rule 8.3(c) nor any other Rule can be read as mandating a formal, adversarial probable cause determination in a preliminary hearing, the preliminary examination is still not required under Arkansas law.

Gerstein has resulted in other indirect limitations upon the preliminary examination. Gerstein made it clear that neither the Fourth Amendment nor due process requires a full-blown, adversarial hearing to determine probable cause for prosecution. As a result of Gerstein and Rule 8.3, the Prosecutors’ Trial Manual notes the following ways in which the courts have attempted to streamline the judicial albatross, the preliminary hearing:

1. Some courts are allowing more hearsay evidence to be used, including state lab reports, sworn statements from or hearsay statements of out-of-state witnesses, and statements showing chain of custody of evidence instead of personal testimony.
2. Some courts are limiting cross-examination to the areas of factual determination and excluding inquiry into credibility, character, and motive.
3. Some judges will close the hearing when probable cause has been established and will require that any further issues of fact be resolved at trial.

Prosecutors’ Trial Manual at 164 (footnote omitted).

The end result of the confusing overlap of statutes and rules in Arkansas, in conjunction with the relevant case law, is that the first appearance requirements of Rules 8.1 and 8.3 are the most reliable pretrial safeguards to ensure some determination of probable cause, albeit for pretrial detention only. In contrast to its decisions on section 43-601 to 43-605, the Court has held that the provisions of Rule 8.1 are mandatory. In Bolden v. State, the defendants received no hearing from the time of their arrests until one month later when they were formally arraigned on the charges. In light of Gerstein’s holding that the Fourth Amendment requires a judicial determination of probable cause for detention as a prerequisite to extended restraint of the arrestee’s liberty following arrest, the Court concluded that Rule 8.1 was mandatory in scope.

Understandably in terms of judicial economy, there has been a trend away from the full scale preliminary hearing in some courts. Although the Constitution may require nothing more than the procedure set forth in Rule 8, Arkansas appears to be unique among direct filing states in its minimum of procedural safeguards to accompany filing of an information. What is and is not provided to the defendant by Rule 8, then, becomes crucial to determining what screening procedures the defendant might expect and the prosecutor anticipate.

First, it was noted in Gerstein that a person arrested under a warrant in Florida could have already received a judicial determination of probable cause. Under the Florida Rules, a warrant could be issued upon a sworn complaint that stated facts showing that the suspect had committed a crime, and the magistrate could also take testimony under oath to determine if there were reasonable grounds to believe the complaint is true. Apparently some prosecutors have used a similar procedure to their advantage. In the Prosecutors’ Trial Manual, one author remarks that:

Some prosecutors have sought to avoid the necessity of Gerstein hearings and preliminary hearings by presenting to the judge issuing the arrest warrant an affidavit of a primary witness on the back of the criminal information filed summarizing the facts. The judge considers the sworn allegations and endorses that he has found probable cause to detain the defendant.

Prosecutors’ Trial Manual at 165 (emphasis added). This procedure, though apparently authorized by Gerstein, would appear to provide little screening by the magistrate (particularly if effectuated as described above), and no opportunity for input by the defendant. The author goes on to warn that this procedure “does not obviate the requirement of a first appearance or a plea and arraignment in circuit court.” The author is correct in that Rule 8.1 still requires a first appearance by the person arrested before a judicial officer without unnecessary delay and section 43-1202 requires arraignment for felonies. Arraignment is defined as “the reading of the indictment [or information] by the clerk to the defendant, and asking him if he pleads guilty or not guilty to the indictment [or information]. The statutory provisions and Rules appear to contemplate two separate proceedings and functions for the first appearance and the arraignment. Although in the first appearance the defendant must be informed of the charge and his rights, as in the arraignment, the focus of the first appearance is the validity of pretrial detention. The focus of the arraignment is the defendant’s plea. Significantly, Rule 8 governing the first appearance is entitled “Release by Judicial Officer at First Appearance” although the corresponding title in the ABA Standards reads “Release by Judicial Officer at First Appearance or Arraignment.”

Nevertheless, the distinctions between the two proceedings may tend to blur in practice when one hearing functions as first appearance and arraignment. One such example is McCree v. State. In McCree, the defendant was arrested on the day of the alleged crime. According to the opinion, the defendant’s allegation of error was directed only to the Arkansas system which per-
mits a prosecutor to file an information directly in circuit court without a pretrial hearing. The Court upheld this aspect of the system based on prior precedent and its opinion that nothing in Gerstein "require[s] dismissal of the charges." In reaching this conclusion the Court referred to Rule 8.1. It noted that the defendant was "arraigned" eight days after the crime, at which time the charges, penalty, and his constitutional rights were explained and the defendant "announced he had retained counsel." No mention of any other pretrial appearance by the defendant is made in the opinion. It is unclear whether the Court considered the defendant to have received a first appearance, a formal arraignment, or both procedures in one.

The distinction is not merely one of semantics for a defendant, who may risk waiving procedural protections by assuming that a hearing is something other than what the judge conceives it to be. The danger is particularly acute when the defendant is confronted with an arraignment/first appearance for, in trying to do too much in one hearing, the court may in fact do too little. Totally aside from the considerations, using arraignment as the first appearance of the defendant under Rule 8 runs a substantial risk of impermissible delay in bringing the confined defendant before the court for the Gerstein probable cause determination. In Gerstein, the disapproved Florida system did provide an opportunity for obtaining a judicial determination of probable cause at arraignment, which the district court had found was often delayed a month or more after arrest. The use of arraignment to satisfy Gerstein's probable cause hearing requirement poses the same danger of a delayed determination which the court implicitly disapproved in Gerstein in its disapproval of the Florida system.

The limited protection of the first appearance does not end here, however. As the Supreme Court reiterated in Gerstein, illegal arrest or detention does not void a subsequent conviction. The Arkansas Supreme Court in Bolden, the case holding Rule 8.1 to be mandatory, relied on Gerstein in refusing to order dismissal of the charges although Rule 8.1 had been violated. In Cook v. State, the Court reaffirmed its holding in Bolden that Rule 8.1 is mandatory, but that a violation of the rule does not mandate dismissal. In Cook, the defendant's first appearance before a judicial officer did not occur until approximately a month after his arrest. The trial court refused to dismiss the charges but did suppress the in-custodial statement by the defendant during that period. In affirming the trial court's actions, the Court remarked that:

[o]n the limited issue of dismissal, the scales are tipped in favor of the State for when the defendant is found guilty he has suffered no prejudice as a result of being in jail. The remedy is to suppress the in-custodial statement as was done. Bolden and Cook make it clear that illegal detention alone will not constitute grounds for reversal of a conviction. The appropriate remedy for a defendant to seek initially in the trial court is suppression of any evidence obtained during the period of delay. Whether the failure of the trial court to suppress inadmissible evidence (or, conceivably, the loss of evidence during a period of illegal delay) will constitute reversible error depends, of course, on the relevance or prejudicial effect of the evidence.

The question remains as to under what circumstances the trial court must suppress evidence obtained during a period of illegal detention under Rule 8.1. For example, does the mere fact that a confession was obtained during the delay necessitate suppression of the confession, or is the illegal detention simply one factor to be considered in assessing the voluntariness of the confession? The Cook Court held that the confession was properly suppressed without any further inquiry into the voluntariness of the confession. Prior to Rule 8.1, the Court had made it clear that a failure to provide a prompt first appearance does not per se invalidate a confession given during the period of illegal detention, but is a factor used to assess voluntariness. However, Cook suggests, by its lack of further inquiry into the trial court's suppression of the confession once unnecessary delay was established, that the defendant need only show: (1) unnecessary delay, and (2) evidence obtained during that delay, to require suppression of the evidence. This approach would be in keeping with the McNabb-Mallory rule that existed in the federal courts prior to 1968 under Rule 5 of the Federal Rules of Criminal Procedure requiring a first appearance without "unnecessary delay." The McNabb-Mallory rule was predicated on the Supreme Court's supervisory power over the federal courts, not on any constitutional mandate, and has been modified by statute. The Arkansas Supreme Court has a corresponding supervisory power over the state courts, and, as was done in McNabb-Mallory, may determine within that authority that suppression of evidence obtained during a period of impermissible delay under Rule 8.1 is necessary to effectuate the requirements of the rule.

Finally, a defendant wishing to assert a Rule 8.1 claim should be cognizant of the fact that the rule prohibits only "unnecessary delay." In Scott v. State, the defendant was seeking dismissal because of the failure to bring him before a magistrate until his "arraignment" one year after the charges were filed and slightly less than four years after the crime had occurred. The defendant claimed the loss of two alibi witnesses, the
loss of one of whom appears to have occurred in the time between filing of the charges and his arraignment. The Court concluded that:

[i]n view of the fact that Scott was in the penitentiary at the time the charges were filed, and that one continuance was at the request of defense counsel, we cannot say that the charges should be dismissed because of failure to bring him before a judicial officer as required by Rule 8.1. . . .

263 Ark. at 674, 566 S.W.2d at 740. In part the Court's decision may be attributed to a reluctance to impose dismissal as the remedy for the defendant's due process claim. The relevance of defense counsel's delay and to its determination earlier in the opinion that the case had to be remanded in any event on the strength of the defendant's due process claim. The relevance of defense counsel's request for a continuance is certainly evident in the Court's decision. The relevance of defense counsel's delay necessarily mandates a case by case determination whether the state is responsible for unnecessary delay, and thus is relevant to the determination of whether relief would be required. However, the relevance of the defendant's incarceration in the state penitentiary is less clear. From the Court's language, it would appear that the Court may have assumed that a violation of Rule 8.1 had occurred, but that dismissal was an inappropriate remedy due to the defense's requested continuance and the defendant's incarceration during the period. Since unnecessary delay necessarily mandates a case by case determination of the state's responsibility for the delay, any delay attributable to defense continuances should, of course, be excluded. Until such time as the Court clarifies what may and may not be considered "unnecessary delay," it remains to be seen what justifications offered by the state will be deemed sufficient.

FOOTNOTES

1. ARK. CONST. art. II, § 8. At common law, an indictment is a written charge of a crime or misdemeanor presented upon oath before a grand jury. A presentment is the written notice taken by a grand jury of any offense, from its own knowledge or observation, without any bill of indictment laid before it. An information is an accusation in writing made by a public prosecuting officer. BLACK'S LAW DICTIONARY 695, 701. 1066 (5th ed. 1979).

2. ARK. CONST. amend. XXI, § 1.


5. KAMISAR, LAFAVE, AND ISRAEL, MODERN CRIMINAL PROCEDURE 980 (5th ed. 1980).

6. Id.


8. KAMISAR, supra note 6, at 983.

9. Id.


12. As used in this article, "first appearance" designates the defendant's initial presentment to a magistrate after the filing of the complaint. The "preliminary hearing or examination" refers to an adversarial hearing to determine probable cause, which is ordinarily a separate proceeding held at least a few days after the first appearance.

13. The statutory provision governing the form of the warrant also provides that the warrant shall command the officer to whom it is directed to arrest the person named therein and "bring him before some magistrate of the county in which the offense was committed, to be dealt with according to law." ARK. STAT. ANN. § 43-407 (1977).

14. Id. § 43-601.

15. Id. A different rule obtains for misdemeanors.

16. Id. § 43-603.

17. Id. § 43-605.

18. Id. §§ 43-601 and 43-604.


21. Id. at 913, 295 S.W.2d at 314. The United States Supreme Court has also held that prosecution by information without a preliminary hearing is constitutionally acceptable. Lem Woon v. Oregon, 229 U.S. 568 (1913), reaffirmed in Gerstein v. Pugh, 420 U.S. 103 (1975) (see infra text at notes 35-40).


23. Id.

24. Id. at 563.

25. See also PROSECUTORS' TRIAL MANUAL at 158 ("The Court also stated that such an appearance is 'required' under Arkansas law.")


27. ARK. R. CRIM. P. 8.1.

28. ARK. R. CRIM. P. 8.3(a).

29. ARK. R. CRIM. P. 8.3(c).

30. Id.


32. Id. § 4.3.

33. See id. § 4.3(e). A provision for a probable cause determination in the first appearance has since been added to the Standards. ABA Standards for Criminal Justice, Pretrial Release § 10-5.4(c) (1979).

34. PROSECUTORS' TRIAL MANUAL at 158.


36. Id. at 111.

37. Id. at 114.

38. Id. at 116.

39. Id. at 120.

40. Id. at 122.

41. The Compiler's Notes to Rule 8.3 refer to section 43-605, governing the procedure for a preliminary examination, as the corresponding statute. ARK. R. CRIM. P. 8.3, compiler's notes (1977); see also PROSECUTORS' TRIAL MANUAL at 158 (referring to Rule 8.3 in connection with the preliminary examination).

42. Institute of Judicial Administration, ABA STANDARDS COMPILATION 219 (1974); see also ABA Standards for Criminal Justice, Pretrial Release § 10-4.2(e) comment (1979); Comment, A Survey of Arkansas Law and the American Bar
**Association Standards, 26 Ark. L. Rev. 169 (1972)** (noting a research study done by the University of Arkansas School of Law based on the 1968 ABA Approved Draft of Pretrial Release Standards to determine what changes in Arkansas law would be necessary to implement the Standards).

43. **ARK. R. CRIM. P. 8.5(a); see also** Thomas v. State, 260 Ark. 512, 542 S.W.2d 284 (1976) (pretrial release inquiry is to be made at first appearance).

44. 480 F. Supp. 529 (W. D. Ark. 1979), affirmed, 615 F.2d 489 (8th Cir. 1980).


46. 480 F. Supp. at 534.

47. *Id.* Compare Sutton v. State, 262 Ark. 492, 559 S.W.2d 16 (1977). In *Sutton*, the defendant was not advised of his right to counsel at his first appearance. In that same proceeding, he requested a preliminary hearing which the court immediately proceeded to conduct. Sutton remained in jail after the hearing during which time he gave a confession while still without counsel. The Court found the confession to be involuntary based in part on the court’s failure to comply with the requirements of Rules 8.2 and 8.3 that the defendant be advised of his right to counsel and that no further steps in the proceedings be taken until defendant and his counsel have an adequate opportunity to confer. In his dissent, Justice Fogelman found the opinion unclear as to whether the failure to appoint counsel at the first appearance was an independent grounds for reversal. If it did so hold, the Justice disagreed (and correctly so) on the basis of *Gerstein*. 262 Ark. at 496, 559 S.W.2d at 18. The confusion in the opinion obviously stems from the fact that the defendant’s first appearance immediately preceded, to the extent of being indistinguishable from, his preliminary hearing. The opinion does, however, expressly state that the defendant “should have had an attorney appointed at his preliminary hearing.” 262 Ark. at 494, 559 S.W.2d at 17.


49. *Id.* at 723-24, 561 S.W.2d at 284.

50. **PROSECUTORS’ TRIAL MANUAL** at 163. This trend may be attributable in part to the prosecutor opting to file directly in circuit court to avoid the preliminary hearing, since the hearing rarely works to the state’s advantage. In the **PROSECUTORS’ TRIAL MANUAL** at 159-61, there is a discussion of ways in which the prosecutor may seek to avoid or limit the preliminary hearing. The discussion also notes that if the magistrate discharges a felony charge at the preliminary hearing, the prosecutor may refuse in circuit court for the same offense because jeopardy has not yet attached. *Id.* at 160.

There are ethical limits on the prosecutor’s attempt to avoid the preliminary hearing at the defendant’s first appearance. See **ABA Standards for Criminal Justice, The Prosecution Function § 3.10 (1979)**.

51. 420 U.S. at 117 n.18.

52. **PROSECUTORS’ TRIAL MANUAL** at 165.

53. **ARK. STAT. ANN. § 43-1201 (1977).**

54. **ABA Standards for Criminal Justice, Pretrial Release Part IV (1968)** (emphasis added); see also **ABA Standards for Criminal Justice, Pretrial Release § 10-1.2(e) comment (1979).**

55. 266 Ark. 465, 585 S.W.2d 938 (1979).

56. *Id.* at 475-76, 585 S.W.2d at 944.

57. *Id.*

58. *Id.*

59. *Id.*

60. 420 U.S. at 119.

61. 262 Ark. at 724, 561 S.W.2d at 284.


63. *Id.* at 246 Compare Scott v. State, 263 Ark. 669, 566 S.W.2d 737 (1978), discussed infra in text at notes 67-69.


66. See 8 J.W. MOORE, FEDERAL PRACTICE 5.02(1)-(6) (2d ed. 1981). The Omnibus Safe Streets and Crime Control Act of 1968 modified the McNabb-Mallory rule to provide that the voluntariness of a confession was determinative of its admissibility and that a confession would not be inadmissible solely because of delay in bringing the person before a magistrate. *Id.* at 5.02(6).

67. 263 Ark. 669, 566 S.W.2d 737 (1978).

68. A footnote in *Gerstein* notes that its probable cause determination is required “only for those suspects who suffer restraints on liberty other than the condition that they appear for trial.” 420 U.S. at 126 n.26. The Court then declines to define those restraints that would require a probable cause determination. *Id.* There is no intimation in the *Scott* opinion as to its reasoning behind the relevance of the defendant’s incarceration.

69. Although there have not yet been many cases involving determinations of “unnecessary delay” under Rule 8.1, the Arkansas Supreme Court has only validated a delay of one day, Logan v. State, 264 Ark. 920, 576 S.W.2d 2 (1979), and a delay of three days, Brown v. State, 276 Ark. 20, 631 S.W.2d 829 (1982). A delay of one month was found to have violated Rule 8.1, *Cook v. State*, 274 Ark. 244, 623 S.W.2d 820 (1981). See also Bolden v. State, 262 Ark. 718, 561 S.W.2d 281 (1978), but compare Scott v. State, 263 Ark. 669, 566 S.W.2d 737 (1978) (discussed *supra* at notes 67). Although what constitutes “unnecessary delay” must necessarily involve case-by-case determinations, none of the Court’s opinions thus far have shed much light on what to consider to be factors which may justify delay. See also 8 J.W. MOORE, *supra* note 66 at 5.02(4) on what constitutes “unnecessary delay” *FED. R. CRIM. P. 5(a).*