

The Burger Court Opinion Writing Database

Gerstein v. Pugh

420 U.S. 103 (1975)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

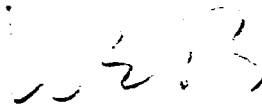
January 24, 1975

Re: No. 73-477 - Gerstein v. Pugh

Dear Lewis:

I join in your opinion circulated January 10.

Regards,



Mr. Justice Powell

Copies to the Conference

✓
Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

February 5, 1975

Dear Potter:

Please join me in your
concurring opinion in 73-477,
GERSTEIN v. PUGH.

WILLIAM O. DOUGLAS

Mr. Justice Stewart
cc: The Conference

✓
Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 16, 1975

RE: No. 73-477 Gerstein v. Pugh

Dear Potter:

Please join me in your concurring opinion
in the above.

Sincerely,

Bill

Mr. Justice Stewart

cc: The Conference

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice White
✓ Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

Circulated: JAN 15 1975

No. 73-477

Recirculated: _____

Richard E. Gerstein, State At-
torney for Eleventh Judicial
Circuit of Florida,
Petitioner,
v.
Robert Pugh et al.

On Writ of Certiorari
to the United States
Court of Appeals for
the Fifth Circuit.

[January —, 1975]

MR. JUSTICE STEWART, concurring.

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

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

It is the prerogative of each State in the first instance to develop pretrial procedures that provide defendants in

*Specifically, I see no need in this case for the Court to say that the Constitution extends less procedural protection to an imprisoned human being than is required to test the propriety of garnishing a commercial bank account, *North Georgia Finishing, Inc. v. Dr-Chem, Inc.*, — U. S. —; the custody of a refrigerator, *Mitchell v. W. T. Grant Co.*, 416 U. S. 600; the temporary suspension of a public school student, *Goss v. Lopez*, — U. S. —; or the suspension of a driver's license, *Bell v. Burson*, 402 U. S. 535.

Pp 1, 2

3rd DRAFT

To: The Chief Justice
Mr. Justice Douglas ✓
Mr. Justice Brennan
Mr. Justice White
✓ Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

SUPREME COURT OF THE UNITED STATES

No. 73-477

Circulated:

Recirculated: FEB 5

Richard E. Gerstein, State At-
torney for Eleventh Judicial
Circuit of Florida,
Petitioner,
v.
Robert Pugh et al.

On Writ of Certiorari
to the United States
Court of Appeals for
the Fifth Circuit.

[January --, 1975]

MR. JUSTICE STEWART, with whom MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, AND MR. JUSTICE MARSHALL join, concurring.

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

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

*Specifically, I see no need in this case for the Court to say that the Constitution extends less procedural protection to an imprisoned human being than is required to test the propriety of garnishing a commercial bank account, *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, — U. S. —, the custody of a refrigerator, *Mitchell v. W. T. Grant Co.*, 410 U. S. 906; the temporary suspen-

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Pp 1-2
fn. omitted

To: The Chief
✓ Mr. Justice
Mr. Justice Brennan
Mr. Justice White
✓ Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Stewart, J.

Circulated: _____

Recirculated: FEB 11 1975

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-477

Richard E. Gerstein, State At- torney for Eleventh Judicial Circuit of Florida, Petitioner, v. Robert Pugh et al.	}	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.
--	---	---

[January —, 1975]

MR. JUSTICE STEWART, with whom MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, AND MR. JUSTICE MARSHALL join, concurring.

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

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✓
Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

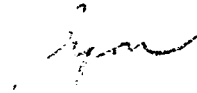
January 10, 1975

Re: No. 73-477 - Gerstein v. Pugh

Dear Lewis:

Please join me in your circulation of
today.

Sincerely,



Mr. Justice Powell

Copies to Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

January 16, 1975

Re: No. 73-477 -- Richard E. Gerstein v. Robert Pugh

Dear Potter:

Please join me in your concurring opinion.

Sincerely,



T. M.

Mr. Justice Stewart

cc: The Conference

Penny - Any reason not to
Supreme Court of the United States *do this?*
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 15, 1975

Done

Re: No. 73-477 - Gerstein v. Pugh

Dear Lewis:

Would there be any point in adding, at the end of footnote 2 on page 2, a phrase such as "See note 20, post, _____"? When I first read footnote 2, I wondered whether there was an inference that if the described procedure had been challenged, there might be a chance of success. Footnote 20 provides an answer to this and prompts me to suggest the addition to footnote 2.

Sincerely,

Larry

Mr. Justice Powell

✓
Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 15, 1975

Re: No. 73-477 - Gerstein v. Pugh

Dear Lewis:

Please join me.

Sincerely,



A handwritten signature in cursive script, appearing to read "Harry", followed by a horizontal line.

Mr. Justice Powell

cc: The Conference

To: The Chief Justice
Mr. Justice Douglas ✓
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Black
Mr. Justice Rehnquist

1st DRAFT

From: Powell, J.

SUPREME COURT OF THE UNITED STATES

Circulated: DEC 17 1974

Recirculated: _____

No. 73-477

Richard E. Gerstein, State At-
torney for Eleventh Judicial
Circuit of Florida,
Petitioner,
v.
Robert Pugh et al.

On Writ of Certiorari
to the United States
Court of Appeals for
the Fifth Circuit.

[December —, 1974]

MR. JUSTICE POWELL delivered the opinion of the
Court.

The issue in this case is whether a person arrested
under a prosecutor's information is constitutionally en-
titled to a judicial determination of probable cause for
pretrial restraint of liberty.

I

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

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

pp 17, 19-22

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
- Mr. Justice Marshall
Mr. Justice Black
Mr. Justice Rehnquist

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

From: Powell, J.

No. 73-477

Circulated: _____

Recirculated: JAN 10 1

Richard E. Gerstein, State At-
torney for Eleventh Judicial
Circuit of Florida,
Petitioner,
v.
Robert Pugh et al.

On Writ of Certiorari
to the United States
Court of Appeals for
the Fifth Circuit.

[December —, 1974]

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whether there was an arrest warrant in either case.

✓ pp 2, 6, 21-22

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Sargent
Mr. Justice White
✓ Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist

4th DRAFT

SUPREME COURT OF THE UNITED STATES

From: Powell, J.

Circulated: _____

No. 73-477

Recirculated: FEB 7 1974

Richard E. Gerstein, State At-
torney for Eleventh Judicial
Circuit of Florida,
Petitioner,
v.
Robert Pugh et al.

On Writ of Certiorari
to the United States
Court of Appeals for
the Fifth Circuit.

[December —, 1974]

MR. JUSTICE POWELL delivered the opinion of the
Court.

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under a prosecutor's information is constitutionally en-
titled to a judicial determination of probable cause for
pretrial restraint of liberty.

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cealed weapon, and possession of a firearm during commission of a
felony. Respondent Henderson was arrested on March 2, and charged
by information on March 19 with the offenses of breaking and
entering and assault and battery. The record does not indicate
whether there was an arrest warrant in either case.

p. 22

142-3

~~142-3~~

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist

From: Powell, J.

Circulated: _____

Recirculated: FEB 12 1974

5th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-477

Richard E. Gerstein, State At- torney for Eleventh Judicial Circuit of Florida, Petitioner, v. Robert Pugh et al.	}	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.
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[December —, 1974]

MR. JUSTICE POWELL delivered the opinion of the Court.

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

I

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

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Supreme Court of the United States

Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

February 26, 1975

FILE COPY

PLEASE RETURN
TO FILE

Case held for No. 73-477 Gerstein v. Pugh

MEMORANDUM TO THE CONFERENCE:

No. 73-6950 Mega v. West Virginia.

In this case we held that a person charged by prosecutor's information was entitled to a judicial determination of probable cause for pretrial detention. Our opinion noted expressly that we had no intention of changing the settled rule that illegal arrest or detention furnish no grounds for vacating a subsequent conviction. Slip op at 15. In Mega, the Petitioner seeks reversal of his conviction for possession of marijuana because he was denied a preliminary hearing after grand jury indictment. The statement in Gerstein thus disposes of his claim, without reference to the fact that Petitioner was held under indictment rather than an information or other form of prosecutor's charge.

There are other, independent issues raised by the Mega petition. Petitioner also raises questions about the State's failure to disclose certain evidence, and its refusal to grant immunity to an informer witness who was present at the time of the alleged drug transaction and who asserted a Fifth Amendment privilege not to testify about the occurrence. Petitioner contends the informer's testimony would have supported his entrapment defense. I do not find this claim worthy of our consideration, and I will vote to deny the petition.

L.F.P.

L.F.P., Jr.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

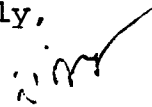
January 14, 1975

Re: No. 73-477 - Gerstein v. Pugh

Dear Lewis:

Please join me.

Sincerely,



Mr. Justice Powell

Copies to the Conference